DATA LABEL: Public

Local Review Body

West Lothian Civic Centre
Howden South Road
LIVINGSTON
EH54 6FF

25 October 2023

A hybrid meeting of the **Local Review Body** of West Lothian Council will be held within the **Council Chambers, West Lothian Civic Centre, Livingston, EH54 6FF** on **Wednesday 1 November 2023** at **11:00am**.

For Chief Executive

BUSINESS

Public Session

1. Apologies for Absence

2. Declarations of Interest - Members must declare any interests they have in the items of business for consideration at the meeting, identifying the relevant agenda items and the nature of their interests.

3. Order of Business, including notice of urgent business, declarations of interest in any urgent business and consideration of reports for information.

   The Chair will invite members to identify any such reports they wish to have fully considered, which failing they will be taken as read and their recommendations approved.

4. Confirm Draft Minutes of Meeting of Local Review Body held on Wednesday 30 August 2023 (herewith)

Public Items for Decision

5. Notice of Review Application No.0261/P/23 - Planning permission in principle for the erection of house, 1 Marrfield Terrace, Uphall Station (herewith)

6. Notice of Review Application No.0130/H/23 - Erection of a 1.9m high timber fence and gates and formation of a gravel surfaced carpark (in retrospect), Threemiletown Farmhouse, Threemiletown (herewith)

NOTE **For further infoirmation please contact Val Johnston, Tel No.01506 281604 or email val.johnston@westlothian.gov.uk**

CODE OF CONDUCT AND DECLARATIONS OF INTEREST (2021)

This form is a reminder and an aid. It is not a substitute for understanding the Code of Conduct and guidance.

Interests must be declared at the meeting, in public.

Look at every item of business and consider if there is a connection.

If you see a connection, decide if it amounts to an interest by applying the objective test.

The objective test is whether or not a member of the public with knowledge of the relevant facts would reasonably regard your connection to a particular matter as being so significant that it would be considered as being likely to influence your discussion or decision-making.

If the connection does not amount to an interest then you have nothing to declare and no reason to withdraw.

If the connection amounts to an interest, declare it as soon as possible and leave the meeting when the agenda item comes up.

When you declare an interest, identify the agenda item and give enough information so that the public understands what it is and why you are declaring it.

Even if the connection does not amount to an interest you can make a statement about it for the purposes of transparency.

More detailed information is on the next page.

January 2022

Look at each item on the agenda, consider if there is a "connection", take advice if necessary from appropriate officers in plenty of time. A connection is any link between the item of business and:-

- you
- a person you are associated with (e.g., employer, business partner, domestic partner, family member)
- a body or organisation you are associated with (e.g., outside body, community group, charity)

Anything in your Register of Interests is a connection unless one of the following exceptions applies.

A connection does not exist where:-

- you are a council tax payer, a rate payer, or a council house tenant, including at budget-setting meetings
- services delivered to the public are being considered, including at budget-setting meetings
- councillors' remuneration, expenses, support services or pensions are being considered
- you are on an outside body through a council appointment or nomination unless it is for regulatory business or you have a personal conflict due to your connections, actions or legal obligations
- you hold a view in advance on a policy issue, have discussed that view, have expressed that view in public, or have asked for support for it

If you see a connection then you have to decide if it is an "interest" by applying the objective test. The objective test is whether or not a member of the public with knowledge of the relevant facts would reasonably regard your connection to a particular matter as being so significant that it would be considered as being likely to influence your discussion or decision-making.

If the connection amounts to an interest then:-

- declare the interest in enough detail that members of the public will understand what it is
- leave the meeting room (physical or online) when that item is being considered
- do not contact colleagues participating in the item of business

Even if decide your connection is not an interest you can voluntarily make a statement about it for the record and for the purposes of transparency.

The relevant documents are:-

- Councillors' Code of Conduct, part 5
- Standards Commission Guidance, paragraphs 129-166
- Advice note for councillors on how to declare interests

If you require assistance, contact:-

- **James Millar, Interim Monitoring Officer and Governance Manager, 01506 281613, james.millar@westlothian.gov.uk**
- **Carol Johnston, Chief Solicitor and Depute Monitoring Officer, 01506 281626, carol.johnston@westlothian.gov.uk**
- **Committee Services Team, 01506 281604, 01506 281621 committee.services@westlothian.gov.uk**

January 2022

MINUTE of MEETING of the LOCAL REVIEW BODY held within COUNCIL CHAMBERS, WEST LOTHIAN CIVIC CENTRE, LIVINGSTON, EH54 6FF, on 30 AUGUST 2023.

Present – Councillors Danny Logue (Chair), Alison Adamson, Tony Boyle, William Boyle and Pauline Clark

Apologies – Councillors Tom Conn and Stuart Borrowman

1. DECLARATIONS OF INTEREST

Agenda Item 6 (App No.0130/H/23) - Councillor Tony Boyle stated that he had attended a meeting of Ecclesmachan and Threemiletown Community Council where the application had been discussed. However, he had not participated in the discussion nor expressed an opinion so would participate in the item of business.

2. MINUTES

The committee confirmed the draft Minute of its meeting held on 31 May 2023 as a correct record. The Minute was thereafter signed by the Chair.

3. NOTICE OF REVIEW APPLICATION NO.0034/FUL/23

The committee considered a report (copies of which had been circulated) by the Clerk and Legal Adviser to the Local Review Body regarding an application to review the refusal of planning permission by the Appointed Person for the formation of a yard for storage and sale of construction aggregates, erection of aggregate bays, fencing and siting of welfare unit, 21 Armadale Road, Whitburn

Attached to the report were the Notice of Review and other relevant documents including letters of representation. The documents identified the policies in the development plan and relevant guidance that had been referred to in the review documents.

The committee decided that the review documents in conjunction with the site visit conducted prior to the meeting provided sufficient information to enable the review to be determined without any further procedure.

The committee then determined the review application in terms of the statutory test and to have regards to the development plan unless material consideration indicated otherwise.

The Local Review Body also took account of the views expressed in the Notice of Review documents.

Motion

To uphold the review application as the development was considered to be in accordance with the following policies of the Local Development

Plan (LDP); DES 1, as there would be no detriment to the surrounding amenity; EMP2, ENV5 and ENV9 of the LDP and that it would also be compliant with Policy 3, (Biodiversity), 23 (Health & Safety), 26 (Business & Industry), 6 (Forestry, Woodland & Trees) and 14 (Design, Quality & Place) of National Planning Framework 4 (NPF4). The grant of planning permission would be subject to the conditions attached to the committee report and would be subject to two additional conditions which was to suppress dust by water spraying and the opening of the access point with detail showing how the access point would be accommodated into the private housing, the two flats and the original manse, with the wording of the two additional conditions to be delegated to the Development Management Manager in consultation with Transportation.

- Moved by Councillor Willie Boyle and seconded by Councillor Tony Boyle

Amendment

To uphold refusal of the application for the reasons outlined in the committee papers.

- Moved by Councillor Clark and seconded by Councillor Adamson

An electronic vote was conducted. The result was as follows:-

Motion	Amendment
Tony Boyle	Alison Adamson
Willie Boyle	Pauline Clark
	Danny Logue

Decision

Following a vote, the amendment was successful by 3 votes to 2 and it was agreed accordingly.

4. NOTICE OF REVIEW APPLICATION NO.0130/H/23 - ERECTION OF A 1.9M HIGH TIMBER FENCE AND GATES AND FORMATION OF A GRAVEL SURFACED CARPARK (IN RETROSPECT), THREEMILETOWN FARMHOUSE, THREEMILETOWN (HEREWITH)

The committee considered a report (copies of which had been circulated) by the Clerk and Legal Adviser to the Local Review Body regarding an application to review the refusal of planning permission by the Appointed Person for the erection of a 1.9m high timber fence and gates and formation of a gravel surfaced carpark (in retrospect), Threemiletown Farmhouse, Threemiletown, Linlithgow.

Attached to the report were the Notice of Review and other relevant documents, including letters of representation. The documents identified the policies in the development plan and relevant guidance that had been referred to in the review documents.

It was noted that committee had attended an unaccompanied site visit prior to its first consideration.

The committee were then advised by the Legal Adviser to the Local Review Body that there had been a late submission of a supporting statement by a legal firm now acting on behalf of the applicant. The committee agreed to allow the introduction of the statement as new evidence for consideration by the Local Review Body. There followed a short adjournment to allow the document to be circulated to members.

The Local Review Body also took account of the views expressed in the Notice of Review documents.

Decision

To unanimously agree to continue the review application to a future meeting of the Local Review Body so that a Procedure Note could be issued to the following groups in order to allow for additional information to be obtained to assist committee in its deliberations of the review application :-

1) Interested parties so they could comment on the late supporting statement

2) The Applicant and Appointed Person to obtain further information on the following :-
   - the protected characteristics that it is considered are applicable in terms of the exercise of the Section 149 duty (having regard to the schedule 18 exceptions) and potential equality impacts if the proposal is refused or approved;
   - the interpretation of policy 16 of NPF4 regarding householder applications in the context of the use of the house and the application of policy 16 of NPF4 to the determination of the review application; and
   - applicability of policies 7 and 14 of NPF4 to the determination of the review application and whether the development proposed complies with those policies, with this information also obtained from the interested parties.

3) The Council's Transportation Service so they could comment on the road safety and the proposed access issues raised in the supporting statement; and

4) To agree that an officer from the Council's Transportation Service attend the meeting of Local Review Body when the application was being re-considered.

West Lothian Council

LOCAL REVIEW BODY

APPLICATION NO.0261/FUL/23 – PLANNING PERMISSION IN PRINCIPLE FOR THE ERECTION OF HOUSE, 1 MARRFIELD TERRACE, UPHALL STATION

REPORT BY CLERK AND LEGAL ADVISER TO THE LOCAL REVIEW BODY

A PURPOSE OF REPORT

This report describes the documents and other matters relevant to the consideration by the Local Review Body of this application for review of the refusal of planning permission for planning permission in principle for the erection of house, 1 Marrfield Terrace, Uphall Station

B REVIEW DOCUMENTS

The following documents form the review documents for consideration by the Local Review Body and are circulated to members with this report:

1. The Notice of Review, and supporting documentation, submitted by the applicant, dated 28 August 2023.

2. The Handling Report, prepared by the Planning Case Officer, dated 29 May 2023.

3. The Decision Notice, issued by the Appointed Person, dated 29 May 2023.

Three representations from local neighbours have been received, all objecting to the proposal. There was also a statutory consultation response from the council's Transportation Service, Flood Prevention Officer and Education, copies of which are attached to this report.

All those who had made representation on the application including the statutory consultees were contacted to advise the review application had been received and to afford them the opportunity to make further comment. No further comments were received.

The applicant has stated that they are of the view that the review application could benefit from a site inspection prior to determination.

C SITE VISITS AND FURTHER PROCEDURE

A site inspection of the application site will be undertaken in advance of the Local Review Body's first consideration of the review application; this will be completed on 1 November 2023. However, the Local Review Body, upon

consideration of the review application before it, can determine if further procedure is required before reaching a decision. This can include any, or any combination, of the following; an accompanied site inspection, further written submissions and hearing session/s.

D DEVELOPMENT PLAN POLICIES AND PLANNING GUIDANCE

The Appointed Person refused the application for the following reasons as outlined in the Decision Notice attached to the committee report :-

1. The proposal, by virtue of the size and orientation of the plot and the established street pattern, would result in overdevelopment of the site and would be detrimental to the character of the area. Any house on the site would have insufficient private amenity space and would appear crammed and out of context with the street pattern. The application is therefore contrary to West Lothian Local Development Plan policies: DES1(Design Principles) and the council's Residential Development Guide and Policy 16 (Quality Homes) of NPF4.

2. There is insufficient space to provide suitable access and parking. The application is therefore contrary to TRAN 1 (Transport Infrastructure)

Further information can be obtained in the Decision Notice and Handling Report both of which are attached to this report.

E PLANNING CONDITIONS, LEGAL AGREEMENTS AND GOOD NEIGHBOUR AGREEMENTS

Without prejudice to the outcome of this review, to assist the LRB in its deliberations and to assist the applicant and interested persons in securing a prompt resolution of the review, attached to the report are a set of draft planning conditions which the LRB may wish to consider imposing should it be minded to grant planning permission. A copy is circulated with this report

Lesley Montague, Managing Solicitor, West Lothian Civic Centre

Email address: - lesley.montague@westlothian.gov.uk

Date: 1 November 2023

West Lothian Council

FOR OFFICIAL USE ONLY

Reference No :
Date of Receipt :

NOTICE OF REVIEW

(LOCAL DEVELOPMENT – DECISION BY APPOINTED PERSON)

This Form is for a review by the West Lothian Council Local Review Body under Section 43A(8) of the Town and Country Planning (Scotland) Act 1997 in respect of decisions by the appointed person on local development applications.

The review will be conducted under the Town and Country Planning (Schemes of Delegation and local Review Procedure) (Scotland) Regulations 2008.

Please read and follow the accompanying West Lothian Council Local Review Body Guidance Notes when completing this form. Failure to supply all the relevant information or to lodge the form on time could invalidate your notice of review.

Use BLOCK CAPITALS if you are completing the form by hand.

PART A **APPLICANT'S DETAILS**

Name MRS WILMA CLIFFORD
Address 27 MAIN STREET
EAST CALDER
Postcode EH53 0ES
Telephone No. (1) [redacted]
Telephone No. (2)
Fax :
E-mail : [redacted]

REPRESENTATIVE (if any)

Name EWAN ROBERTSON
Address ROBERTSON ARCHITECTURE + DESIGN
17 CLIFTON ROAD, EAST CALDER
Postcode EH53 0HT
Telephone No. (1) [redacted]
Telephone No. (2)
Fax :
E-mail : [redacted]

Please tick this box if you wish all contact to be through your representative.

Do you agree to correspondence regarding your review being sent by e-mail? * **YES/NO**

West Lothian Council

PART B	APPLICANT REF. NO.	0261/P/23
	SITE ADDRESS	1 MARRFIELD TERRACE UPHALL STATION, LIVINGSTON EH54 5PX
	DESCRIPTION OF PROPOSED DEVELOPMENT	PLANNING PERMISSION IN PRINCIPLE FOR THE ERECTION OF A HOUSE
	DATE OF APPLICATION	30/03/23
	DATE OF DECISION NOTICE (IF ANY)	29/05/23

Note:- This notice must be served on the planning authority within three months beginning with the date of the decision notice or, if no decision notice was issued, from the date of expiry of the period allowed for determining the application.

Type of Application (please tick the appropriate box)

Application for planning permission (including householder application)	
Application for planning permission in principle	✓
Further application (including development that has not yet commenced and where a time limit has been imposed; renewal of planning permission; and/or modification, variation or removal of a planning condition)	
Application for approval of matters specified in conditions	

PART C	TYPE OF REVIEW CASE	
	Refusal of application by appointed officer	✓
	Failure by appointed officer to determine the application within the period allowed	
	Conditions imposed on consent by appointed officer	

West Lothian Council

Statement of reasons and matters to be raised

You must state, in full, the reasons for requiring a review of your case. You must also set out and include with your application all the matters you consider require to be taken into account and which you intend to raise in the review. You may not have a further opportunity to add to your statement of review at a later date. It is therefore essential that you submit with your notice of review, all necessary information and evidence that you rely on and wish the Local Review Body to consider as part of your review.

State here the reasons for requiring the review and all the matters you wish to raise. If necessary, this can be continued or provided in full in a separate document. **You may also submit additional documentation with this form.**

PLEASE SEE ATTACHED SUPPORTING STATEMENT

Have you raised any matters which were not before the appointed officer at the time the determination on your application was made?	* YES/NO

West Lothian Council

If yes, you should now explain why you are raising new material, why it was not raised with the appointed officer before, and why you consider it should now be considered in your review.

ALTHOUGH NO NEW MATTERS HAVE BEEN RAISED AN EXPLANATORY PLAN HAS BEEN ATTACHED TO BETTER ILLUSTRATE OUR REASONS FOR REVIEW

List of documents and evidence

Please provide a list of all documents, materials and evidence which you wish to submit and rely on in your review. **All** of these documents, materials and evidence must be lodged with this notice. If necessary, this can be continued or provided in full in a separate document.

1.	LOCATION PLAN
2.	REFUSAL NOTICE
3.	HANDLING REPORT
4.	LRB SUPPORTING STATEMENT
5.	2701-PL01 EXPLANATORY PLAN
6.	
7.	
8.	
9.	
10.	
11.	
12.	

West Lothian Council

PART D **REVIEW PROCEDURE**

The Local Review Body will decide on the procedure to be used to determine your review and may at any time during the review process require that further information or representations be made to enable them to determine the review.

Can this review continue to a conclusion, in your opinion, based on a review of the relevant information provided by yourself and other parties, without any further procedures?. For example, written submission, hearing session, site inspection *

*Please indicate what procedure (or combination of procedures) you think is most appropriate for the handling of your review. You may select more than one option if you wish the review to be a combination of procedures.

SITE INSPECTION

If you have selected "further written submissions" or "hearing session(s)", please explain which of the matters you have included in your statement of reasons you believe ought to be subject of those procedures, and why.

N/A

SITE INSPECTION

The Local Review Body may decide to inspect the land which is subject to the review.

Can the site be viewed entirely from public land? * YES/NO

Is it possible for the site to be accessed safely, and without barriers to entry? * YES/NO

If you think the Local Review Body would be unable to undertake an unaccompanied site inspection, please explain why that may be the case.

West Lothian Council

PART E **CHECKLIST**

Please mark the appropriate boxes to confirm you have provided all supporting documents and evidence relevant to your review. Failure to supply all the relevant information or to lodge the form on time could invalidate your notice of review.

Full completion of all parts of this form	✓
Statement of your reasons for requiring a review and matters to be raised	✓
Statement of your preferred procedure	✓
All documents, materials and evidence INCLUDING LOCATION PLANS AND/OR DRAWINGS which you intend to rely on. Copies must accompany this notice.	✓

Where your case relates to another application (e.g. it is a renewal of planning permission or a modification, variation or removal of a planning condition, or an application for approval of matters specified in conditions), it is advisable to provide that other application reference number, approved plans and decision notice from that earlier consent.

*****DECLARATION*****

I, the ~~applicant~~/agent*, hereby require West Lothian Council to review the case as set out in this form and in the supporting documents, materials and evidence lodged with it and which includes those plans/drawings that were used by the Appointed Person when determining the original planning application.

I have been provided with a copy of the West Lothian Council Local Review Body Guidance Notes before lodging this notice.

Signed [redacted] Date 28/08/23

* Delete as appropriate

Please email this completed form to :-

committeeservices@westlothian.gov.uk or alternatively post to :-
Committee Services
West Lothian Council
West Lothian Civic Centre
Howden South Road
Livingston
EH54 6FF

LRB APPLICATION

23/08/2023

PLANNING APPLICATION

0261/P/23

Planning permission in principle for the erection of a house 1 Marrfield Terrace, Uphall Station, Livingston, West Lothian, EH54 5PX

PREPARED BY:

ROBERTSON ARCHITECTURE & DESIGN

FIELD HOUSE

17 CLIFTON ROAD

EAST CALDER

WEST LOTHIAN

EH53 0HJ

MOB: [redacted]

E-MAIL: [redacted]

ON BEHALF OF MS WILMA CLIFFORD

23/08/2023

We hereby seek the assistance of the Local review body in determining the above application as we believe the reasons for refusal have not been fully assessed in the context required based on the policies and supplementary guidance noted. The applicant has not been given the opportunity to provide any additional information which may have helped the case officer reach a more considered conclusion.

The refusal notice refers to an overdevelopment of the site, insufficient private amenity space and appearing crammed and out of context, all without any evidential basis. For instance, how can the statement regarding private amenity space be made without information showing what is available or how it would work.

We have as part of this submission included a site plan addressing the salient points contained within the policies and supplementary guidance utilised in determining the application to better explain our points for consideration in this review. We would view the plan as a visual expression of our reasons for review set out in this document and that this, albeit technically new material, could not have been provided earlier. The case officer did not ask for any additional information to assist in the interrogation of policies to better enable them to make statements in the refusal notice that were fully considered and proven.

Under Policy Des 1 it states: *All development proposals will require to take account of and be integrated with the local context and built form. Development proposals should have no significant adverse impacts on the local community and where appropriate, should include measures to enhance the environment and be high quality in their design.*
Development proposals which are poorly designed will not be supported.

This application was submitted by the landowner and attached a location plan showing the plot boundaries with a description for the erection of a new dwelling house. The above noted policy calls for the assessment of the local context and built form. You should of course consider the immediate setting and built form, but in this instance, there was no comparative information requested to give a more robust assessment of the impact a dwelling would have. I would consider this infill site as not being detrimental to the local community as the site currently offers no benefit to the wider public. More detailed requirements for high quality design at this planning in principle stage are not needed and would of course be conditioned in any future reserved matters application.

Des 1

a. *there is no significant adverse impact on adjacent buildings or streetscape in terms of layout, scale, massing, design, external materials or amenity;*

For the above we have consulted the information set out in the 'Residential Development Guide' which is also noted in the refusal notice, we have set out how this proposed development works below and in the attached plan detailing compliance on key matters contrary to the refusal.

In order to prevent sites being over-developed and to leave sufficient open space around a new dwelling for outdoor activity and for possible future extensions, the following plot ratio standards will apply to new residential developments:

detached and semi-detached dwellings, the proportion of plot area to building footprint should be 70:30

These figures should, however, be regarded as averages for the development site as a whole and some variation within a development is permissible in order to accommodate choice and achieve diversity.

The proposed development as evidenced in the attached plan falls well within the desired plot ratios for detached dwellings **76.3 : 23.7** whilst maintaining a built form that is sympathetic to the surrounding area and supportive of external amenity for outdoor activity as described above.

The massing, meaning the three-dimensional expression of the amount of development on a site, and height, should not overshadow, overlook and overwhelm any adjacent buildings and spaces. Particularly in larger developments, building heights should be varied in order to add visual interest and break up the overall mass of the development.

The proposed plan shows a basic massing diagram between the nearest dwelling and the proposed house where it can be demonstrated that through considered design and layout there is little to no adverse impact on existing amenity or overshadowing and is compliant with the guidance WLC uses in the consideration of the same.

New buildings close to plot boundaries, particularly flats, can also be intrusive when seen from existing gardens or from within existing dwellings. The following minimum dimensions will therefore apply, measured from the nearest point of the rear elevation of the development to the nearest boundary: Single and two storey 9M

These dimensions may similarly be relaxed, but again, only where it can be satisfactorily demonstrated that residential and environmental amenity will not suffer for either the new or existing buildings.

The layout and orientation of the proposed development achieves the minimum standard of 9M at the largest portion, the size does decrease in the Northern portion of the site, however I would consider the overall amenity both residential and environmental to be more than adequate. Indeed the level of amenity provided in overall plot area is actually better than the dwellings surrounding the site.

The council will not require developers to apply uniform standard garden sizes across an entire residential development since it is recognised that a degree of flexibility is necessary in order to facilitate varied and more interesting layouts.

The average plot area within the surrounding residential developments is circa 180Sqm versus 209Sqm, this site surely cannot be considered as having insufficient private amenity space and appearing crammed and out of context when it has better provision than the established housing pattern. The garden area available to the proposed house is 89Sqm which is acceptable as a minimum standard for 3 and 4 bedroom detached and semi-detached homes as per the standards set out in the 'Residential Development Guide'.

Des 1

c. The proposed development is accessible for all, provides suitable access and parking, encourages active travel and has no adverse implications for public safety.

The Site has an existing access which sits to the North West corner over the manoeuvring section of the adjacent layby parking, please see below:

The refusal notice states that the site has insufficient space to provide suitable access and parking contrary to policy TRAN 1, however I would consider the above alongside the proposed site plan as adequately demonstrating that the site has a suitable access as well as parking for 2 vehicles.

Furthermore, we hereby attach two further photographs of access driveways also located in Uphall Station on the B8406 which go over the parking bay manoeuvring spaces.

The site itself sits within the context of Uphall station and encourages active travel with ready access to public transport and cycle links, adequate parking is shown on site and we do not consider the proposals to exacerbate existing parking provision or have adverse implication for public safety. Our client would of course if required look at arranging a traffic / parking assessment under a reserved matters application should it be required. We would consider the development site to be a 20 minute neighbourhood.

Lastly looking at policy 16 within the NPF 4 we consider section 'F' to be most applicable under the terms of *'Development proposals for new homes on land not allocated for housing in the LDP will only be supported in limited circumstances where:*

i. the proposal is supported by an agreed timescale for build-out; and

ii. ii. the proposal is otherwise consistent with the plan spatial strategy and other relevant policies including local living and 20 minute neighbourhoods;

iii. iii. and either:

- *delivery of sites is happening earlier than identified in the deliverable housing land pipeline. This will be determined by reference to two consecutive years of the Housing Land Audit evidencing substantial delivery earlier than pipeline timescales and that general trend being sustained; or*
- *the proposal is consistent with policy on rural homes; or*
- *the proposal is for smaller scale opportunities within an existing settlement boundary; or*
- *the proposal is for the delivery of less than 50 affordable homes as part of a local authority supported affordable housing plan.*

We have also considered section G in NPF 4 which makes reference to 'householder' development and seems to be complimentary to the 'Residential development Guide' under policy Des 1 as it describes similar topics, however this is not a householder application. I am therefore unclear as to which part of NPF 4 we are being refused on, please see section 'G' below for reference:

g) Householder development proposals will be supported where they:

i. do not have a detrimental impact on the character or environmental quality of the home and the surrounding area in terms of size, design and materials; and

ii. do not have a detrimental effect on the neighbouring properties in terms of physical impact, overshadowing or overlooking.

In conclusion the refusal of the proposed development is predicated on a basic level of information, the assessment of which leaves many questions unanswered. How were certain conclusions derived, with the ability to state that the site would be overcrowded and that basic amenity levels could not be met without more succinct information. We have demonstrated through our explanatory plan that the advice in the 'Residential Development Guide' which compliments Des 1 and sets out design, layout and massing standards can be fully applied and adhered to.
It is therefore our considered opinion that this application should be granted planning permission and terms set out as required for a reserved matters application that will deal with the more detailed aspects of the project.

DATA LABEL: PUBLIC

West Lothian Council

HANDLING REPORT

Ref. No.:	0261/P/23	**Email:**	lucy.hoad@westlothian.gov.uk
Case Officer:	Lucy Hoad	**Tel No.:**	
Ward:	East Livingston & East Calder	**Member:**	Cllr Damian Doran-Timson Cllr Carl John Cllr Danny Logue Cllr Veronica Smith

Title	Planning permission in principal for the erection of a house (Grid Ref: 306112,670446) at 1 Marrfield Terrace, Uphall Station, Livingston, West Lothian, EH54 5PX
Application Type	Local Application
Decision Level	Delegated List
Site Visit	
Recommendation	Refuse Permission
Decision	Refuse Permission
Neighbour Notification	Neighbour notification procedures have been carried out correctly - case officer verification. YES/NO
Advertisement	
EIA Screening	Does the development require EIA screening - Yes/No If Yes, checklist completed and filed - Yes/No

Description of Proposals

Planning permission in principal for the erection of a house

Representations

3 Representations were received for this application. This is a summary of the representations received. The full documents are contained in the application file.

Three objections have been received-
Visual Impact
Overlooking
Loss of privacy
Overshadowing
Lack of parking
Town cramming
Noise during construction

Consultations

This is a summary of the consultations received. The full documents are contained in the application file.

Consultee	Objection?	Comments	Planning Response
Transportation	Objection	Advises refusal on grounds of insufficient parking	Noted
Flood Risk Management	No objection	Drainage measures required	Noted
Education Planning (Andrew Cotton)	No objection	Contributions to education provision	Noted

Policies Considered

National Planning Framework 4

Policy Title	Policy Text
Policy 16 - Quality homes	a) Development proposals for new homes on land allocated for housing in LDPs will be supported.b) Development proposals that include 50 or more homes, and smaller developments if required by local policy or guidance, should be accompanied by a Statement of Community Benefit. The statement will explain the contribution of the proposed development to:i. meeting local housing requirements, including affordable homes;ii. providing or enhancing local infrastructure, facilities and services; andiii. improving the residential amenity of the surrounding area.c) Development proposals for new homes that improve affordability and choice by being adaptable to changing and diverse needs, and which address identified gaps in provision, will be supported. This could include:i. self-provided homes;ii. accessible, adaptable and wheelchair accessible homes;iii. build to rent;iv. affordable homes;v. a range of size of homes such as those for larger families;vi. homes for older people, including supported accommodation, care homes and sheltered housing; vii. homes for people undertaking further and higher education; and viii. homes for other specialist groups such as service personneld) Development proposals for public or private, permanent or temporary, Gypsy/Travellers sites and family yards and Travelling Showpeople yards, including on land not specifically allocated for this use in the LDP, should be supported where a need is identified and the proposal is otherwise consistent with the plan spatial strategy and other relevant policies, including human rights and equalitye) Development proposals for new homes will be supported where they make provision for affordable homes to meet an identified need. Proposals for market homes will only be supported where the contribution to the provision of affordable homes on a site will be at least 25% of the total number of homes, unless the LDP sets out locations or circumstances where:i. a higher contribution is justified by evidence of need, orii. a lower contribution is justified, for example, by evidence of impact on viability, where proposals are small in scale, or to incentivise particular types of homes that are needed to diversify the supply, such as self-build or wheelchair accessible homes.The contribution is to be provided in accordance with local policy or guidance.f) Development proposals for new homes on land not allocated for housing in the LDP will only be supported in limited circumstances where:i. the

	proposal is supported by an agreed timescale for build-out; andii. the proposal is otherwise consistent with the plan spatial strategy and other relevant policies including local living and 20 minute neighbourhoods;iii. and either:o delivery of sites is happening earlier than identified in the deliverable housing land pipeline. This will be determined by reference to two consecutive years of the Housing Land Audit evidencing substantial delivery earlier than pipeline timescales and that general trend being sustained; oro the proposal is consistent with policy on rural homes; oro the proposal is for smaller scale opportunities within an existing settlement boundary; oro the proposal is for the delivery of less than 50 affordable homes as part of a local authority supported affordable housing plan.g) Householder development proposals will be supported where they:i. do not have a detrimental impact on the character or environmental quality of the home and the surrounding area in terms of size, design and materials; andii. do not have a detrimental effect on the neighbouring properties in terms of physical impact, overshadowing or overlooking. h) Householder development proposals that provide adaptations in response to risks from a changing climate, or relating to people with health conditions that lead to particular accommodation needs will be supported.

West Lothian Local Development Plan

Policy Title	Policy Text
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Officer Assessment

The proposal seeks planning consent in principle for the erection of a single dwelling house. Records indicate that consent was refused previously for the erection of a shop with 2 flats due to overdevelopment of the site and insufficient parking. (Ref: LIVE/0995/P/07).

The current proposal is for one dwelling. The site is constrained in size and would provide insufficient space for a dwelling, parking provision or amenity space. It is not possible to locate a house on this site which would reflect the spatial pattern or street scene of the surrounding area. The proposal is therefore out of keeping with the character and local context of the area. As the site is surrounded by layby parking is it not possible to create a driveway. Without the off-street parking there is limited on street parking available.

Overall the proposal would result in overdevelopment of the site and would be detrimental to the character of the area. Transportation has advised that the application should be refused on the grounds of insufficient parking available.

The application is therefore contrary to West Lothian Local Development Plan policies: DES1 (Design Principles) and TRAN 1 (Transport Infrastructure), the council's Residential Development Guide and Policy 16 (Quality Homes) of NPF4.

Refusal is therefore recommended.

Conclusions and Reasons for Decision

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List of Review Documents

Drawings schedule:

Docquetted Number	Drawing Description
1	Location and Site Plan

Other relevant documents:

West Lothian Local Development Plan, 2018;

Case Officer: LHoad Date: 29/05/2023

DECISION NOTICE
REFUSAL OF PLANNING PERMISSION IN PRINCIPLE

Town and Country Planning (Scotland) Act 1997, as amended

West Lothian Council, in exercise of its powers under the Town & Country Planning (Scotland) Act 1997 (as amended), **refuses planning permission in principle for the development described below**, and in the planning application and docquetted plan(s).

APPLICATION REFERENCE	**0261/P/23**
PROPOSAL	Planning permission in principal for the erection of a house
LOCATION	1 Marrfield Terrace, Uphall Station, Livingston, West Lothian, EH54 5PX, (GRID REF: 306112, 670446)
APPLICANT	Mrs Wilma Clifford, 27 Main Street, East Calder, EH53 0ES

The above **local application was determined** by **an officer appointed by the council in accordance with its scheme of delegation.** Please see the advisory notes for further information, including how to request a review of any conditions.

Docquetted plans relative to this decision are identified in Annex 1, Schedule of Plans.

Dated: 29.05.2023

Wendy McCorriston
Development Management Manager

West Lothian Council
West Lothian Civic Centre
Howden South Road
Livingston
EH54 6FF

Signature: [redacted]

DATA LABEL: PUBLIC

The council in exercise of its powers under the Town and Country Planning (Scotland) Act 1997 (as amended) refuses planning permission for planning application 0261/P/23, for the reason(s) set out as follows:

1 The proposal, by virtue of the size and orientation of the plot and the established street pattern, would result in overdevelopment of the site and would be detrimental to the character of the area. Any house on the site would have insufficient private amenity space and would appear crammed and out of context with the street pattern.

The application is therefore contrary to West Lothian Local Development Plan policies: DES1 (Design Principles) and the council's Residential Development Guide and Policy 16 (Quality Homes) of NPF4.

2 There is insufficient space to provide suitable access and parking. The application is therefore contrary to TRAN 1 (Transport Infrastructure).

ADVISORY NOTES TO DEVELOPER

How to challenge the council's Decision

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If the decision of the council is overturned by the Local Review Body or the Directorate for Planning and Environmental Appeals, the developer of the land should be made aware of the following notes.

Notification of the start of development

It is a legal requirement that the person carrying out this development must notify the planning authority prior to work starting on site. The notification must include full details of the name and address of the person carrying out the development as well as the owner of the land and must include the reference number of the planning permission and the date it was granted. If someone is to oversee the work, the name and contact details of that person must be supplied. The relevant form is available online on the council web site under Planning and Building Standards. Please ensure this form is completed and returned accordingly.

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The person who completes this development must, as soon as practicable after doing so, give notice of completion to the planning authority. The relevant form is available online on the council web site under Planning and Building Standards. Please ensure this form is completed and returned accordingly.

Contaminated land procedures

In the event that contamination is found at any time when carrying out the approved development that was not previously identified, work on site shall cease and the issue shall be reported in writing to the planning authority immediately. The developer is required to follow the councils Supplementary Planning Guidance Development of land potentially affected by contamination. This document provides developers and their consultants with information on dealing with the planning process in West Lothian when development is proposed on land which is suspected of being affected by contamination. This document and further guidance is provided via the Councils web pages at https://www.westlothian.gov.uk/article/34731/Contaminated-Land

Liaison with the Coal Authority

As the proposed development is within an area which could be subject to hazards from current or past coal mining activity, the applicant is advised to liaise with the Coal Authority before work begins on site, to ensure that the ground is suitable for development.

Any activities which affect any coal seams, mine workings or coal mine entries (shafts) require the written permission of the Coal Authority. Failure to obtain such permission constitutes trespass, with the potential for court action. The Coal Authority is concerned, in the interest of public safety, to ensure that any risks associated with existing or proposed coal mine workings are identified and mitigated.

To contact the Coal Authority to obtain specific information on past, current and proposed coal mining activity you should contact the Coal Authority's Property Search Service on 0845 762 6848 or at ***www.groundstability.com****.*

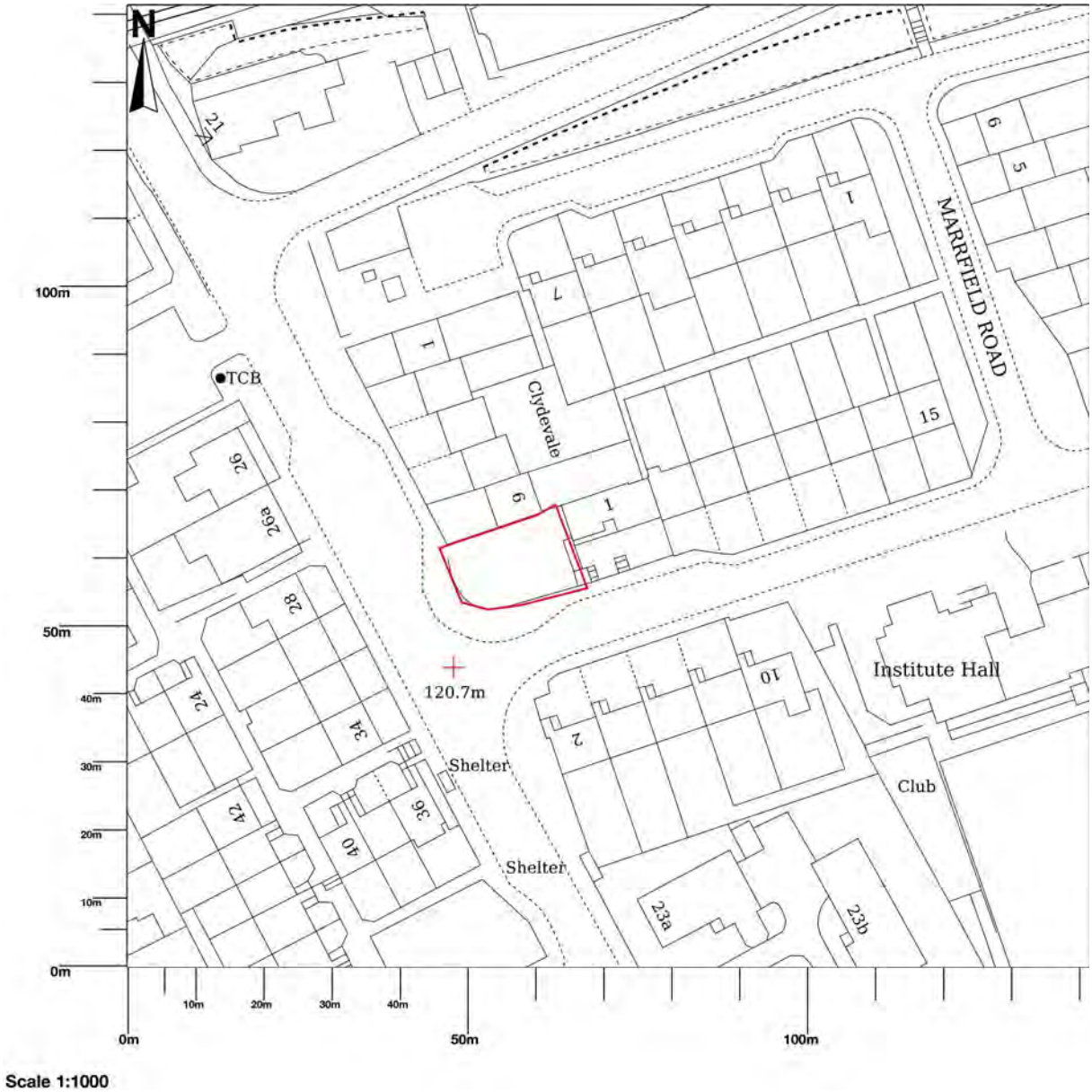
Advisory note to developer - General

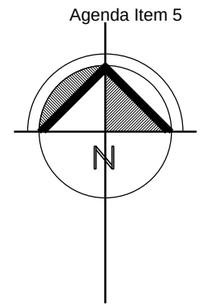
Please note that it is the developer's responsibility to ensure that all relevant consents and certificates are in place prior to starting work on site and that it is the developer's responsibility to speak with service authorities to ensure safe connection is possible to allow the development to proceed.

Annex 1, Schedule of Plans - 0261/P/23

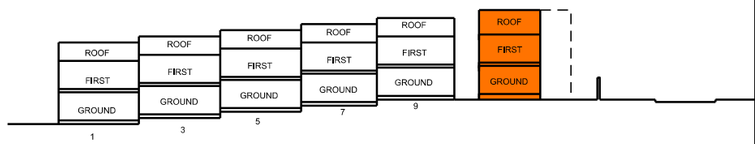
Docquetted Number	Drawing Description
1	Location and site plan

1 Marrfield Terrace, Uphall Station, Livingston, EH54 5PX





Denotes boundary of application site



Basic massing diagram 1:500 from B8046

REV.	DATE	DRAWN	DESCRIPTION

REVISIONS

0 2 4 10 20 40 80
1 3 5 15 30 60 100

CLIENT: Ms Wilma Clifford

JOB: New Dwelling
1 Marrfield Terrace

DRAWING: Explanatory Plan

DRAWNER	JOB NO2701	DR NO2701-PL01
DATE Aug 23	REV.	SCALE 1:500

ROBERTSON ARCHITECTURE & DESIGN

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Development Management Manager

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Annex 1, Schedule of Plans - 0261/P/23

Docquetted Number	Drawing Description
1	Location and site plan

DATA LABEL: PUBLIC

West Lothian Council

HANDLING REPORT

Ref. No.:	0261/P/23	**Email:**	lucy.hoad@westlothian.gov.uk
Case Officer:	Lucy Hoad	**Tel No.:**	
Ward:	East Livingston & East Calder	**Member:**	Cllr Damian Doran-Timson Cllr Carl John Cllr Danny Logue Cllr Veronica Smith

Title	Planning permission in principal for the erection of a house (Grid Ref: 306112,670446) at 1 Marrfield Terrace, Uphall Station, Livingston, West Lothian, EH54 5PX
Application Type	Local Application
Decision Level	Delegated List
Site Visit	
Recommendation	Refuse Permission
Decision	Refuse Permission
Neighbour Notification	Neighbour notification procedures have been carried out correctly - case officer verification. YES/NO
Advertisement	
EIA Screening	Does the development require EIA screening - Yes/No If Yes, checklist completed and filed - Yes/No

Description of Proposals

Planning permission in principal for the erection of a house

Representations

3 Representations were received for this application. This is a summary of the representations received. The full documents are contained in the application file.

Three objections have been received-
Visual Impact
Overlooking
Loss of privacy
Overshadowing
Lack of parking
Town cramming
Noise during construction

Consultations

This is a summary of the consultations received. The full documents are contained in the application file.

Consultee	Objection?	Comments	Planning Response
Transportation	Objection	Advises refusal on grounds of insufficient parking	Noted
Flood Risk Management	No objection	Drainage measures required	Noted
Education Planning (Andrew Cotton)	No objection	Contributions to education provision	Noted

Policies Considered

National Planning Framework 4

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Other relevant documents:

West Lothian Local Development Plan, 2018;

Case Officer: LHoad Date: 29/05/2023

From: Cotton, Andrew
To: Hoad, Lucy
Subject: RE: 0261/P/23 Dev Contribs Amounts required - [OFFICIAL]
Date: 19 May 2023 11:10:27

Hi Lucy

The proposed development is a windfall site as defined by the Strategic Development Plan (i.e. it is a site which is not identified through the forward planning process). Standard policy is not to object to small developments coming forward unless there is an immediate capacity issue at primary level. As there are no immediate problems at primary level Education would not register an objection to this application provided contributions are made. These contributions are targeted at relieving existing or forecast school capacity constraints and represent a proportionate contribution for the size of development suggested.

Education Planning therefore have no objection to this planning application coming forward.

Education Planning Contributions as follows:
ND Primary – None
Denominational Primary – St Nicholas' (Broxburn) £1,153 unindexed
ND Secondary - None
Denominational Secondary – West Lothian Wide £2,510 unindexed.

Residential properties with less than 3 habitable rooms (usually 1 bedroom or studio properties) are exempt from contributions for Education Infrastructure.
Residential properties with less than 4 habitable rooms (usually 2 bedroom properties) are eligible for a 20% discount on contributions for Education Infrastructure.

Cheers

Andy Cotton

Senior Education Planning Officer
Development Planning and Environment
West Lothian Civic Centre
Howden South Road
Livingston
EH54 6FF

From: Hoad, Lucy <Lucy.Hoad@westlothian.gov.uk>
Sent: 19 May 2023 10:35
To: Cotton, Andrew <Andrew.Cotton@westlothian.gov.uk>
Subject: 0261/P/23 Dev Contribs Amounts required - [OFFICIAL]

DATA LABEL: OFFICIAL

Hello Andrew

Can you confirm Developer Contribution Amounts required for 0261/P/23 please?

Planning permission in principal for the erection of a house
1 Marrfield Terrace
Uphall Station
Livingston

Thank you

Kind regards

Lucy

Lucy Hoad
Planning

West Lothian Council - Data Labels:

OFFICIAL - Sensitive: Contains Personal or Business Sensitive Information for authorised personnel only
OFFICIAL: Contains information for council staff only
PUBLIC: All information has been approved for public disclosure
NON-COUNCIL BUSINESS: Contains no business related or sensitive information

↻ **SAVE PAPER - Please do not print this e-mail unless absolutely necessary.**

From: Kelly, Sophie
To: Hoad, Lucy
Subject: 0261/P/23 - [OFFICIAL]
Date: 12 April 2023 15:42:08

DATA LABEL: OFFICIAL

Lucy,

I refer to your consultation in respect of the above application. I am pleased to comment as follows:

Flood Risk:
The council holds no records to suggest that the application site is at a particular risk from flooding.

Surface Water Drainage:
No drainage layout/details have been provided by the applicant in support of the proposal. If the planning authority is otherwise minded to support the application, it is recommended that the applicant be asked to bring forward drainage proposals, which will be expected to include basic measures to treat runoff and control the forward flow of surface water from the proposed dwelling.

Regards,
Sophie

DATA LABEL: PUBLIC

West Lothian Council

OPERATIONAL SERVICES
ROADS & TRANSPORTATION
DEVELOPMENT MANAGEMENT & TRANSPORTATION PLANNING

ROADS & TRANSPORTATION CONSULTATION RESPONSE TO PLANNING APPLICATION

This proposal is (tick as appropriate)	
Acceptable without conditions	
Acceptable with conditions noted below	
Not acceptable & should be refused	X
HOLDING OBJECTION – The application is not acceptable in current format and applicant requires to submit additional information to enable the proposals to be fully assessed.	

Signing Off	
DM & TP Officer Roads & Transportation	Chris Nicol
DM & TP Manager Roads & Transportation	
Date Issued to Development Management Officer	24 April 2023

Recommendation & Proposed Conditions	From a Roads & Transportation view, this application is **REFUSED** for the following reasons **Residential development guide requires off street parking for new housing. However as the site is surrounded by layby parking not possible to create a driveway.** **Without the off street parking there is limited on street parking available.**

DM Case Officer	Lucy Hoad	**Applicant**	Mrs Wilma Clifford
Application Ref	0261/P/23	**Date Issued**	03 April 2023
Proposal	Planning permission in principle for erection of a house		
Location	1 Marrfield Terrace, Uphall Station		

Legislation & Guidance Applicable (tick as appropriate)		**Constraints** (tick as appropriate)	
Roads (Scotland) Act 1984		**Public Footpath / Rights of Way**	
Designing Streets		**Core Path Plan**	
SCOTS National Roads Development Guide	X		
SUDS for Roads		**Control of Advertisements (Scotland) 1984**	
Sewers for Scotland		**Residential Development Guide 2018**	X

Other (please specify)	

DATA LABEL: PUBLIC

Site Description	**Slabbed land**
Quality Plan	N/A
Road Safety Audit	N/A
Transport Assessment or Statement	N/A
Does the red line boundary reach the adopted public road	Yes
Is there a footway or footpath connecting the site to the existing adopted road network	No
Drawings & documents assessed	Location Plan
Does Road Layout comply with WLC Standards	Yes
Does Parking comply with WLC Standards (including disabled provision)	No off street parking possible

DATA LABEL: PUBLIC

Sightline Requirements	N/A
Do the proposals affect any existing TRO's (e.g) waiting restrictions, speed limits) or bus stop locations	No
Do the proposals affect any Core Paths, NCR's or Rights of Way	No
SUDS Details	
Site History including any previous planning applications	

ROADS & TRANSPORTATION MANAGER
Operational Services
Whitehill Service Centre
4 Inchmuir Road
Whitehill Industrial Estate
Bathgate
West Lothian
EH48 2EP

Comments for Planning Application 0261/P/23

Application Summary

Application Number: 0261/P/23
Address: 1 Marrfield Terrace Uphall Station Livingston West Lothian EH54 5PX
Proposal: Planning permission in principal for the erection of a house
Case Officer: Lucy Hoad

Customer Details

Name: Miss Katarzyna Orzol
Address: 9 Clydevale Terrace Uphall Station EH54 5PU

Comment Details

Commenter Type: Neighbour
Stance: Customer objects to the Planning Application
Comment Reasons:
Comment:I am writing to express my strong objection to the application for Planning Permission in Principle for the erection of a house. I have several concerns regarding the impact this proposed development will have on my property and quality of life.

Firstly, the height and position of the new house will result in overshadowing of my house and garden. This will significantly reduce the amount of sunlight my living area and garden currently receive, leading to a loss of natural light and potential negative effects on plant growth in my garden.

Secondly, the construction process is likely to cause disruption in terms of noise and pollution. This will not only be inconvenient but may also pose health risks and affect overall well-being during the building phase.

Thirdly, the issue of parking space is already a challenge in our area, and the addition of a new house will exacerbate the problem. The increased demand for parking due to the new development will further limit the available space for residents, including myself, and create additional inconvenience and stress.

Lastly, the new house will overlook my property, resulting in a loss of privacy in my garden. This intrusion on my privacy will negatively impact the enjoyment of my outdoor space, and it is a significant concern.

In light of these concerns, I urge the planning authority to carefully consider the potential adverse effects of this proposed development on my property and quality of life.

Comments for Planning Application 0261/P/23

Application Summary

Application Number: 0261/P/23
Address: 1 Marrfield Terrace Uphall Station Livingston West Lothian EH54 5PX
Proposal: Planning permission in principal for the erection of a house
Case Officer: Lucy Hoad

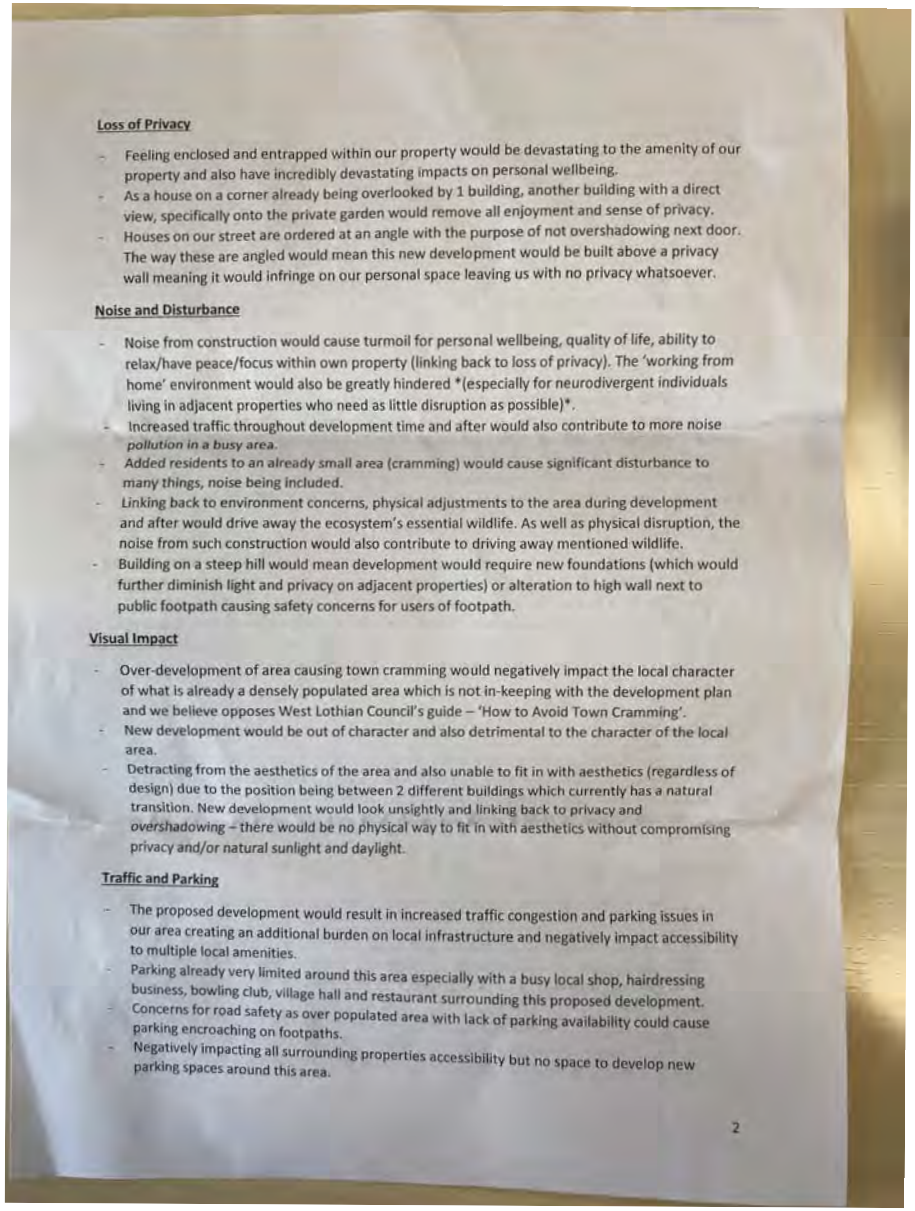
Customer Details

Name: Mr Luke Wilson
Address: 9 Clydevale Terrace Uphall Station EH54 5PU

Comment Details

Commenter Type: Neighbour
Stance: Customer objects to the Planning Application
Comment Reasons:
Comment:-The proposed development would significantly diminish sunlight/daylight in the living spaces within our home and the gardens. This directly leads to a detrimental impact on the amenity of our property, quality of life and wellbeing.
-Possible safety issues in dark if new development is to block any light or illumination from street lamps.
-Area on a steep hill meaning alteration of water sources, drainage and sewage could cause hazardous flooding.
-Encouraging & attracting wildlife into gardens is great for environment and replenishing the ecosystem. Development would cause turmoil to wildlife and their habitats.
-Living organisms would be damaged. Negative impact on grass and plants through lack of sunlight resulting in reduced urban greenery which is also essential to the ecosystem and impacting the enjoyment of our garden.
-Feeling enclosed and entrapped within our property would be devastating to the amenity of our property and impacts on wellbeing.
-As a house on a corner already being overlooked by 1 building, another building overlooking the private garden would remove all enjoyment and sense of privacy.
-Houses on our street are ordered at an angle with the purpose of not overshadowing next door. The way these are angled would mean this new development would be built above a privacy wall then infringing on our property.
-Noise from construction would cause turmoil for personal wellbeing, quality of life, ability to relax/have peace/focus within own property. The 'working from home' environment would also be hindered.
-Increased traffic throughout development and after would contribute to more noise pollution in a busy area.
-Building on steep hill would mean development would require new foundations or alteration to

high wall next to public footpath causing safety concerns for users of footpath.
Visual Impact
-Over-development of area causing town cramming would negatively impact what is already a densely populated area.
-New development would be detrimental to character of the local area.
-Detracting from aesthetics of the area & unable to fit in with aesthetics (regardless of design) due to position being between 2 different building sizes which currently has a natural transition. New development would look unsightly.
-The proposed development would result in increased traffic congestion and parking issues in our area creating an additional burden on local infrastructure and negatively impact accessibility to multiple local amenities.
-Parking already very limited around this area especially with a busy local shop, hairdressing business, bowling club, village hall and restaurant surrounding this proposed development.
-Concerns for road safety as over populated area with lack of parking availability could cause parking encroaching on footpaths.
-Current system is 'on street parking' on a fast main road (also on a hill) which would become more dangerous with increased number of residents cars or 'permanent' cars in the area.



Loss of Privacy

- Feeling enclosed and entrapped within our property would be devastating to the amenity of our property and also have incredibly devastating impacts on personal wellbeing.
- As a house on a corner already being overlooked by 1 building, another building with a direct view, specifically onto the private garden would remove all enjoyment and sense of privacy.
- Houses on our street are ordered at an angle with the purpose of not overshadowing next door. The way these are angled would mean this new development would be built above a privacy wall meaning it would infringe on our personal space leaving us with no privacy whatsoever.

Noise and Disturbance

- Noise from construction would cause turmoil for personal wellbeing, quality of life, ability to relax/have peace/focus within own property (linking back to loss of privacy). The 'working from home' environment would also be greatly hindered *(especially for neurodivergent individuals living in adjacent properties who need as little disruption as possible)*.
- Increased traffic throughout development time and after would also contribute to more noise pollution in a busy area.
- Added residents to an already small area (cramming) would cause significant disturbance to many things, noise being included.
- Linking back to environment concerns, physical adjustments to the area during development and after would drive away the ecosystem's essential wildlife. As well as physical disruption, the noise from such construction would also contribute to driving away mentioned wildlife.
- Building on a steep hill would mean development would require new foundations (which would further diminish light and privacy on adjacent properties) or alteration to high wall next to public footpath causing safety concerns for users of footpath.

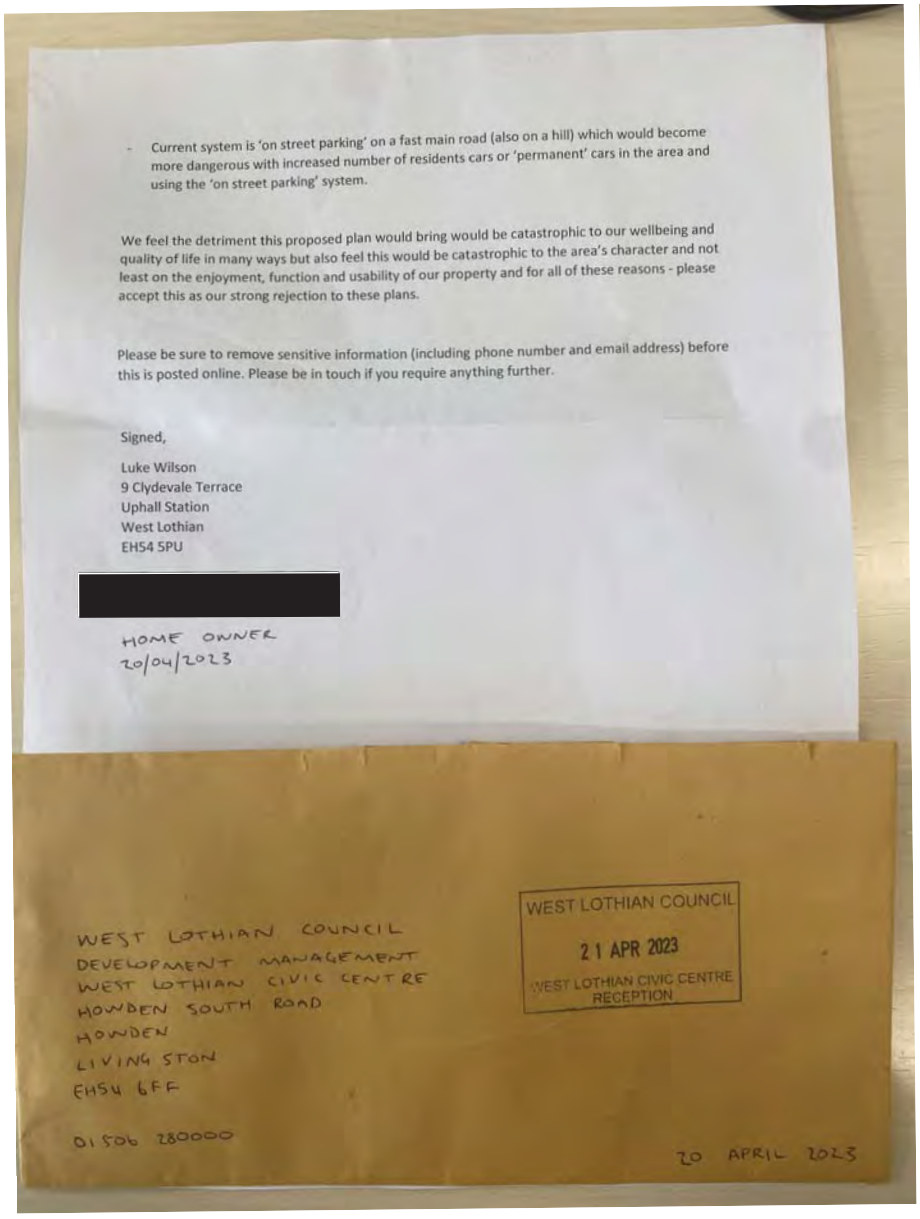
Visual Impact

- Over-development of area causing town cramming would negatively impact the local character of what is already a densely populated area which is not in-keeping with the development plan and we believe opposes West Lothian Council's guide – 'How to Avoid Town Cramming'.
- New development would be out of character and also detrimental to the character of the local area.
- Detracting from the aesthetics of the area and also unable to fit in with aesthetics (regardless of design) due to the position being between 2 different buildings which currently has a natural transition. New development would look unsightly and linking back to privacy and overshadowing – there would be no physical way to fit in with aesthetics without compromising privacy and/or natural sunlight and daylight.

Traffic and Parking

- The proposed development would result in increased traffic congestion and parking issues in our area creating an additional burden on local infrastructure and negatively impact accessibility to multiple local amenities.
- Parking already very limited around this area especially with a busy local shop, hairdressing business, bowling club, village hall and restaurant surrounding this proposed development.
- Concerns for road safety as over populated area with lack of parking availability could cause parking encroaching on footpaths.
- Negatively impacting all surrounding properties accessibility but no space to develop new parking spaces around this area.

2



- Current system is 'on street parking' on a fast main road (also on a hill) which would become more dangerous with increased number of residents cars or 'permanent' cars in the area and using the 'on street parking' system.

We feel the detriment this proposed plan would bring would be catastrophic to our wellbeing and quality of life in many ways but also feel this would be catastrophic to the area's character and not least on the enjoyment, function and usability of our property and for all of these reasons - please accept this as our strong rejection to these plans.

Please be sure to remove sensitive information (including phone number and email address) before this is posted online. Please be in touch if you require anything further.

Signed,

Luke Wilson
9 Clydevale Terrace
Uphall Station
West Lothian
EH54 5PU

[redacted]

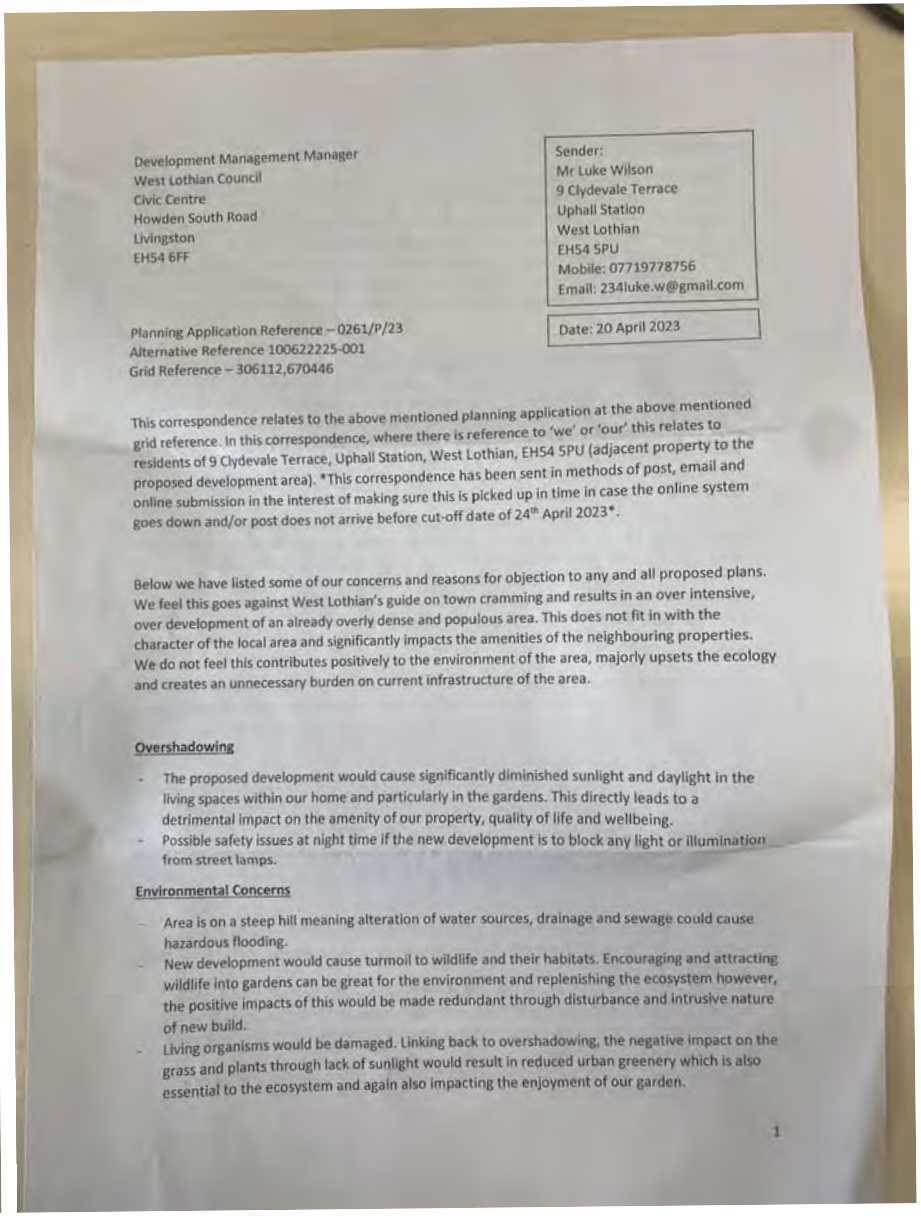
HOME OWNER
20/04/2023

WEST LOTHIAN COUNCIL
DEVELOPMENT MANAGEMENT
WEST LOTHIAN CIVIC CENTRE
HOWDEN SOUTH ROAD
HOWDEN
LIVINGSTON
EH54 6FF

01506 280000

WEST LOTHIAN COUNCIL
21 APR 2023
WEST LOTHIAN CIVIC CENTRE
RECEPTION

20 APRIL 2023



Development Management Manager
West Lothian Council
Civic Centre
Howden South Road
Livingston
EH54 6FF

Sender:
Mr Luke Wilson
9 Clydevale Terrace
Uphall Station
West Lothian
EH54 5PU
Mobile: 07719778756
Email: 234luke.w@gmail.com

Planning Application Reference – 0261/P/23
Alternative Reference 100622225-001
Grid Reference – 306112,670446

Date: 20 April 2023

This correspondence relates to the above mentioned planning application at the above mentioned grid reference. In this correspondence, where there is reference to 'we' or 'our' this relates to residents of 9 Clydevale Terrace, Uphall Station, West Lothian, EH54 5PU (adjacent property to the proposed development area). *This correspondence has been sent in methods of post, email and online submission in the interest of making sure this is picked up in time in case the online system goes down and/or post does not arrive before cut-off date of 24th April 2023*.

Below we have listed some of our concerns and reasons for objection to any and all proposed plans. We feel this goes against West Lothian's guide on town cramming and results in an over intensive, over development of an already overly dense and populous area. This does not fit in with the character of the local area and significantly impacts the amenities of the neighbouring properties. We do not feel this contributes positively to the environment of the area, majorly upsets the ecology and creates an unnecessary burden on current infrastructure of the area.

Overshadowing

- The proposed development would cause significantly diminished sunlight and daylight in the living spaces within our home and particularly in the gardens. This directly leads to a detrimental impact on the amenity of our property, quality of life and wellbeing.
- Possible safety issues at night time if the new development is to block any light or illumination from street lamps.

Environmental Concerns

- Area is on a steep hill meaning alteration of water sources, drainage and sewage could cause hazardous flooding.
- New development would cause turmoil to wildlife and their habitats. Encouraging and attracting wildlife into gardens can be great for the environment and replenishing the ecosystem however, the positive impacts of this would be made redundant through disturbance and intrusive nature of new build.
- Living organisms would be damaged. Linking back to overshadowing, the negative impact on the grass and plants through lack of sunlight would result in reduced urban greenery which is also essential to the ecosystem and again also impacting the enjoyment of our garden.

1

From: Planning
To: Hoad, Lucy
Subject: FW: Objecting to a planning application - [OFFICIAL]
Date: 17 April 2023 12:28:01

DATA LABEL: OFFICIAL

From: Yvonne Ballinas
Sent: 17 April 2023 12:22
To: Planning <Planning@westlothian.gov.uk>
Subject: Objecting to a planning application

Yvonne Ballinas
57 mill road
Armadale
EH48 3QL

Monday 17th April 2023

Application number-0261/P/23
Address- 1 marrfield terrace, uphall station, Livingston, West Lothian, EH54 5PX

I object to this planning as my business will suffer from viewing salon of road
Get Outlook for iOS

West Lothian Council - Data Labels:

OFFICIAL - Sensitive: Contains Personal or Business Sensitive Information for authorised personnel only
OFFICIAL: Contains information for council staff only
PUBLIC: All information has been approved for public disclosure
NON-COUNCIL BUSINESS: Contains no business related or sensitive information

↻ **SAVE PAPER - Please do not print this e-mail unless absolutely necessary.**

Development Management
West Lothian Civic Centre
Howden South Road
Howden
Livingston
EH54 6FF

Tel: 01506 280000

Our Ref: 0261/P/23
Direct Dial No:
Email:
lucy.hoad@westlothian.gov.uk
29 September 2023

Draft Conditions

This permission is granted subject to the following conditions:

1. This planning permission in principle will lapse on the expiration of 5 years beginning with the date of this decision notice, unless the development to which the permission relates has begun before that date.

Reason: To accord with Section 59 of the Town and Country Planning (Scotland) Act 1997 (as amended).

2. No development granted under the terms of this planning permission in principle shall commence until plans and particulars of the under-noted matters have been submitted to, and approved in writing by, the planning authority. Thereafter, the development shall be carried out in accordance with that approval.

Application for approval of any such matters (approval of matters specified in a condition or "MSC application") shall be made in accordance with the additional provisions and requirements of the further conditions set out in this permission in principle.

Matters for Approval:

a) Plans, sections and elevations of all buildings and structures, including fencing and retaining walls to be erected, indicating the type and colour of all external materials.
b) Existing and proposed ground levels and proposed finished floor levels.
c) Access and parking arrangements.
d) Hard and soft landscaping details including the location of all existing and proposed trees, hedges and shrubs; a schedule of plants to comprise species, plant size and proposed number and density.
e) Surface water and drainage arrangements including SUDS details where to be provided.
f) Phase 2 Geoenvironmental interpretive site investigation report with remediation statement.

Reason: To enable the council to assess those details which have yet to be submitted.

3. Part 1
The development shall not begin until a contaminated land site investigation and risk assessment has been completed and a written report submitted to and approved in writing by the planning authority. The site investigation and risk assessment must be undertaken by suitably qualified, experienced and competent persons. The written report of the findings must include:
(a) A Phase 1 desk study report incorporating an initial conceptual model of the site.
(b) A Phase 2 report incorporating a survey of the extent, scale and nature of contamination, and an updated conceptual model of the site;
(c) An assessment of the potential risks to:

- human health,
- property (existing and proposed) including buildings, crops, livestock, pets, woodland and service lines and pipes,
- adjoining land,
- the water environment,
- ecological systems,
- archaeological sites and ancient monuments
- flora and fauna associated with the new development;

(d) An appraisal of remedial options, and proposal of the preferred options(s).

This must be conducted in accordance with the Environment Agency's Land Contamination Risk Management (LCRM). If it is concluded by the written report that remediation of the site is not required, and this is approved in writing by the planning authority, then parts 2 and 3 of this condition can be disregarded.

Part 2
The development shall not begin until a remediation statement to bring the site to a condition suitable for the intended use by removing unacceptable risks to all relevant and statutory receptors has been submitted to and approved in writing by the planning authority. The remediation statement shall include all works to be undertaken, proposed remediation objectives and remediation criteria, timetable of works and site management procedures. The remediation statement shall ensure that the site will not qualify as contaminated land under Part 2A of the Environmental Protection Act 1990 in relation to the intended use of the land following development.

Part 3
Thereafter the remediation statement as approved shall be carried out in accordance with its terms. Following completion of the remediation measures, a verification report that demonstrates the effectiveness of the remediation carried out shall be prepared. The development shall not be occupied until the verification report has been submitted to and approved in writing by the planning authority.

Reason: To identify any contamination present on site and ensure appropriate remediation is carried out.

4. The development shall not begin until details of proposed ground and floor levels have been submitted to and approved in writing by the planning authority. Thereafter the development shall be implemented in accordance with the details as approved.

Reason: To enable full consideration to be given to those details which have yet to be submitted, in the interests of visual and environmental amenity.

5. Surface water from the development shall be treated and attenuated by a sustainable drainage system (SUDS) in accordance with the Water Assessment & Drainage Assessment Guide (published by SUDS Working Party) and The SUDS Manual C753 (published by CIRIA). The development shall not begin until a drainage assessment has been submitted to and approved in in writing by the planning authority. Thereafter the development shall be implemented in accordance with the details as approved.

Reason: To minimise the cumulative effects of surface water and diffuse pollution on the water environment.

6. The following restrictions shall apply to the construction of the development:

Noise (Construction)
Any work required to implement this planning permission that is audible within any adjacent noise sensitive receptor or its curtilage shall be carried out only between the hours of 08:00 and 18:00 Monday to Friday and 08:00 and 13:00 on a Saturday and at no time on a Sunday. This includes deliveries and operation of on-site vehicles and equipment.

No generators shall be audible within any residential properties between the hours of 20:00 and 08:00.

Noise (Vehicles/Plant)
All site vehicles (other than delivery vehicles) must be fitted with non-tonal broadband reversing alarms.

Vibration (Construction)
Where piling or other significant vibration works are likely during construction which may be perceptible in other premises, measures must be in place (including hours of operation) to monitor the degree of vibration created and to demonstrate best practice. Prior to any piling or other significant vibration works taking place, a scheme to minimise and monitor vibration affecting sensitive properties shall be submitted to and approved in writing by the planning authority. Thereafter the development shall be implemented in accordance with the details as approved.

Site Compound
The development shall not begin until the location and dimensions of any site compound and means of access to same have been submitted to and approved in writing by the planning authority. Thereafter the development shall be implemented in accordance with the details as approved.

Waste
Effective facilities for the storage of refuse, building debris and packaging shall be provided on site. The facilities shall be specifically designed to prevent refuse, building debris and packaging from being blown off site. Any debris blown or spilled from the site onto surrounding land shall be cleared on a weekly basis. For the purposes of this condition, it shall be assumed that refuse, debris and packaging on surrounding land has originated from the site if it is of the same or similar character to items used or present on the site.

Wheel Cleaning
All construction vehicles leaving the site shall do so in a manner that does not cause the deposition of mud or other deleterious material on surrounding roads. Such steps shall include the cleaning of the wheels and undercarriage of each vehicle where necessary and the provision of road sweeping equipment.

Reason: In the interests of visual and environmental amenity.

Standard Notes

Please read the following notes carefully as they contain additional information which is of relevance to your development.

Notification of completion of development

It is a legal requirement that the person carrying out this development must notify the planning authority prior to work starting on site. The notification must include full details of the name and address of the person carrying out the development as well as the owner of the land and must include the reference number of the planning permission and the date it was granted. If someone is to oversee the work, the name and contact details of that person must be supplied. A form which can be used for this purpose can be found using the following link:

https://www.westlothian.gov.uk/article/33098/Completion-of-development

Contaminated land procedures

In the event that contamination is found at any time when carrying out the approved development that was not previously identified, work on site shall cease and the issue shall be reported in writing to the planning authority immediately. The developer is required to follow the councils Supplementary Planning Guidance Development of land potentially affected by contamination. This document provides developers and their consultants with information on dealing with the planning process in West Lothian when development is proposed on land which is suspected of being affected by contamination. This document and further guidance is provided via the Councils web pages at
https://www.westlothian.gov.uk/article/34731/Contaminated-Land

Liaison with the Coal Authority

As the proposed development is within an area which could be subject to hazards from current or past coal mining activity, the applicant is advised to liaise with the Coal Authority before work begins on site, to ensure that the ground is suitable for development.

Any activities which affect any coal seams, mine workings or coal mine entries (shafts) require the written permission of the Coal Authority. Failure to obtain such permission constitutes trespass, with the potential for court action. The Coal Authority is concerned, in the interest of public safety, to ensure that any risks associated with existing or proposed coal mine workings are identified and mitigated.

To contact the Coal Authority to obtain specific information on past, current and proposed coal mining activity you should contact the Coal Authority's Property Search Service on 0845 762 6848 or at www.groundstability.com.

Advisory note to developer - SGN

There are a number of risks created by built over gas mains and services; these are:

Pipework loading - pipes are at risk from loads applied by the new structure and are more susceptible to interference damage.
Gas entry into buildings - pipework proximity increases risk of gas entry in buildings. Leaks arising from previous external pipework able to track directly into main building from unsealed entry.
Occupier safety - lack or no fire resistance of pipework, fittings, or meter installation. Means of escape could be impeded by an enclosed meter.

Please note therefore, if you plan to dig, or carry out building work to a property, site, or public highway within our gas network, you must:}

1.Check your proposals against the information held at https://www.linesearchbeforeudig.co.uk/ to assess any risk associated with your development and
2.Contact our Plant Protection team to let them know. Plant location enquiries must be made via email, but you can phone us with general plant protection queries. See our contact details: Phone 0800 912 1722 / Email plantlocation@sgn.co.uk

In the event of an overbuild on our gas network, the pipework must be altered, you may be temporarily disconnected, and your insurance may be invalidated.

Further information on safe digging practices can be found here:

Our free Damage Prevention e-Learning only takes 10-15 minutes to complete and highlights the importance of working safely near gas pipelines, giving clear guidance on what to do and who to contact before starting any work https://www.sgn.co.uk/damage-prevention

Further information can also be found here https://www.sgn.co.uk/help-and-advice/digging-safely.

SGN personnel will contact you accordingly.

Advisory note to developer - General

Please note that it is the developer's responsibility to ensure that all relevant consents and certificates are in place prior to starting work on site and that it is the developer's responsibility to speak with service authorities to ensure safe connection is possible to allow the development to proceed.

Draft Heads of Terms for Planning Obligation

A legal agreement is required to be entered in respect of developer contributions as follows:

Education Planning Contributions:
ND Primary – None
Denominational Primary – St Nicholas' (Broxburn) £1,153 unindexed
ND Secondary - None
Denominational Secondary – West Lothian Wide £2,510 unindexed.

Cemetery provision:
£88 per dwelling indexed to Q4 2017 RICS BCIS –
Cost code 754200-94108, PG Agreed 19 January 2021

OR

The council in exercise of its powers under the Town and Country Planning (Scotland) Act 1997 (as amended) refuses planning permission for planning application , for the reason(s) set out as follows:

West Lothian Council

LOCAL REVIEW BODY

APPLICATION NO.0130/H/23 – ERECTION OF A 1.9M HIGH TIMBER FENCE AND GATES AND FORMATION OF A GRAVEL SURFACED CAR PARK (IN RETROSPECT), THREEMILETOWN FARMHOUSE, THREEMILETOWN, LINLITHGOW

REPORT BY CLERK AND LEGAL ADVISER TO THE LOCAL REVIEW BODY

A PURPOSE OF REPORT

This report describes the documents and other matters relevant to the consideration by the Local Review Body of this application for review of the refusal of planning permission for the erection of a 1.9m high timber fence and gates and formation of a gravel surfaced car park (in retrospect), Threemiletown Farmhouse, Threemiletown, Linlithgow

B REVIEW DOCUMENTS

The following documents form the review documents for consideration by the Local Review Body and are circulated to members with this report:

1. The Notice of Review, and supporting documentation, submitted by the applicant, dated 23 June 2023.

2. The Handling Report, prepared by the Planning Case Officer, dated 17 April 2023.

3. The Decision Notice, issued by the Appointed Person, dated 20 April 2023.

Thirteen representations were received in respect of the planning application, all in objection to the proposal. A statutory consultation response was also received from the council's Transportation Services who consider the proposal to be acceptable subject to a condition that there shall be no direct vehicular access onto the B9080 due to the restricted visibility eastwards that the neighbouring building creates and the car park shall be from the Canal Court using the surfaced access.

All those who had made representation on the planning application, including the statutory consultee, were contacted to advise the review application had been received and to afford them the opportunity to make further comment. Six of those who objected submitted further representations within the correct timeframe and these were shared with the applicant; the applicant submitted a response to those matters raised in the additional representations. Copies

of the statutory consultee response, representations made, and the applicant's response thereto, are circulated with this report.

The applicant has stated in the review application that they have raised new matters which were not before the Appointed Person at the time of the determination of the planning application; these concerns lowering the height of the fence crossing the garden and staining/painting the fence to tone in with the surrounding environment; and measures to make the exit from the new car parking area safer.

The applicant has stated in the review application that it is their opinion that the review would most appropriately be determined following an accompanied site inspection and a hearing session.

C SITE VISITS AND FURTHER PROCEDURE

At the first consideration of the review application committee were advised that a supporting statement that had not formed part of the review documents had been submitted by the applicant's agent. Committee agreed that the supporting statement raised new material considerations which required to be considered in determining the application. The submission was therefore permitted to be submitted for consideration by Committee. Committee agreed to continue the review application to allow the thirteen objectors an opportunity to consider the material considerations raised in the supporting statement and to comment on them, and for further information to be obtained from; the Appointed Person, Transportation and the applicant's agent on matters that had been raised in the supporting statement. All information required by the Local Review Body was outlined in a Procedure Note, a copy of which is attached to this report.

The Local Review Body requested that a member of the Council's Transportation Service attend the next meeting of the Local Review Body so that further professional advice could be provided to Committee with regards road safety issues and the proposed access to the development site.

Reponses to the Procedure Note were received within the stipulated 14-day period and were subsequently shared with all interested parties who then had a further 14 days in which to comment on them. All correspondence referred to is attached to the report as a series of appendices.

Members of the Local Review Body undertook a site visit on the 30 August 2023 when the review application was first considered.

D DEVELOPMENT PLAN POLICIES AND PLANNING GUIDANCE

The Appointed Person refused the application for the following reasons as outlined in the Decision Notice circulated with the committee report: -

1. The fence and car park by virtue of its scale and design will be visually detrimental to residential and the visual amenity of the C-listed building. The choice of materials (timber fence boards and light grey gravel) is not acceptable and would have an adverse impact on existing residents' amenity. Therefore, the proposal was considered to be

contrary to West Lothian Local Development Plan policies DES 1 (Design Principles) and ENV 28 (Listed Buildings), National Planning Framework 4 Policies 16g and 16h and guidance given in the Extension and Alteration Design Guide 2020.

2. The use of the vehicle entrance on the B9080 will create a safety risk to road users. Therefore, the proposal was considered contrary to West Lothian Local Development Plan Policy DES 1(c) (Design Principles).

Further information can be obtained in the Decision Notice and Handling Report both of which are circulated with this report.

E PLANNING CONDITIONS, LEGAL AGREEMENTS AND GOOD NEIGHBOUR AGREEMENTS

Without prejudice to the outcome of this review, to assist the LRB in its deliberations and to assist the applicant and interested persons in securing a prompt resolution of the review, attached to the report are a set of draft planning conditions which the LRB may wish to consider imposing should it be minded to grant planning permission. A copy is circulated with this report

Lesley Montague, Managing Solicitor, West Lothian Civic Centre

Email address: - lesley.montague@westlothian.gov.uk

Date: 1 November 2023

Section 1 contains the following documents

- Notice of Review Application
- Decision Notice
- Handling Report
- Statutory Consultation(s)
- Representations

FOR OFFICIAL USE ONLY

Reference No :
Date of Receipt :

NOTICE OF REVIEW

(LOCAL DEVELOPMENT – DECISION BY APPOINTED PERSON)

This Form is for a review by the West Lothian Council Local Review Body under Section 43A(8) of the Town and Country Planning (Scotland) Act 1997 in respect of decisions by the appointed person on local development applications.

The review will be conducted under the Town and Country Planning (Schemes of Delegation and local Review Procedure) (Scotland) Regulations 2008.

Please read and follow the accompanying West Lothian Council Local Review Body Guidance Notes when completing this form. Failure to supply all the relevant information or to lodge the form on time could invalidate your notice of review.

Use BLOCK CAPITALS if you are completing the form by hand.

PART A	**APPLICANT'S DETAILS**	Name ___Stuart Provan Address _____Seamab _____Rumbling Bridge Postcode ___KY13 0PT Telephone No. (1) [redacted] Telephone No. (2) [redacted] Fax : _____ E-mail : [redacted]
	REPRESENTATIVE (if any)	Name _____ Address _____ _____ Postcode _____ Telephone No. (1) _____ Telephone No. (2) _____ Fax : _____ E-mail : _____
	Please tick this box if you wish all contact to be through your representative.	
	Do you agree to correspondence regarding your review being sent by e-mail? *** YES**	

PART B	**APPLICANT REF. NO.**	0130/H/23
	SITE ADDRESS	Threemiletown Farmhouse Threemiletown Linlithgow EH49 6NF
	DESCRIPTION OF PROPOSED DEVELOPMENT	Erection of a 1.9m high timber fence and gates and formation of a gravel surfaced car park (in retrospect)
	DATE OF APPLICATION	14/02/2023
	DATE OF DECISION NOTICE (IF ANY)	20/04/2023

Note:- This notice must be served on the planning authority within three months beginning with the date of the decision notice or, if no decision notice was issued, from the date of expiry of the period allowed for determining the application.

Type of Application (please tick the appropriate box)

	Application for planning permission (including householder application)	✓
	Application for planning permission in principle	
	Further application (including development that has not yet commenced and where a time limit has been imposed; renewal of planning permission; and/or modification, variation or removal of a planning condition)	
	Application for approval of matters specified in conditions	

PART C	**TYPE OF REVIEW CASE**	
	Refusal of application by appointed officer	✓
	Failure by appointed officer to determine the application within the period allowed	
	Conditions imposed on consent by appointed officer	

Statement of reasons and matters to be raised

You must state, in full, the reasons for requiring a review of your case. You must also set out and include with your application all the matters you consider require to be taken into account and which you intend to raise in the review. You may not have a further opportunity to add to your statement of review at a later date. It is therefore essential that you submit with your notice of review, all necessary information and evidence that you rely on and wish the Local Review Body to consider as part of your review.

State here the reasons for requiring the review and all the matters you wish to raise. If necessary, this can be continued or provided in full in a separate document. **You may also submit additional documentation with this form.**

See attachment - Statement of reasons and matters to be raised

Have you raised any matters which were not before the appointed officer at the time the determination on your application was made?	* **YES**

If yes, you should now explain why you are raising new material, why it was not raised with the appointed officer before, and why you consider it should now be considered in your review.

	We have proposed lowering the height of the fence crossing the garden to lessen the impact, and staining or painting all fencing to tone in with the surrounding environment. We have also proposed measures to make the exit from the new car parking area safer. Both of these have been added after discussion with planners. This is explained in the supporting statement and we would welcome the opportunity to attend a hearing session to discuss further. We were not given the opportunity to meet with West Lothian Council planners to discuss ways to make the application more acceptable until after the application was refused,

List of documents and evidence

Please provide a list of all documents, materials and evidence which you wish to submit and rely on in your review. **All** of these documents, materials and evidence must be lodged with this notice. If necessary, this can be continued or provided in full in a separate document.

1.	Statement of reasons and matters to be raised
2.	Householder application 0130/H/23
3.	Supporting statement submitted with householder application
4.	Location map
5.	Drawing 1 in 500
6.	Photo – new fence at side of house
7.	Photo – New gate to oil tank at rear of house
8.	Photo – Fence around garden area
9.	Photo – Gravel at entranceway
10.	Decision notice
11.	
12.	

PART D

REVIEW PROCEDURE

The Local Review Body will decide on the procedure to be used to determine your review and may at any time during the review process require that further information or representations be made to enable them to determine the review.

Can this review continue to a conclusion, in your opinion, based on a review of the relevant information provided by yourself and other parties, without any further procedures?. For example, written submission, hearing session, site inspection *

*Please indicate what procedure (or combination of procedures) you think is most appropriate for the handling of your review. You may select more than one option if you wish the review to be a combination of procedures.

We do not accept that the review can be concluded without a hearing session and site inspection, and request that both of these are arranged

If you have selected “further written submissions” or “hearing session(s)”, please explain which of the matters you have included in your statement of reasons you believe ought to be subject of those procedures, and why.

If deemed appropriate we would be happy to meet on site to discuss the application with the people who will consider our Appeal. We do not agree that the use of the vehicle entranceway on the B9080 will create a risk to road users, as this is an existing (not new) entrance to the Farmhouse.

SITE INSPECTION

The Local Review Body may decide to inspect the land which is subject to the review.

Can the site be viewed entirely from public land?	* **NO**
Is it possible for the site to be accessed safely, and without barriers to entry?	* **YES**

If you think the Local Review Body would be unable to undertake an unaccompanied site inspection, please explain why that may be the case.

Children are now resident in the house and access to the garden area can only be by prior arrangement, to ensure the young residents are kept safe and informed of any visitors. Gates may be locked.

PART E	CHECKLIST	
	Please mark the appropriate boxes to confirm you have provided all supporting documents and evidence relevant to your review. Failure to supply all the relevant information or to lodge the form on time could invalidate your notice of review.	
	Full completion of all parts of this form	✓
	Statement of your reasons for requiring a review and matters to be raised	✓
	Statement of your preferred procedure	✓
	All documents, materials and evidence INCLUDING LOCATION PLANS AND/OR DRAWINGS which you intend to rely on. Copies must accompany this notice.	✓
	Where your case relates to another application (e.g. it is a renewal of planning permission or a modification, variation or removal of a planning condition, or an application for approval of matters specified in conditions), it is advisable to provide that other application reference number, approved plans and decision notice from that earlier consent.	

*****DECLARATION*****

I, the applicant/agent*, hereby require West Lothian Council to review the case as set out in this form and in the supporting documents, materials and evidence lodged with it and which includes those plans/drawings that were used by the Appointed Person when determining the original planning application.

I have been provided with a copy of the West Lothian Council Local Review Body Guidance Notes b[redacted]ore lodging this notice.

Signed [redacted] Date 23 June 2023

* Delete as appropriate

Please email this completed form to :-

committeeservices@westlothian.gov.uk or alternatively post to :-
Committee Services
West Lothian Council
West Lothian Civic Centre
Howden South Road
Livingston
EH54 6FF

STATEMENT OF REASONS AND MATTERS TO BE RAISED

Under the Town and Country Planning (Scotland) Act of 1997 you have refused permission for the following reasons:

1. The fence and car park by virtue of its scale and design will be visually detrimental to residential and the visual amenity of the C-listed building. The choice of materials (timber fence boards and light grey gravel) is not acceptable and would have an adverse impact on existing resident's amenity
2. The use of the vehicle entranceway on to B9080 will create a safety risk to road users

Background:

West Lothian council issued an approval of a Certificate of Lawfulness for Seamab to create a care home for up to 4 children/young people at Threemiletown Farmhouse. In order to make this care home as functional and practical as possible we set about making adaptations externally as outlined in the planning application. I believed that by issuing the Certificate that we could make reasonable changes so as to create practical changes to improve the running of the home.

For planning purposes, the house falls into the Class 9. Houses category where under section (a) (ii) where: Not more than 5 residents live together including where care is provided for residents.

Reasons for Refusal:

Point 1 - The fence and car park by virtue of its scale and design will be visually detrimental to residential and the visual amenity of the C-listed building. The choice of materials (timber fence boards and light grey gravel) is not acceptable and would have an adverse impact on existing resident's amenity.

It is important to highlight that as new tenants at Threemiletown we contacted our Landlord, Hopetoun Estate, prior to making the changes that are being discussed. We provided plans, photographs and sketches and gained approval from Hopetoun prior to undertaking the works. We were not made aware of the listed status of the building or we would have spoken with planners prior to undertaking any works.

We have built fencing around the boundary of the property in what we consider a reasonable and normal style and we have used materials that are natural and sustainable. The fence is new and will weather with time and be less noticeable. I note in neighbouring properties, some of which may be listed, there are similar wooden fenced areas that have weathered over time.

We would be happy to stain or paint the fencing in a colour close to the existing weathered fencing at the side of the house and in neighbouring properties, to make this more unobtrusive if that was asked of us.

The plot next to the house to the west is an area of unattractive scrubland that has been left unattended. I understand this has planning permission for the erection of a residential dwelling house. As tenants of Threemiletown Farmhouse, we need to ensure that our property is secure and access to the garden is controlled due to the vulnerability of the young residents and that children are safe from the road. We would wish to keep the fencing on that side of the house at the height of 6ft/1.82 metres height for these reasons, we are happy to stain/paint this fence around the garden if instructed to do so.

We can reduce the height of the fence that crosses the garden (B to D on map) by some 440mm; stain/paint the fence as noted above; and plant shrubs and flowers around the fence to soften the aspect. Reducing this fence and gate height would give a much better view of the farmhouse from the B9080 side of the property and would be visually more appealing in the countryside setting.

From discussion with planners on site it was indicated that a height reduction of 440mm's (between the middle spar and the top spar of the fence structure) of this fence would make the property more visible as a C listed building.

Regarding the light grey gravel in the parking area, we opted for this so as to be as unobtrusive as possible within the surroundings. This has already weathered/toned down and the colour matches the slate roofing on surrounding buildings. This was commented on by planners at the site visit as was the fact that the materials that we chose for chips was in keeping with a C Listed building.

The children that we support have a variety of complex needs. They are vulnerable children who have the potential to place themselves at risk – much like any child. Their health and safety is our first priority and reducing risk by creating a safe and boundary fence to the garden is critical. I believe that any family moving into the property would wish to do the same for children and/or for pets.

Point 2 - The use of the vehicle entranceway on to B9080 will create a safety risk to road users

The vehicle entrance on the B9080 has existed for many years and indeed was the original gateway to the Farmhouse. Our wish is only to re-instate the entranceway so that the house, in its modern context and current usage, can have the benefit of two separate entranceways.

We have only a small walled car park to the rear of the house, at the Canal Court side of the Farmhouse. There will be infrequent times when this will not be large enough for staff and house cars, plus anyone visiting the house. By creating additional parking off the B9080, at the traditional entrance to the Farmhouse, we intend to minimise inconvenience to our neighbours and avoid having an "***adverse impact on existing resident's amenity***".

By using a small parking and turning area at the front entrance, we reduce the potential for poor relations with our neighbours. We have had one neighbour claim numerous times that we are not permitted to park any of our vehicles in Canal Court. We have been asked to move vehicles off what one neighbour views as a 'private road.' We have since checked with West Lothian Council and have been advised that Canal Court is an adopted road and free for anyone to use.

Objectors to our application have stated that the road is busy and has the potential to be dangerous. However, there is very clear visibility to the right when exiting at this entranceway and a left-turn from that gate provides very clear visibility to the right-hand side.

We have had a number of council employees visit the property and they have all expressed that to turn left is the most sensible, safe and practical way to manage this entranceway. We are very willing to instruct all of our staff to only turn left from this gate and we can attach signage to the fence or to the gate pillars (if it were to be the pillars we would lodge a planning application in keeping with the Listed status). These signs – one saying STOP and the other below TURN LEFT – would serve as a reminder to anyone leaving this exit. If wishing to travel to Linlithgow, for example, cars can turn left and left again into Canal Court and come out again so as to turn right at the main junction with the B9080. We are also happy to fit a convex mirror across from the entranceway to aid safe exit.

Use of that parking/turning area at Canal Court will be minimal as we would generally keep the two "house cars" at the front and children going to school would always be a left turn. This would allow Staff and visitor cars to be parked to the rear of the house and staff could come into the house via the side kitchen door. This would mean that, by using the front car park, the children would avoid scrutiny by neighbours and have their privacy respected by coming in/out of the front door.

This is what we outlined to the neighbours at a meeting that we held at the farmhouse in December 2022. After the meeting I had a very cordial discussion with the neighbours across from the side entranceway and they were happy if we fitted fencing to the existing low fence so that it was 6ft/1.82m high. This way both properties could have their privacy enhanced - see planning application 0235/LBC/23.

The children moving into the Farmhouse have very traumatic early life histories and they already have anxieties about moving to a new home. We need to ensure that we do all we can to give them reassurances that they are safe and protected. By erecting a boundary fence we can help to ensure that the young people and those working at the house, can assimilate into the community in a low-key manner without too much scrutiny from neighbours that have already declared their views about us very openly. The fence between the garden and the new car parking area also protects the children from playing near to the B9080 which we have been told, as noted above, is a "busy and dangerous road".

We were cognizant of the opinions of some neighbours about our use of the house and our aim was to integrate slowly into the community, retain our own privacy, gain trust and build good relationships over time.

We have breathed new life and invested significantly into reviving what is a wonderful historical farmhouse, the first house in Threemiletown I would imagine. We are invested in our young people having a bright future at this house and we wish to do this whilst respecting others within the community. The physical layout and how we practically deliver our care home with coming and goings of young people and staff is very important and will influence I believe just how we may be accepted by some of the neighbours. We wish to have good relationships and the practical steps that we have taken have been made with this in mind.

Summary

We do not agree that the works have had an "adverse impact on existing residents' amenity". The fencing and car park are at a side of the house that does not impact on other residents as most properties on Canal Court have no visibility to the side and rear of our property. The choice of materials are used in virtually all residential areas to create boundaries and to create an area to park vehicles on. In addition, we are offering to stain/paint the fencing and reduce the height of the fence that faces the house and the road so to allow for more visibility of the house.

It is notable that most traffic past the house is by car and rarely do people walk on the path. The amount of time to view the house from a passing car is brief but we are happy to make that opportunity easier to view what is a beautiful house from around the 1850's.

We do not agree that the use of the vehicle entranceway on the B9080 will create a risk to road users, as this is an existing (not new) entrance to the Farmhouse. We feel that the condition of a left-turn only from this exit would alleviate any concerns so that all users of the entranceway would abide by this turning left protocol.

We thank you for your time in reading through our Appeal and for enabling us to make such an Appeal.

West Lothian Civic Centre Howden South Road Howden Livingston EH54 6FF Tel: 01506 280000 (for general enquiries) Email: planning@westlothian.gov.uk

Applications cannot be validated until all the necessary documentation has been submitted and the required fee has been paid.

Thank you for completing this application form:

ONLINE REFERENCE 100616333-001

The online reference is the unique reference for your online form only. The Planning Authority will allocate an Application Number when your form is validated. Please quote this reference if you need to contact the planning Authority about this application.

Description of Proposal

Please describe accurately the work proposed: * (Max 500 characters)

The erection of a timber fence and gates around the garden of Threemiletown Farmhouse. The fence is no more than 1.9m in height at any point, is free-standing and not attached to the house or existing garden wall. The works include: • A fence to the west side of the building, and gate at south west corner of house. • A fence across the garden with a gate at centre. • Oil tank area – replacement gate and fence. • Fit fencing panels on the property boundary at the east side of the house.

Has the work already been started and/ or completed? *

☐ No ☒ Yes - Started ☐ Yes – Completed

Please state date of completion, or if not completed, the start date (dd/mm/yyyy): * 19/01/2023

Please explain why work has taken place in advance of making this application: * (Max 500 characters)

Most of the fencing work has been completed; only the addition of a fence above the wall at the east side has not yet been carried out. We were not aware that planning consent was required, as the work does not affect the listed building or any of the existing walls, gate piers etc.

Applicant or Agent Details

Are you an applicant or an agent? * (An agent is an architect, consultant or someone else acting on behalf of the applicant in connection with this application) ☒ Applicant ☐ Agent

Applicant Details

Please enter Applicant details

Title:	Mr	You must enter a Building Name or Number, or both: *	
Other Title:		Building Name:	Seamab School
First Name: *	Stuart	Building Number:	
Last Name: *	Provan	Address 1 (Street): *	Rumbling Bridge
Company/Organisation	Seamab	Address 2:	
Telephone Number: *	[redacted]	Town/City: *	KINROSS
Extension Number:		Country: *	Scotland
Mobile Number:		Postcode: *	KY13 0PT
Fax Number:			
Email Address: *	[redacted]		

Site Address Details

Planning Authority: West Lothian Council

Full postal address of the site (including postcode where available):

Address 1:	THREEMILETOWN FARMHOUSE
Address 2:	THREEMILETOWN
Address 3:	
Address 4:	
Address 5:	
Town/City/Settlement:	LINLITHGOW
Post Code:	EH49 6NF

Please identify/describe the location of the site or sites

Northing	675756	Easting	305926

Pre-Application Discussion

Have you discussed your proposal with the planning authority? * ☐ Yes ☒ No

Trees

Are there any trees on or adjacent to the application site? * ☐ Yes ☒ No

If yes, please mark on your drawings any trees, known protected trees and their canopy spread close to the proposal site and indicate if any are to be cut back or felled.

Access and Parking

Are you proposing a new or altered vehicle access to or from a public road? * ☐ Yes ☒ No

If yes, please describe and show on your drawings the position of any existing, altered or new access points, highlighting the changes you proposed to make. You should also show existing footpaths and note if there will be any impact on these.

Planning Service Employee/Elected Member Interest

Is the applicant, or the applicant's spouse/partner, either a member of staff within the planning service or an elected member of the planning authority? * ☐ Yes ☒ No

Certificates and Notices

CERTIFICATE AND NOTICE UNDER REGULATION 15 – TOWN AND COUNTRY PLANNING (DEVELOPMENT MANAGEMENT PROCEDURE) (SCOTLAND) REGULATION 2013

One Certificate must be completed and submitted along with the application form. This is most usually Certificate A, Form 1, Certificate B, Certificate C or Certificate E.

Are you/the applicant the sole owner of ALL the land? * ☐ Yes ☒ No

Is any of the land part of an agricultural holding? * ☐ Yes ☒ No

Are you able to identify and give appropriate notice to ALL the other owners? * ☒ Yes ☐ No

Certificate Required

The following Land Ownership Certificate is required to complete this section of the proposal:

Certificate B

Land Ownership Certificate

Certificate and Notice under Regulation 15 of the Town and Country Planning (Development Management Procedure) (Scotland) Regulations 2013

I hereby certify that

(1) - No person other than myself/the applicant was an owner [Note 4] of any part of the land to which the application relates at the beginning of the period of 21 days ending with the date of the accompanying application;

or –

(1) - I have/The Applicant has served notice on every person other than myself/the applicant who, at the beginning of the period of 21 days ending with the date of the accompanying application was owner [Note 4] of any part of the land to which the application relates.

Name:	Owner None None
Address:	Hopetoun EstatesHopetoun Estate Office, Home Farm, South Queensferry, EH30 9SL
Date of Service of Notice: *	08/02/2023

(2) - None of the land to which the application relates constitutes or forms part of an agricultural holding;

or –

(2) - The land or part of the land to which the application relates constitutes or forms part of an agricultural holding and I have/the applicant has served notice on every person other than myself/himself who, at the beginning of the period of 21 days ending with the date of the accompanying application was an agricultural tenant. These persons are:

Name:	
Address:	
Date of Service of Notice: *	

Signed: Mr Stuart Provan

On behalf of:

Date: 07/02/2023

☒ Please tick here to certify this Certificate. *

Checklist – Application for Householder Application

Please take a few moments to complete the following checklist in order to ensure that you have provided all the necessary information in support of your application. Failure to submit sufficient information with your application may result in your application being deemed invalid. The planning authority will not start processing your application until it is valid.

a) Have you provided a written description of the development to which it relates?. * ☒ Yes ☐ No

b) Have you provided the postal address of the land to which the development relates, or if the land in question has no postal address, a description of the location of the land? * ☒ Yes ☐ No

c) Have you provided the name and address of the applicant and, where an agent is acting on behalf of the applicant, the name and address of that agent.? * ☒ Yes ☐ No

d) Have you provided a location plan sufficient to identify the land to which it relates showing the situation of the land in relation to the locality and in particular in relation to neighbouring land? *. This should have a north point and be drawn to an identified scale. ☒ Yes ☐ No

e) Have you provided a certificate of ownership? * ☒ Yes ☐ No

f) Have you provided the fee payable under the Fees Regulations? * ☒ Yes ☐ No

g) Have you provided any other plans as necessary? * ☒ Yes ☐ No

Continued on the next page

A copy of the other plans and drawings or information necessary to describe the proposals
(two must be selected). *

You can attach these electronic documents later in the process.

☐ Existing and Proposed elevations.

☐ Existing and proposed floor plans.

☐ Cross sections.

☒ Site layout plan/Block plans (including access).

☐ Roof plan.

☒ Photographs and/or photomontages.

Additional Surveys – for example a tree survey or habitat survey may be needed. In some instances you may need to submit a survey about the structural condition of the existing house or outbuilding. ☐ Yes ☒ No

A Supporting Statement – you may wish to provide additional background information or justification for your Proposal. This can be helpful and you should provide this in a single statement. This can be combined with a Design Statement if required. * ☒ Yes ☐ No

You must submit a fee with your application. Your application will not be able to be validated until the appropriate fee has been Received by the planning authority.

Declare – For Householder Application

I, the applicant/agent certify that this is an application for planning permission as described in this form and the accompanying Plans/drawings and additional information.

Declaration Name: Mr Stuart Provan

Declaration Date: 14/02/2023

Payment Details

Online payment: 988270
Payment date: 14/02/2023 13:31:15

Created: 14/02/2023 13:32

SUPPORTING STATEMENT
Planning portal ref. no. 100616333-001

Seamab has leased Threemiletown Farmhouse from Hopetoun Estates and we are in the process of setting this up as a residential care home for up to four children aged 5 to 18 years. The house will be registered with the Care Inspectorate for this purpose in due course and we have been granted a Certificate of Lawfulness from West Lothian Council advising that our use of the building does not require Change of Use. The Farmhouse is a category C listed building.

Seamab is a specialised residential resource supporting children and young people who have not managed to maintain a place within a mainstream setting. There is a variety of complex reasons why this is the case and we help these young people to feel safe, happy and secure. We have more than 30 years' experience of providing this type of care and our homes are carefully designed to reflect a safe, comfortable, welcoming and nurturing environment.

To ensure the safety of the young people who will live in the house, we have installed fencing around the west and south of the front garden area and have replaced an existing fence panel and gate at the oil tank of the property, as noted on the attached drawing. We took this step having first spoken to our landlord, Hopetoun Estate, who have perused our plan and given us permission to carry out the works. In anticipation of a Care Inspectorate registration visit, we replaced fencing and a padlock to the oil tank and installed fencing to the side of the property's front garden. This provides a safety measure from the busy main road for our children and young people.

We are seeking retrospective planning permission for the fencing work that has already been completed and for a small section of fencing, still to be fitted, at the east side of the house. We met with around 12 neighbours in December, after they became aware of the purpose for which we took on the tenancy. We discussed with one immediate neighbour that our kitchen door/side entrance to the house faces onto their property. They were pleased that we intended to raise the height of the fence panelling there to 2 metres so as to provide privacy to both parties.

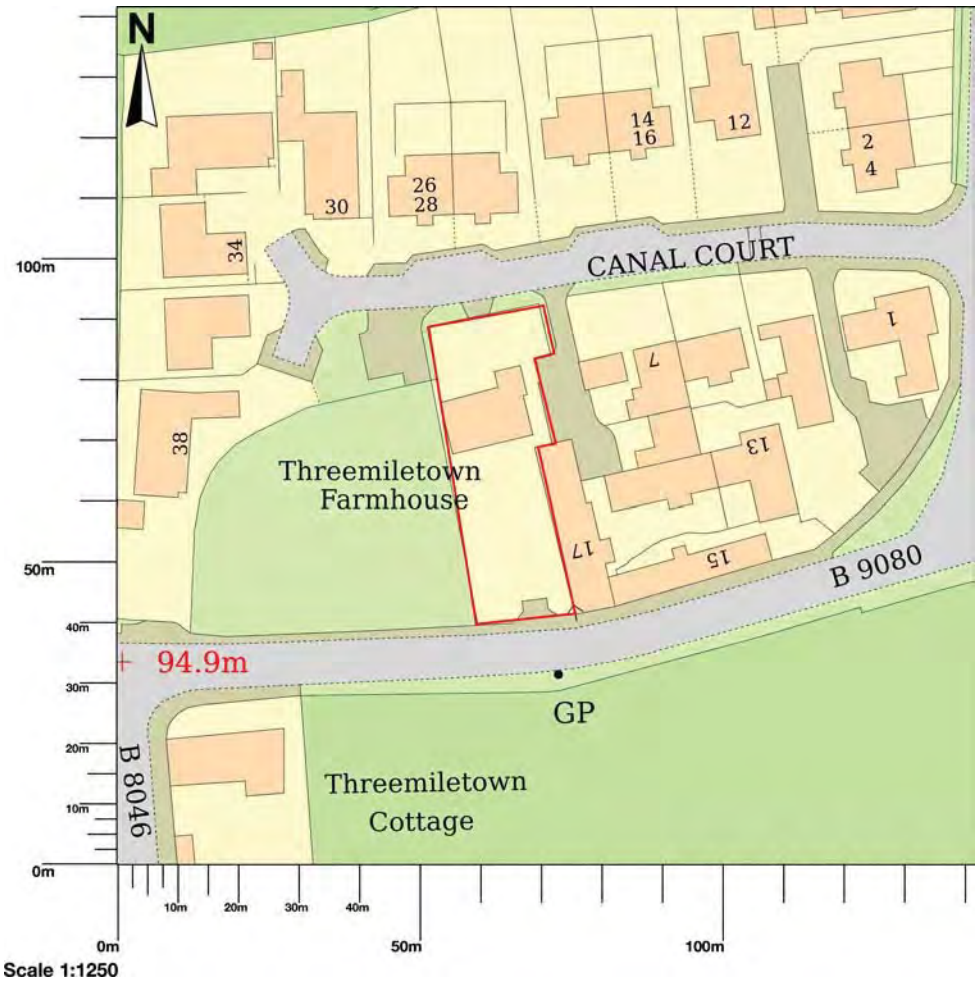
The works include:

- A to B on enclosed plan – a section of fence (height 1900mm) running from the rear boundary wall, down the west side of the building for 33 metres. This section replaces an existing post and wire fence. We are aware that planning consent has been granted for the construction of a dwelling house on the vacant land immediately to the west of the Farmhouse and this section of fence will help ensure our privacy during the neighbouring construction works.
- A new gate (1500mm wide) fitted to the fence between points A and B, and across to the southwest corner of the house, to restrict access to the garden area from the rear of the house. The gate is not affixed to the building.
- B to D on enclosed plan – a new fence (height 1900mm) across the garden 9 metres from the existing road entrance, with a gate in the middle to allow access to the gravel parking area which is accessed off the main road. Existing boundary wall and gate posts remain in situ.
- Oil tank area – a gate and new section of fence has been fitted at the oil tank at the rear of the building, replacing an existing fence/gate.
- E to F on enclosed plan – we also seek permission to fit fencing panels on the property boundary at the east side of the house for a length of 8m; to allow some privacy from and for immediate neighbours. Panels will sit on top of the existing boundary wall and total height will not exceed 2 metres.
- All fencing is of timber post and slat construction.

We have held a meeting with the local community and we are aware that some neighbours are resistant to our development of the house for residential child care. We will continue to work to overcome some of the prejudice that we experienced at this meeting and hope that the new fence will help to lessen any nuisance/noise for neighbours caused by children playing in the garden area.

We are happy to meet with planners, if necessary, to discuss any alterations we can make to the fencing (colour/height) if any aspect of this work is not acceptable. Our aim is to be good neighbours and, by taking the steps that we have taken, we intended to reduce impact on neighbouring properties from traffic of people coming in and out of the house from Canal Court by using car parking at both the front and back of the house.

Threemiletown Farmhouse, Linlithgow, EH49 6NF



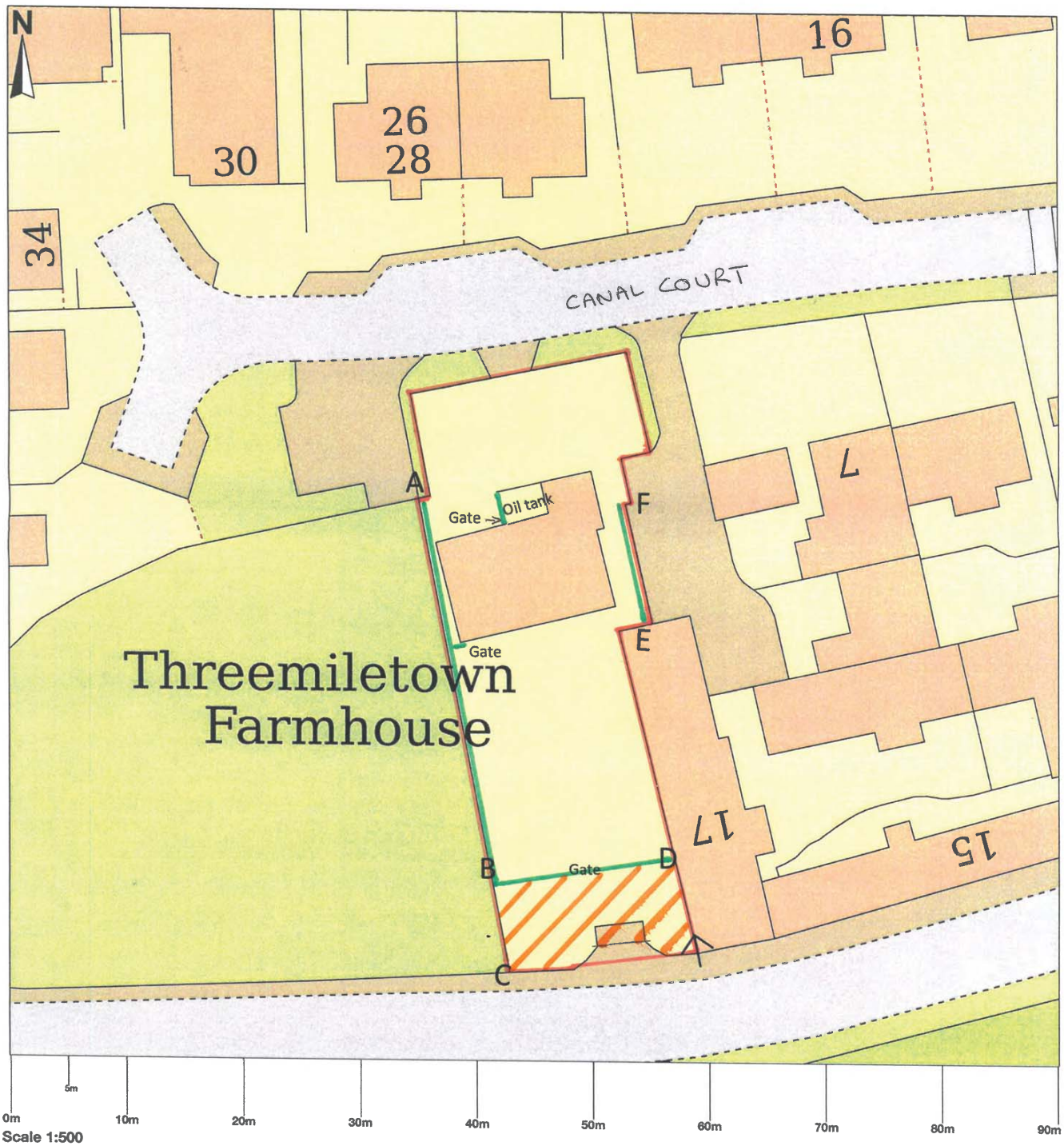
UK Planning Maps

THREEMILETOWN FARMHOUSE FENCING
Seamab, Rumbling Bridge, Kinross-shire KY13 0PT

A – B = 33 metres
B – C = 9 metres
B – D = 16 metres
E – F = 8 metres

Property boundary
New fence
Gravelled area

Threemiletown Farmhouse, Linlithgow, EH49 6NF



DECISION NOTICE
REFUSAL OF PLANNING PERMISSION

Town and Country Planning (Scotland) Act 1997, as amended

West Lothian Council, in exercise of its powers under the Town & Country Planning (Scotland) Act 1997 (as amended), **refuses full planning permission for the development described below**, and in the planning application and docquetted plan(s).

APPLICATION REFERENCE	**0130/H/23**
PROPOSAL	Erection of a 1.9m high timber fence and gates and formation of a gravel surfaced car park (in retrospect)
LOCATION	Threemiletown Farmhouse, Threemiletown, Linlithgow, West Lothian, EH49 6NF, (GRID REF: 305926, 675756)
APPLICANT	Mr Stuart Provan, Seamab School, Rumbling Bridge, Kinross, KY13 0PT

The above **local application was determined** by **an officer appointed by the council in accordance with its scheme of delegation.** Please see the advisory notes for further information, including how to request a review of any conditions.

Docquetted plans relative to this decision are identified in Annex 1, Schedule of Plans.

Dated:
20.04.2023

Wendy McCorriston
Development Management Manager

West Lothian Council
West Lothian Civic Centre
Howden South Road
Livingston
EH54 6FF

Signature: [redacted]

DATA LABEL: PUBLIC

The council in exercise of its powers under the Town and Country Planning (Scotland) Act 1997 (as amended) refuses planning permission for planning application 0130/H/23, for the reason(s) set out as follows:

1 The fence and car park by virtue of its scale and design will be visually detrimental to residential and the visual amenity of the C-listed building. The choice of materials (timber fence boards and light grey gravel) is not acceptable and would have an adverse impact on existing residents' amenity.

The proposal is therefore contrary to West Lothian Local Development Plan policies DES 1 (Design Principles) and ENV 28 (Listed Buildings) , National Planning Framework 4 Policies 16g and 16h and guidance given in the Extension and Alteration Design Guide 2020.

2 The use of the vehicle entrance on the B9080 will create a safety risk to road users.

The proposal is therefore contrary to West Lothian Local Development Plan Policy DES 1(c) (Design Principles).

Advisory Notes to Developer

How to challenge the council's Decision

If your application was determined under delegated powers as a local application by an officer appointed by the council and you disagree with the council's decision on your application, or one or more of the conditions attached to the decision, you can apply for a review by the council's Local Review Body. If the application was heard at a committee and in any other case you can seek an appeal of that decision to the Government's Directorate for Planning and Environmental Appeals. You can find information on these processes and how to apply for a review, or to appeal, here: https://www.westlothian.gov.uk/article/33128/Decisions-Reviews-and-Appeals

Annex 1, Schedule of Plans - 0130/H/23

Docquetted Number	Drawing Description	Drawing Number
1	Location Plan	
2	Site Plan	

DATA LABEL: PUBLIC

HANDLING REPORT

Ref. No.:	0130/H/23	**Email:**	anna.mccabe@westlothian.gov.uk
Case Officer:	Anna McCabe	**Tel No.:**	01506 280000
Ward:	Linlithgow	**Member:**	Cllr Tom Conn Cllr Pauline Orr Cllr Sally Pattle

Title	Erection of a 1.9m high timber fence and gates and formation of a gravel surfaced car park (in retrospect)(Grid Ref: 305926,675756) at Threemiletown Farmhouse, Threemiletown, West Lothian EH49 6NF
Application Type	Local Application
Decision Level	Delegated List
Site Visit	08.03.2023
Recommendation	Refuse Permission
Decision	
Neighbour Notification	Neighbour notification procedures have been carried out correctly - case officer verification. YES
Advertisement	
EIA Screening	Does the development require EIA screening - No

Description of Proposals

Erection of a 1.9m high timber fence and gates and formation of a gravel surfaced car park (in retrospect)

Threemiletown Farmhouse is a detached traditional category C listed blond sandstone house located in Linlithgow. The property is a residential care home will be run by Seamab which is a Scottish charity registered with Office of the Scottish Charity Regulator (OSCR) and the Care Inspectorate.

Site History

0917/CLU/22 - Certificate of lawfulness for the proposed use of a house as a residential care home for up to 4 young people. Issued 2 December 2022

0235/LBC/23 - Listed building consent for erection of external lighting and timber gate and wall (in retrospect). Under consideration.

Representations

14 Objections were received for this application.

This is a summary of the representations received. The full documents are contained in the application file.

Objecting Comments	**Response**
Fence and car park is an eyesore	Noted
Restricted visibility from car park	Noted
Busy residential footpath/car park	Noted
Hard core should be a change of use	Not included in this application.
Misleading/underhanded/incomplete application	There is enough information to determine the application.
Satellite dish on the property	This has since been removed
Changes the character of the Listed building	Noted
Overbearing development/Unsightly paving	Noted
Unsympathetic to the key identity of the area/Conservation area (not applicable)-	The site is not in a Conservation Area
Restricted access to Canal Court for existing 29 occupants	Canal Court is an adopted road and there are no such planning restrictions in place that would be relevant to this application.

Consultations

This is a summary of the consultations received. The full documents are contained in the application file.

Consultee	Objection?	Comments	Planning Response
WLC Roads & Transportation	Acceptable with conditions	There shall be no direct vehicular access onto B9080 due to the restricted visibility eastwards that the neighbouring building creates. The car park shall be from Canal Court using the surfaced access	The concerns over road safety in relation to the access to the B9080 are noted. Should planning permission be granted, then a condition should be attached to any permission requiring vehicles to access the site from the existing access/parking area on Canal Court in order to minimise any traffic safety risk.

Policies Considered

7.1 Section 25 of the Town and Country Planning (Scotland) Act 1997 requires planning applications to be determined in accordance with the Development Plan, unless material considerations indicate otherwise.

7.2 The development plan comprises the National Planning Framework 4 (NPF 4) and the West Lothian Local Development Plan (LDP).

7.3 The relevant development plan policies are listed below

National Planning Framework 4

Policy Title	Policy Text
Policy 16 - Quality homes	g) Householder development proposals will be supported where they: i. do not have a detrimental impact on the character or environmental quality of the home and the surrounding area in terms of size, design and materials; and ii. do not have a detrimental effect on the neighbouring properties in terms of physical impact, overshadowing or overlooking.

	h) Householder development proposals that provide adaptations in response to risks from a changing climate, or relating to people with health conditions that lead to particular accommodation needs will be supported.

West Lothian Local Development Plan

Policy Title	Policy Text
DES1 - Design Principles	All development proposals will require to take account of and be integrated with the local context and built form. Development proposals should have no significant adverse impacts on the local community and where appropriate, should include measures to enhance the environment and be high quality in their design. Development proposals which are poorly designed will not be supported. When assessing development proposals, the developer will be required to ensure that: a. there is no significant adverse impact on adjacent buildings or streetscape in terms of layout, scale, massing, design, external materials or amenity; … c. the proposed development is accessible for all, provides suitable access and parking, encourages active travel and has no adverse implications for public safety; …
ENV28 - Listed Buildings	… In determining applications for planning permission and listed building consent relating to a listed building, the council will specify and require the fullest supporting information. Prior to the implementation of an approved alteration, recording shall be required in accordance with a schedule to be issued. Owners of major heritage assets will be encouraged to prepare and adopt management or conservation plans based on current best practice for their long-term guardianship. Additional controls (such as Article 4 Directions removing permitted development rights) will be

	introduced to protect the setting of listed buildings where such buildings are under threat from development.

Officer Assessment

The applicant seeks retrospective consent to erect a 1.9m high timber fence and gates and form a gravel surfaced car park to the front of the property.

The 1.9m fence runs on the west and east perimeter of the property and is set back approximately 9m from the southern boundary to allow for a gravel car park. This fence was erected to ensure the safety of the children under their care. The fence is constructed of vertical timber fence boards and is stark in contrast to the immediate context of the surrounding listed buildings.

The gravel car park to the front (south) of the property uses light grey gravel and runs the width of the property up unto the new southern fence. The existing entrance to the property allowed access to the house via a footpath, the new car park creates a large sever contrast to the blond sandstone of the C-listed building. Roads and transportation have also commented stating that there shall be no direct vehicular access onto B9080 (road to the south of the site) due to the restricted visibility eastwards that the neighbouring building creates. They suggest that any vehicular access to the site should be via Canal Court.

The overall impact of the fence and the car park are stark in contrast with the existing building which detract from the character of the listed building.

It is recommended that this application is refused due to the adverse impact on the listed building and traffic safety.

Conclusions and Reasons for Decision

The proposal is contrary to West Lothian Local Development Plan's DES 1 (Design Principles) Policy, National Planning Framework 4 Policies 16g and 16h and the guidance given in the Extension and Alteration Design Guide 2020.

It is recommended that this application is refused planning permission.

List of Review Documents

Drawings schedule:

Docquetted Number	Drawing Description	Drawing Number
1	Location Plan	
2	Site Plan	

Other relevant documents:

West Lothian Local Development Plan, 2018;

Case Officer – Anna McCabe Date 17/4/23

DATA LABEL: PUBLIC

West Lothian Council

OPERATIONAL SERVICES
ROADS & TRANSPORTATION
DEVELOPMENT MANAGEMENT & TRANSPORTATION PLANNING

ROADS & TRANSPORTATION CONSULTATION RESPONSE TO PLANNING APPLICATION

This proposal is (tick as appropriate)	
Acceptable without conditions	
Acceptable with conditions noted below	X
Not acceptable & should be refused	
HOLDING OBJECTION – The application is not acceptable in current format and applicant requires to submit additional information to enable the proposals to be fully assessed.	

Signing Off	
DM & TP Officer Roads & Transportation	Chris Nicol
DM & TP Manager Roads & Transportation	
Date Issued to Development Management Officer	08 March 2023

Recommendation & Proposed Conditions	From a Roads & Transportation view, this application is approved subject to the following conditions **There shall be no direct vehicular access onto B9080 due to the restricted visibility eastwards that the neighbouring building creates.** **The car park shall be from Canal Court using the surfaced access.**

DM Case Officer	Anna McCabe	**Applicant**	Seamab
Application Ref	0130/H/23	**Date Issued**	24 February 2023
Proposal	Erection of timber fence and gates and formation of paving (in retrospect)		
Location	Threemiletown Farmhouse, Threemiletown		

Legislation & Guidance Applicable (tick as appropriate)		**Constraints** (tick as appropriate)	
Roads (Scotland) Act 1984	X	**Public Footpath / Rights of Way**	
Designing Streets		**Core Path Plan**	
SCOTS National Roads Development Guide			
SUDS for Roads		**Control of Advertisements (Scotland) 1984**	
Sewers for Scotland		**Residential Development Guide 2018**	
		Other (please specify)	

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Site Description	**Existing property with gardens to front and back and car parking recently to the back and a disused entrance to the front. Road Safety due to B9080 traffic increase will prevent use of this access.**
Quality Plan	N/A
Road Safety Audit	N/A
Transport Assessment or Statement	N/A
Does the red line boundary reach the adopted public road	Yes
Is there a footway or footpath connecting the site to the existing adopted road network	No
Drawings & documents assessed	Location Plan Supporting Statement Submitted Plans
Does Road Layout comply with WLC Standards	N/A
Does Parking comply with WLC Standards (including disabled provision)	Yes

DATA LABEL: PUBLIC

Sightline Requirements	2.4 by 70m
Do the proposals affect any existing TRO's (e.g) waiting restrictions, speed limits) or bus stop locations	No
Do the proposals affect any Core Paths, NCR's or Rights of Way	No
SUDS Details	
Site History including any previous planning applications	

ROADS & TRANSPORTATION MANAGER
Operational Services
Whitehill Service Centre
4 Inchmuir Road
Whitehill Industrial Estate
Bathgate
West Lothian
EH48 2EP

Comments for Planning Application 0130/H/23

Application Summary

Application Number: 0130/H/23
Address: Threemiletown Farmhouse Threemiletown Linlithgow West Lothian EH49 6NF
Proposal: Erection of timber fence and gates and formation of paving (in retrospect)
Case Officer: Anna McCabe

Customer Details

Name: Mr Andrew Sneddon
Address: 12 Canal Court, Threemiletown, Linlithgow, West Lothian EH49 6LZ

Comment Details

Commenter Type: Neighbour
Stance: Customer objects to the Planning Application
Comment Reasons:
Comment:I object to the number and nature of recent developments at this property, the Farmhouse Threemiletown Steading.
This type of Fence construction on this listed building, fundamentally changes the characteristics of the Farmhouse and its Amenity.

The addition of a satellite dish and cheap gravel are not in keeping with its surrounds. The formation of a parking area is against the residential amenity in such as it dominates the front of the development and gives the outward impression of a business premises not in character with any other residences in the development.
Traffic management is already a problem at the very busy junction and adding minibus parking will fully exacerbate this.
The level of cumulative development in the area is of a scale and intensity so as to be over bearing and negative in its effect on the areas amenity.

Comments for Planning Application 0130/H/23

Application Summary

Application Number: 0130/H/23
Address: Threemiletown Farmhouse Threemiletown Linlithgow West Lothian EH49 6NF
Proposal: Erection of timber fence and gates and formation of paving (in retrospect)
Case Officer: Anna McCabe

Customer Details

Name: Mrs Angela Edwards
Address: 4 canal court Threemiletown EH49 6LZ

Comment Details

Commenter Type: Neighbour
Stance: Customer objects to the Planning Application
Comment Reasons:
Comment:I wish to object to this planning application as its misleading. Our development in canal court had strict conditions put on the residents in terms of what we could and couldn't do. There is no mention of the satellite that's been put up...as residents we have been forced into having a shared dish i would expect the farmhouse to be under the same conditions. The paving constitutes a driveway its hard core and has been fenced with a large fence and has the clear intended use of a driveway. This is an already busy junction and creates additional traffic management requirements. The conditions we are subject to is to compliment the build of the farmhouse and not to detract from what is a listed building. However it would appear the same consideration is not being given by owners of the farmhouse. We are not allowed to even put up whirly gig washing lines yet a monstrosity of a fence has been ericted.

Comments for Planning Application 0130/H/23

Application Summary

Application Number: 0130/H/23
Address: Threemiletown Farmhouse Threemiletown Linlithgow West Lothian EH49 6NF
Proposal: Erection of timber fence and gates and formation of paving (in retrospect)
Case Officer: Anna McCabe

Customer Details

Name: Mrs Dianne Risbridger
Address: 3 Canal Court Threemiletown By Linlithgow EH49 6LZ

Comment Details

Commenter Type: Neighbour
Stance: Customer objects to the Planning Application
Comment Reasons:
Comment:Firstly, I notice this application is retrospective. All work has already been completed. This begs the question why an established business is ignorant of planning regulations, especially as the Farmhouse is a listed building set within a conservation area.
The Farmhouse lies within Canal Court, a small development with many restrictions detailed within the Title Deeds of all the properties. These include:
a) the dwellinghouse shall be used and occupied solely as a privare dwellinghouse and shall not be subdivided or occupied by more than one family at a time
b) no commercial vehicles other than private motor cars to park on any part of the development
c) express prohibition from carrying on any trade, business or profession
d) strict prohibition of satellite dishes (and other items)
The application refers to paving, when in reality it is a car park and is already in use as such. This car park is located in the front garden of the property, thus changing its use from a residential garden to a business car park, to be used by a charity to transport children on a daily basis. The access and egress is on to a very busy road close to a staggered junction, with restricted visability and therefore posing a safety risk, not only to vehicles but also pedestrians who use the footpath crossed by all vehicles using this car park. This situation becomes even more dangerous at peak times.
The unsightly fencing erected across the front garden is totally out of keeping with the frontage of the property. It is more suited to a modern property.
There is no mention of the satellite dish erected on the front of the building and in breach of current planning regulations for this development.
These significant alterations are totally out of keeping with a listed building set within a conservation area, damaging the historical characteristic of both. They can only be described as both an eyesore and a safety risk.

The above alterations to this property are all to the front of a very grand, historic building, situated within the small settlement of Canal Court, Threemiletown Steading. It is a characteristic example of its type, with few remaining in the county.

I wish to formally object to this appliction in lieu of the above, and would hope remedial works undertaken as a matter of priority to restore this fine building to its original state.

Comments for Planning Application 0130/H/23

Application Summary

Application Number: 0130/H/23
Address: Threemiletown Farmhouse Threemiletown Linlithgow West Lothian EH49 6NF
Proposal: Erection of timber fence and gates and formation of paving (in retrospect)
Case Officer: Anna McCabe

Customer Details

Name: Miss Eileen Boyle
Address: 6 canals court Linlithgow EH49 6LZ

Comment Details

Commenter Type: Neighbour
Stance: Customer objects to the Planning Application
Comment Reasons:
Comment:I want to object to this for the following reasons;
The paving is ugly hard core laid down to create a car park. This constitutes a change of use of the Farmhouse garden to a formal car park - a business, really?
This will create a traffic management issue at a very busy junction which is already infamous for car accidents. This is a car park for a business function of the charity to transport children which sounds incredible for these safety reasons. Im also concerned this will put pressure on rear access of the Farmhouse for its business use and severely impact canal court Resident access and parking as there is after all only one short street in the estate.
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Comments for Planning Application 0130/H/23

Application Summary

Application Number: 0130/H/23
Address: Threemiletown Farmhouse Threemiletown Linlithgow West Lothian EH49 6NF
Proposal: Erection of timber fence and gates and formation of paving (in retrospect)
Case Officer: Anna McCabe

Customer Details

Name: Mrs Fiona Irving
Address: 22 Canal Court Linlithgow EH49 6LZ

Comment Details

Commenter Type: Neighbour
Stance: Customer objects to the Planning Application
Comment Reasons:
Comment:Firstly, this application is misleading as a satellite dish is omitted that has already been erected. Other residents in this development are not allowed to erect dishes. Furthermore, the 'paving' is hard core laid down to create car parking so this is also misleading. The high fence, satellite dish and parking fundamentally changes the listed characteristics of the Farmhouse and it's amenity.
Also, the hard core constitutes a change of use of the Farmhouse garden to a formal car park. This in turn creates a traffic management issue at a very busy junction where there are already many accidents. It is a car park for the business function of the charity to transport children. Concerns are that this then puts pressure on the rear access of Farmhouse for it's business use and will impact in residents access.
This is all unacceptable levels of development that impact our community.

Comments for Planning Application 0130/H/23

Application Summary

Application Number: 0130/H/23
Address: Threemiletown Farmhouse Threemiletown Linlithgow West Lothian EH49 6NF
Proposal: Erection of a 1.9m high timber fence and gates and formation of a gravel surfaced car park (in retrospect)
Case Officer: Anna McCabe

Customer Details

Name: Fiona Irving
Address: 22 Canal Court Linlithgow EH49 6LZ

Comment Details

Commenter Type: Neighbour
Stance: Customer objects to the Planning Application
Comment Reasons:
Comment:Why has the application suddenly changed from 'paving' to an ACTUAL CARPARK! Surely this is now a change of use to commercial as we all know it is.
Also this is NOT what is written on the notification sent out to all the residents. This is very underhand and not factually correct.

Comments for Planning Application 0130/H/23

Application Summary

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Address: Threemiletown Farmhouse Threemiletown Linlithgow West Lothian EH49 6NF
Proposal: Erection of timber fence and gates and formation of paving (in retrospect)
Case Officer: Anna McCabe

Customer Details

Name: Miss Gillian Macwhirter
Address: 26 Canal Court Threemiletown Linlithgow EH49 6LZ

Comment Details

Commenter Type: Neighbour
Stance: Customer objects to the Planning Application
Comment Reasons:
Comment:SEAMAB's retrospective application is misleading.
A satelite dish has been errected to the western side of the grade c listed building (omitted on the application), the significant wooden fence errected is out of character to the listed visual aspect of the grade c listed building, it also disects the front garden again changing the amenity and visual aspect.
The 'paving' is deep hard core laid down to enable formal parking of buses and cars - the small low gate has been removed to enable vehicle access. This is a change of use of the front garden, away from its home use of garden to a formal and established creation of parking. Again a fundamental change to its listed characteristics and the visual impact on the locality and to Canal Court and surrounding residnets.
The parking area will be used by the charity's business purpose of transporting children. The vehicle access poses a signifcant traffic managment issue to an already dangerous junction of the B8090 Livingston junction that has poor visilbity. This is also likely to impact on spillover traffic for the business of the charity using the farrhouse rear acces into Canal Court which is not sustainable.

Comments for Planning Application 0130/H/23

Application Summary

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Proposal: Erection of a 1.9m high timber fence and gates and formation of a gravel surfaced car park (in retrospect)
Case Officer: Anna McCabe

Customer Details

Name: Miss Gillian Macwhirter
Address: 26 Canal Court Threemiletown Linlithgow EH49 6LZ

Comment Details

Commenter Type: Neighbour
Stance: Customer objects to the Planning Application
Comment Reasons:
Comment:Following on my objection to the first posting of retrospective planning application to erect the 1.9m wooden fence and lay paving, I note there has been a change to the wording to the application. I wish to add to the objection following the change in wording of 'formation of a gravel surfaced car park' from 'laying paving'. My objection and the queries within the first proposal remain and I extend them include the following.
Please can the Council advise how the retrospective planning application; constitutes development (in that it must seek retrospective planning consent) in keeping with and proportionate to a Listed domestic dwelling. I am curious to understand how this development, and the reasons for the need of it (business and not domestic occupation - also a home doesn't use hard core), does or does not constitute a change of use. Is retrospective planning request being sought and amended because:
1.) SEAMAB and its Trustees hadn't sourced the right advise at the outset about its intended occupation and did not reasonably anticipate / disclose its occupational needs reflecting its activities. Given its years of operation / experience in setting up a residential home, presumably there is prior experience associated formalities to draw on. This retrospective planning permission is puzzling. Specifically concerning is the preparation of the appropriate fence to screen the children for their ongoing safety / privacy and also provide for the necessary vehicular movements of its staff and transportation of the children - how to plan for this and relevant consents. 2. Or there was a short fall of the information provided to the Council and also of the Council's follow through to understand the nature of the occupation of a business / charity (of even just four children) would require. This includes the reasonable anticipation of the location of parking for children's transportation and any traffic assessment on the impact of direct egress onto the B8090 as well as the children needing security provisions in a range of forms; 3.) or was Certificate of Lawful Use secured first with the view to then undertake its planned development of the fence and

formal car parking and then if required seek retrospective planning consent.
If the Council consider retrospective consent can be granted for the fence and car parking for non-domestic use, how does this work with a Certificate of Lawful use?
Had SEAMAB stated its development requirements at the outset, for which it now seeks retrospective consent I understand that as it would have required a planning application; immediate neighbours would have been consulted; it may have gone to planning committee for consideration at which time the community could have made representations, Local Councillors engaged including the Community Council. This did not happen.

Comments for Planning Application 0130/H/23

Application Summary

Application Number: 0130/H/23
Address: Threemiletown Farmhouse Threemiletown Linlithgow West Lothian EH49 6NF
Proposal: Erection of timber fence and gates and formation of paving (in retrospect)
Case Officer: Anna McCabe

Customer Details

Name: Mrs Heather Sargeant
Address: 38 canal court Threemiletown Linlithgow EH49 6LZ

Comment Details

Commenter Type: Neighbour
Stance: Customer objects to the Planning Application
Comment Reasons:
Comment:My main objections to the proposals for the fence and parking area at the farmhouse on canal court is that it totally changes the beauty of what I believe to be a listed building with a 5ft high , maybe even higher, running the full vicinity of the house it changes the whole outlook of what was once a beautiful building. The hardcore carpark also. is not in keeping at all with listed building surrounding area.
The access to said car park is from a very busy road that I hear regular traffic near misses, horns honking and actual many car crashes in the 8 years I have lived near the junction. I believe this would be a danger to children accessing the home but also further traffic problems if they were to need access from canal court side as we already have quite a flow of cars from residents that live here.
This leads me to my point that to use the house as a business also does not sit well within a community of residential homes . I
Hope my points will be recognised and believe many more neighbours will be if the same view.

Comments for Planning Application 0130/H/23

Application Summary

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Proposal: Erection of timber fence and gates and formation of paving (in retrospect)
Case Officer: Anna McCabe

Customer Details

Name: Mrs Jenny Mcdonagh
Address: 10 canal court Threemiletown Linlithgow Eh496lz

Comment Details

Commenter Type: Neighbour
Stance: Customer objects to the Planning Application
Comment Reasons:
Comment:Canal court has restrictions due to the Steading and Farmhouse being in a conservation area. It also has restrictions on not running a business from this address- a residential house for young people with trauma is run by a business Seamab.
The change to the farmhouse garden installing fencing and a car park are very concerning. Traffic management must be looked at as this is a key junction where many accidents occur. Vision coming out of the car park is seriously limited and poses a risk to the young people staying here.
The change of use and lack of consultation on this shows unacceptable levels of development which directly impacts our community.

Comments for Planning Application 0130/H/23

Application Summary

Application Number: 0130/H/23
Address: Threemiletown Farmhouse Threemiletown Linlithgow West Lothian EH49 6NF
Proposal: Erection of a 1.9m high timber fence and gates and formation of a gravel surfaced car park (in retrospect)
Case Officer: Anna McCabe

Customer Details

Name: Miss Lorraine Porter
Address: 20 Canal Court Threemiletown Linlithgow EH49 6LZ

Comment Details

Commenter Type: Neighbour
Stance: Customer objects to the Planning Application
Comment Reasons:
Comment:I would like to formally object to the above application for retrospective planning permission.

The buiding is a Grade C listed building and forms part of a Conservation Area. I feel that the changes made adversely affect both the character of the building and the appearance of the area.

The fence and car park are cheap and industrial looking. Materials and styles far more sympathetic and in-keeping with the area could easily have been chosen/used.

The Farmhouse is a central feature of the Canal Court development and is indeed a key consideration when other building plans have been submitted. To suddenly allow this building to then be changed unsympathetically, seems contradictory to this previous stance.

In addition, the entrance to the car park leads straight out onto a busy road and is close to an extremely dangerous junction. The applicants were made well aware of this by local residents who were genuinely concerned for the safety of the children who will be transported by this route more than twice daily. It's puzzling why they would chose to ignore this and build the car park regardless, without any kind of planning input/guidance/permission from yourselves/Roads & Transport.

Comments for Planning Application 0130/H/23

Application Summary

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Address: Threemiletown Farmhouse Threemiletown Linlithgow West Lothian EH49 6NF
Proposal: Erection of a 1.9m high timber fence and gates and formation of a gravel surfaced car park (in retrospect)
Case Officer: Anna McCabe

Customer Details

Name: Ms Pauline Stewart
Address: 5 Canal Court Threemiletown Linlithgow EH496LZ

Comment Details

Commenter Type: Neighbour
Stance: Customer objects to the Planning Application
Comment Reasons:
Comment:Seamab were granted a Certificate of Lawfulness for a care home for up to 4 young adults and did not require to submit a planning application. I believe they stated on the Certificate of Lawfulness that they were not doing anything that required planning consent. They build a large wooden fence and a car park around a listed building in a conservation hamlet without permission and now have to apply for retrospective planning permission. How does this stand with the Certificate of Lawfulness because I believe they stated in their application for this that no work would be undertaken that required planning permission and yet they have had to apply for planning permission. They clearly knew they required a second car park as they have residential staff and the minibus that takes the children/young adults to school in Rumbling Bridge every day alongside other vehicles that supply the home. They are running a business/care home in a tiny hamlet that has only one road in and out for 29 residents who already have trouble parking and with added traffic congestion when guests visit. This is not a suitable environment for such a business as there is no extra car parking for this business. The residents are not allowed to run businesses from here for that very reason. In addition I note that the Roads and Transport state that Seamab cannot use the car park they are applying to use due to restricted visibility. We, the residents, clearly advised them regarding this but they advised us that they had already signed a 5 year lease. There is also restricted visibility in the one road that leads into the hamlet and this is also dangerous. For the above reason I would like to object. I would like to also ask what the position is with the Certificate of Lawfulness as they have applied for planning permission and have made changes that required this.

Comments for Planning Application 0130/H/23

Application Summary

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Address: Threemiletown Farmhouse Threemiletown Linlithgow West Lothian EH49 6NF
Proposal: Erection of timber fence and gates and formation of paving (in retrospect)
Case Officer: Anna McCabe

Customer Details

Name: Mr Robin Risbridger
Address: 3 Canal Court Threemiletown By Linlithgow EH49 6LZ

Comment Details

Commenter Type: Neighbour
Stance: Customer objects to the Planning Application
Comment Reasons:
Comment:Firstly, I notice this application is retrospective. All work has already been completed. This begs the question why an established business is ignorant of planning regulations, especially as the Farmhouse is a listed building set within a conservation area.
The Farmhouse lies within Canal Court, a small development with many restrictions detailed within the Title Deeds of all the properties. These include:
a) the dwellinghouse shall be used and occupied solely as a private dwellinghouse and shall not be subdivided or occupied by more than one family at a time
b) no commercial vehicles other than private motor cars to park on any part of the development
c) express prohibition from carrying on any trade, business or profession
d) strict prohibition of satellite dishes (and other items)
The application refers to paving, when in reality it is a car park and is already in use as such. This car park is located in the front garden of the property, thus changing its use from a residential garden to a business car park, to be used by a charity to transport children on a daily basis. The access and egress is on to a very busy road close to a staggered junction, with restricted visability and therefore posing a safety risk, not only to vehicles but also pedestrians who use the footpath crossed by all vehicles using this car park. This situation becomes even more dangerous at peak times.
The unsightly fencing erected across the front garden is totally out of keeping with the frontage of the property. It is more suited to a modern property.
There is no mention of the satellite dish erected on the front of the building and in breach of current planning regulations for this development.
These significant alterations are totally out of keeping with a listed building set within a conservation area, damaging the historical characteristic of both. They can only be described as both an eyesore and a safety risk.

The above alterations to this property are all to the front of a very grand, historic building, situated within the small settlement of Canal Court, Threemiletown Steading. It is a characteristic example of its type, with few remaining in the county, according to Historic Environment Scotland.

I wish to formally object to this appliction in lieu of the above, and would hope remedial works undertaken as a matter of priority to restore this fine building to its original state.

Comments for Planning Application 0130/H/23

Application Summary

Application Number: 0130/H/23
Address: Threemiletown Farmhouse Threemiletown Linlithgow West Lothian EH49 6NF
Proposal: Erection of timber fence and gates and formation of paving (in retrospect)
Case Officer: Anna McCabe

Customer Details

Name: Ms Siofra O'Smotherly
Address: 1 Flint Cottages Westmill SG9 9LN

Comment Details

Commenter Type: Member of Public
Stance: Customer objects to the Planning Application
Comment Reasons:
Comment:I own a property within the neighbouring Canal Court development, and have serious concerns with this application. I believe the application is incomplete and misleading, as the erection of a satellite dish has been omitted and the proposed paving is hard core to be laid down to create car parking. The fence, satellite dish and parking will fundamentally changes the listed characteristics of the Farmhouse. I also believe the hard core constitutes a change of use of the Farmhouse garden to a formal car park. This in turn creates a traffic management issue at a very busy junction. The establishment of a car park is for the business function of the charity to transport children which in turn will put pressure on rear access of the Farmhouse for its business use, which will negatively impact residents access.

Comments for Planning Application 0130/H/23

Application Summary

Application Number: 0130/H/23
Address: Threemiletown Farmhouse Threemiletown Linlithgow West Lothian EH49 6NF
Proposal: Erection of timber fence and gates and formation of paving (in retrospect)
Case Officer: Anna McCabe

Customer Details

Name: Mrs Vicky Hunter
Address: 1 can Al court Linlithgow Eh49 6lz

Comment Details

Commenter Type: Neighbour
Stance: Customer objects to the Planning Application
Comment Reasons:
Comment:Ridiculous and an eye sore for what was beautiful. Car park is a death trap, blind spots at both sides on a horrendously busy road where there are multiple accidents. Absolutely no H&S assessment done, I walk my dog past there every morning, afternoon & night and give the obstruction there's no way a driver leaving the car park would see me. It's a busy residential path but again no assessment of the use done what so ever!

Section 2 contains the following documents

- Further representations (in response to the Notice of Review)

- Response from SEAMAB (the applicant) to the further representations

- Additional supporting statement from SEAMAB's legal representative

Hi Val, (received 10 Jul at 19:07)

We intend to comment on the Appeal currently being heard regards

TOWN AND COUNTRY PLANNING (SCHEMES OF DELEGATION AND LOCAL REVIEW PROCEDURE) (SCOTLAND) REGULATIONS 2008

APPLICATION NO.0130/H/23 – ERECTION OF A 1.9M HIGH FENCE AND GATES AND FORMATION OF A GRAVEL SURFACED CAR PARK (IN RETROSPECT), THREEMILETOWN FARMHOUSE, THREEMILETOWN, LINLITHGOW

Our concerns have not been taken seriously by Mr Provan which is consistent with his initial approach to our development. Mr Provan turned up and winged what was obviously a very important meeting for us. Mr Provan took no notes and provided no reassurances on any of our points, very arrogant man I am afraid.

In his submission to your appeal process he makes statements, on heights and qualities of fencing and gravel, as if he is an expert on Listed buildings. He clearly is not.

He was educated at that meeting that the building was grade C category.

He also did not know much about that entrance being formerly chained off to stop it being used as a vehicle entrance, traffic on that road is greatly increased now due to the massive developments going on in the area.

He was carefully warned that night about the danger of turning into the farmhouse from the front entrance but decided to ignore the locals advice.

I and other locals have witnessed wayward maneuvers by drivers passing cars turning in left to the farmhouse; to pass they have crossed the central divide and headed into unseen traffic around the blind corner.

Can you let me know who, during the appeal process hiatus, is prosecutable/ culpable in the event of a vehicle left or right turning into the farmhouse and causing an accident or worse.

Is it WL Council or Police Scotland who have failed in their duty to protect the public in a wholly predictable scenario or event?

Either way, for the safety of all and to reduce liability to zero should the entrance at the front be barriered off during this period?

Can WL council really believe that their decisions and processes allow them to act carelessly or with impunity?

The colour and quality of the fencing and gravel adds insult to potential injury to locals now having to navigate the notorious B9080 / B8046 corner.

Mr Provan has blamed everyone for his own person lack of leadership and does not see any of this as his personal responsibility I am afraid.

Best Wishes

Andy and Jacqui Sneddon

12 Canal Court

Threemiletown

EH496LZ

Hello, (Received by email on 29th Jun at 19:41)

I have now read the attached document and Seamab's proposals for making further alterations to the Farmhouse at Threemiletown, this time with a view to getting planning approval.

They state they were not advised by the owner, Hopetoun Estate, that this is a listed building. However, this information is readily available in the public domain had they bothered to check. They state further on that they have breathed new life into a wonderful historic farmhouse, the original building within the development. This suggests they were well aware of its listed status but chose to ignore it. It's quite staggering that they would plead ignorance as their defence.

They refer to neighbouring fencing which, in fact, is built horizontally as opposed to their vertical fencing panels already erected. Also, they have installed considerably more fencing than that surrounding the neighbouring properties.

They state 1.82 metres high fencing is necessary to secure the property and control access, especially as it's directly on to a very busy road. This is the same busy and dangerous road, as acknowledged by them, they already use unauthorised as a car park. They also state they will reduce the height of the fence crossing the front garden to make the property more visually appealing. Yet again, this contradicts their reasons for putting up this fence in the first place as it will be much easier for the residents of the Farmhouse to abscond! What has suddenly happened to their safety concerns?

It is a fact that this unauthorised car park does not meet, nor will it ever, the necessary visibility requirements for this speed of road for all road users, whether by vehicle, bicycles or on foot.

They state this entranceway is an existing one which it is, but for pedestrian only access. When was it ever previously used for vehicles? Today the B9080 is extremely busy on account of all the connections to various motorways, linking rapidly expanding villages and towns nearby.

They now propose to have all vehicles using the unauthorised car park turn into Canal Court. Canal Court is already struggling with the increased volume of traffic created by this business venture and now they intend to have even more vehicles use it as a turning head. This proposal beggars belief!

Their suggestion of fitting a convex mirror across from the entranceway to aid safe exit comes strewn with dangers, too many to list here, but well known by West Lothian Council's Roads and Transport department.

They state that rarely do people walk on the path. Have they monitored footfall by any chance? This path is very busy with dog walkers, families with children and those using the local bus services, to name but a few.

They state the existing car park off Canal Court is too small for their needs. They were well aware of that when they signed the five years lease agreement many

months before they agreed to meet with the local residents, and also many months before they were granted the Certificate of Lawfulness. As this was clearly important to their business, why was this not looked into at the outset?

They repeatedly stress the vulnerability of the residents of the Farmhouse having the potential to place themselves at risk, with health and safety therefore being their first priority. Why then place these residents in a building completely unsuited to them? They are surrounded by busy and dangerous roads, and these roads are the only means of accessing and egressing the property. In addition, they will be kept fenced in at all times. What kind of life is that for the residents, especially as they are to be transported daily to be schooled many miles from here ?

Canal Court residents are being unfairly portrayed as the enemy in this appeals submission. They refer to the Farmhouse residents' need to avoid scrutiny and have their privacy respected - what about the long standing residents of Canal Court?

They state the physical layout and how they practically deliver their care home with the comings and goings of young people and staff is important. Clearly their needs are very different to those of the average resident within Canal Court, and it very much appears that they take priority and we, the many long standing residents, must adapt to the needs of the few new ones.

The meeting in December referred to in this appeal was at the insistence of the residents of Canal Court and took place on December 1st. Seamab made no effort whatsoever to involve or cooperate with existing residents of Canal Court before this or since then.

The remedial proposals put forward by Seamab do not change the fact that this road is both extremely busy and very dangerous, and therefore should not be allowed to be used as a car park.

Regards,

Dianne Risbridger

Dear Madam (received by email on 8th Jul at 13:06)

Further to my previous objections, I am making a new representation on the matter of Application No.0130/H/23. This is against SEAMAB's request for the Council to review and overturn its refusal of SEAMAB's retrospective planning permission of the installation of car parking, fencing, and using the front Farmhouse entrance to access and egress off the B9080.

My basis for doing so are as follows:

1. The prima facia issue is the Council's initial grant of a Certificate of Lawful Use of the property as a 'Residential Home' should be revoked.

The revocation can be done so on the statutory grounds that the applicant, SEAMAB, withheld and misrepresented information in it's original application for a Certificate of Lawful use. The information withheld and misrepresented is contained within SEAMAB's own supporting statement of appeal.

SEAMAB would appear to not be using the premises for residential use only. This week we have had 10 cars on one occasion in and around the farmhouse and constant comings and goings. I fail to see how 2 children in residence can create so much traffic. The business have clearly not declared certain points when submitting their original application. It appears that there has been a selective declaration of known facts and a failing to professional fully declare today's requirements associated with the children's prior traumas at the point of the application for the Certificate of Lawful Use.

SEAMAB want to retain items of 'development' under planning law, that would have professionally and reasonably been anticipated at the outset of its lease signing, reflecting their professional understanding of the children's vulnerabilities and needs, prior to applying for a Certificate for Lawful Use. I refute that both SEAMAB AND HOPETOUN would not fully understand what was required.

a. It is asking for the fence be retained (lowered / not changing the material),
b. stated its intention to retain the gravel surface for the car parking (arguing the slate colour blends with the roof but ignoring the material point of the development of the car park or change to a more appropriate surface to a Grade C listed building),
c. and stated reasons for its ongoing use of the car parking at the front, which it has continued to use at an extensive level, since the Roads Department declared the entranceway unsafe / unfit for use.

The Charity is advised by a professional Board of Trustees including two property developers and a real estate lawyer on their Board of Trustees, having a legal duty of care and of governance of and to the Charity, and from SEAMAB's own professional experience in carrying out its own charitable / business duties, prior knowledge of all these requirements of development were reasonably known, would have been professionally anticipated. Collectively the Board of Trustees and the Charity had a duty of care to the children to undertake its due diligence on all aspects of its selection of a Residential Home.All of these factors were clearly known at the outset of SEAMAB's engagement with the property and the Charity (company under Scottish Law) prior to signing the business lease for it. Subsequent to this, SEAMAB required authorisation for lawful use of the building in order that it could receive a certificate from the Care Inspectorate for no more than 4 children. It had to get the Council's Certificate of Lawful Use.

The scale and design of works having a visual detrimental impact of the property and adversely impacting the existing residents amenities have not been adequately addressed.

They state -

"We were not made aware of the listed status of the building or we would have spoken with planners prior to undertaking any works."

This is simply unbelievable and The Board of Trustees and the Charity itself has to undertake its own due diligence about the nature of the property it is occupying, and to understand any material needs it has to adhere to, prior to its occupation of the property. It is reasonable to expect that the Board of Trustees extensive experience on such matters and would be accessed and leveraged. This includes understanding the erection of fencing and building a car park constitute development and thus a requirement for a planning application. It is unknown what advice the Board gave and what decisions that Charity chose to take, on how to secure a 'legal' means of occupying the property in order to secure a certificate of use from the Care Inspectorate.

They state -

"The children that we support have a variety of complex needs. They are vulnerable children who have the potential to place themselves at risk – much like any child. Their health and safety is our first priority and reducing risk by creating a safe and boundary fence to the garden is critical."

Children have been moved into the residential care home prior to SEAMAB's appeal to the Council being submitted and outstanding issues around car parking and fencing, all needed to protect the children, have been resolved. They face considerable disruption in these matters being resolved due to the Charity's actions.

3. The use of the vehicle entranceway onto the B9080 will create a safety risk to road users

"The vehicle entrance on the B9080 has existed for many years and indeed was the original gateway to the Farmhouse. Our wish is only to re-instate the entranceway so that the house, in its modern context and current usage, can have the benefit of two separate entranceways. We have only a small walled car park to the rear of the house, at the Canal Court side of the Farmhouse. There will be infrequent times when this will not be large enough for staff and house cars, plus anyone visiting the house. By creating additional parking off the B9080, at the traditional entrance to the Farmhouse, we intend to minimise inconvenience to our neighbours and avoid having an "adverse impact on existing resident's amenity".

Risk assessment of the entrance usage. The said entrance existed in the days of horse and cart being chained off for many years to prevent vehicular access and egress. Local residents have not yet been made aware of any risk assessment by either the Council (Roads Department or Planning Team) or SEAMAB to demonstrate and satisfy safe access and egress from the B9080 for the staff / children of SEAMAB, local residents of Canal Court and public road users.

"Use of that parking/turning area at Canal Court will be minimal as we would generally keep the two "house cars" at the front and children going to school would always be a left turn. This would allow Staff and visitor cars to be parked to the rear of the house and staff could come into the house via the side kitchen door. "

Clarity is required on what authority / whose authority are SEAMAB currently permitted to use front car park. If the Council has stated that the entrance is not to be used, then either SEAMAB are blatantly defying this or they have been advised that they can!

On a day to day basis SEAMAB have between six to eight cars parked across the front entrance car park, rear farmhouse car park and on the private land adjacent to the Farmhouse (not adopted). Our understanding that this is in support of two children.

There is insufficient capacity to even support the eight cars and their vehicular movements along with their privately contracted commercial waste disposal lorries that remove their refuse.

Residents watched cars turn very slowly into the front car park, coming from Livingston slowing traffic behind them. Last week there was a near incident caused by the same type of movement, where upon a car decided to overtake the slowly manoeuvring SEAMAB car into the carpark, as the passing car moved out into the centre of the road and nearly hitting an on coming car.

Part of the land at the rear car park is owned by Canal Court that is incorrectly included in the lease curtilage of the Farmhouse Lease. Should we choose to exercise our right to claim this land, this would reduce the current parking facility down to a maximum of two of their larger SUV's or possibly three small cars.

4. Road adoption and lawful access and parking

The Council has a duty to ensure that it is consistent in its decision making and the precedents it wants to set and how these precedents and how these can be justified with the Scottish Public Services Ombudsman.

The Council has to formally demonstrate is regulatory and statutory ability to assert that a matter of adoption of a private road, nullifies a pre-existing restrictive Servitude on a Registered Land Title. The Council also has to demonstrate how, without being ultra vires, it can assert it has the power to make a series of decisions where the direct consequence of this results in members of the public facing a Civil dispute and also incurring financial losses.

The Farmhouse ONLY benefits from a right of access and egress along Canal Court for private residential use, it also does not grant the Farmhouse rights of parking in Canal Court.

SEAMAB's use of the road is for its continuation of its business purposes of running a Residential Home not occupation of the Farmhouse as a private residence. Its staff use Canal Court to access and leave their place of work and to transport children to school. SEAMAB's use of Canal Court is a continual breach of this servitude. The Council's statement that the Charity should use Canal Court, directly enforces the breach of this servitude.

There is a gap of several feet between the adopted dropped kerb / driveway to that of the boundary of the Farmhouse wall. At the very least, this section of the driveway is not adopted. Technically, Canal Court residents can ask SEAMAB staff cars and by foot not to walk or drive over this section of land.

The Charity therefore holds an incorrect understanding of its right of access along and over Canal Court whether by foot or by car.

Again I emphasise that I find it incredible that the Council can make decisions that have a detrimental effect on residents, then want to wash their hands of the awful situation we are in here and would leave us with no choice but to go down the road of a civil matter.

This business has made a mockery of the planning process and the council appear to be allowing this to go on,

Regards

Fiona Irving

Dear Val (received by email on 5 Jul at 10:13am)

Further to your email of 29th June 2023, I am making a new representation on the matter of Application No.0130/H/23. This is against SEAMAB's request for the Council to review and overturn its refusal of SEAMAB's retrospective planning permission of its installation of car parking, fencing, and using the front Farmhouse entrance to access and egress off the B9080.

My basis for doing so are as follows:

1. The prima facia issue is the Council's initial grant of a Certificate of Lawful Use of the property as a 'Residential Home' should be revoked.

The revocation can be done so on the statutory grounds that the applicant, SEAMAB, withheld and misrepresented information in its application for a Certificate of Lawful Use. The information withheld and misrepresented is contained within SEAMAB's own supporting statement of appeal.

SEAMAB cannot argue both ways its professional reasons for retaining the aspects of development due to their knowledge of the children's trauma and yet not have accountability for not declaring or have known these points at the time of making the application for the Certificate of Lawful Use. It appears that there has been a selective declaration of known facts and a failing to professional fully declare todays requirements associated with the children's prior traumas at the point of the application for the Certificate of Lawful Use.

SEAMAB want to retain items of 'development' under planning law, that would have professionally and reasonably been anticipated at the outset of its lease signing, reflecting their professional understanding of the children's vulnerabilities and needs, prior to applying for a Certificate for Lawful Use:

a. It is asking for the fence be retained (lowered / not changing the material),
b. stated its intention to retain the gravel surface for the car parking it built (arguing the slate colour blends with the roof but ignoring the material point of the development of the car park or change to a more appropriate surface to a Grade C listed building),
c. and stated reasons for its ongoing use of the car parking at the front, which it has continued to use at an extensive level, since the Roads Department declared the entranceway unsafe / unfit for use.

The Charity is advised by a professional Board of Trustees including two property developers and a real estate laywer. Its Board of Trustees, having a legal duty of care and of governance of and to the Charity, and from SEAMAB's own professional experience in carrying out its own charitable / business duties, prior knowledge of all these requirements of development were reasonably known, would have been professionally anticipated. Collectively the Board of Trustees and the Charity had a duty of care to the children to undertake its due diligence on all aspects of its selection of a Residential Home for the vulnerable children.

SEAMAB's professional understanding of the childrens' prior trauma and vulnerability, has made clear that screening (thus fencing), security (thus fencing), adequate staffing levels and support services (thus car parking) were known at the outset. The experienced Board of Trustees etc would have the prior professional expertise to know what changes constitute development and enough commercial sense to identify if a property is listed or not.

Proper and professional selection of materials and development design, including prior risk assessments, could have been prepared and consulted on for the matters of development in question. Drawing on the collective professional expertise of what constitutes development and of the buildings listed nature, property due diligence as the materials to use and justification of use should have been evidenced and be in place.

All of these factors were clearly known at the outset of SEAMAB's engagement with the property and the Charity (company under Scottish Law) prior to signing the business lease for it. Subsequent to this, SEAMAB required authorisation for lawful use of the building in order that it could receive a certificate from the Care Inspectorate for no more than four children. It had to get the Council's Certificate of Lawful Use.

Below are only a couple of illustrations of many inaccuracies and poorly defended principles by SEAMAB on its right to retain matters of development.

2. Failing to adequately address the justification of need for the materials of choice:

The scale and design having a visual detrimental impact of the property and adversely impacting the existing residents amenities have not been adequately addressed.

"We were not made aware of the listed status of the building or we would have spoken with planners prior to undertaking any works."

The Board of Trustees and the Charity itself has to undertake its own due diligence about the nature of the property it is occupying, and to understand any material needs it has to adhere to, prior to its occupation of the property. It is reasonable to expect that the Board of Trustees extensive experience on such matters and would be accessed and leveraged. This includes understanding the erection of fencing and building a car park constitute development and thus a requirement for a planning application. It is unknown what advice the Board gave and what decisions that Charity chose to take, on how to secure a 'legal' means of occupying the property in order to secure a certificate of use from the Care Inspectorate.

"The children that we support have a variety of complex needs. They are vulnerable children who have the potential to place themselves at risk – much like any child. Their health and safety is our first priority and reducing risk by creating a safe and boundary fence to the garden is critical."

Children have been moved into the residential care home prior to SEAMAB's appeal to the Council being submitted and outstanding issues around car parking and fencing, all needed to protect the children, have been resolved. They face considerable disruption in these matters being resolved due to the Charity's actions.

3. The use of the vehicle entranceway onto the B9080 will create a safety risk to road users

"The vehicle entrance on the B9080 has existed for many years and indeed was the original gateway to the Farmhouse. Our wish is only to re-instate the entranceway so that the house, in its modern context and current usage, can have the benefit of two separate entranceways. We have only a small walled car park to the rear of the house, at the Canal Court side of the Farmhouse. There will be infrequent times when this will not be large enough for staff and

house cars, plus anyone visiting the house. By creating additional parking off the B9080, at the traditional entrance to the Farmhouse, we intend to minimise inconvenience to our neighbours and avoid having an "adverse impact on existing resident's amenity".

Risk assessment of the entrance usage. The said entrance existed in the days of horse and cart being chained off for many years to prevent vehicular access and egress. Local residents have not yet been made aware of any risk assessment by either the Council (Roads Department or Planning Team) or SEAMAB to demonstrate and satisfy safe access and egress from the B9080 for the staff / children of SEAMAB, local residents of Canal Court and public road users.

"Use of that parking/turning area at Canal Court will be minimal as we would generally keep the two "house cars" at the front and children going to school would always be a left turn. This would allow Staff and visitor cars to be parked to the rear of the house and staff could come into the house via the side kitchen door. "

Clarity is required on what authority / whose authority are SEAMAB currently permitted to use front car park. If the Council has stated that the entrance is not to be used, then either SEAMAB are blatantly defying this or they have been advised that they can!

On a day to day basis SEAMAB have between six to eight cars parked across the front entrance car park, rear farmhouse car park and on the private land adjacent to the Farmhouse (not adopted). Our understanding that this is in support of two children.

There is insufficient capacity to even support the eight cars and their vehicular movements along with their privately contracted commercial waste disposal lorries that remove their refuse.

Residents watched cars turn very slowly into the front car park, coming from Livingston slowing traffic behind them. Last week there was a near incident caused by the same type of movement, where upon a car decided to overtake the slowly manoeuvring SEAMAB car into the carpark, as the passing car moved out into the centre of the road and nearly hitting an on coming car.

Part of the land at the rear car park is owned by Canal Court that is incorrectly included in the lease curtilage of the Farmhouse Lease. Should we choose to exercise our right to claim this land, this would reduce the current parking facility down to a maximum of two of their larger SUV's or possibly three small cars.

4. Road adoption and lawful access and parking

The Council has a duty to ensure that it is consistent in its decision making and the precedents it wants to set and how these precedents and how these can be justified with the Scottish Public Services Ombudsman.

The Council has to formally demonstrate is regulatory and statutory ability to assert that a matter of adoption of a private road, nullifies a pre-existing restrictive Servitude on a Registered Land Title with Scotlis. The Council also has to demonstrate how, without being ultra vires, it can assert it has the power to make a series of decisions where the direct consequence of this results in members of the public facing a Civil dispute and also incurring financial losses.

The Farmhouse ONLY benefits from a right of access and egress along Canal Court for private residential use, it also does not grant the Farmhouse rights of parking in Canal Court.

SEAMAB's use of the road is for its continuation of its business purposes of running a Residential Home not occupation of the Farmhouse as a private residence. Its staff use Canal Court to access and leave their place of work and to transport children to school. SEAMAB's use of Canal Court is a continual breach of this servitude. The Council's statement that the Charity should use Canal Court, directly enforces the breach of this servitude.

There is a gap of several feet between the adopted dropped kerb / driveway to that of the boundary of the Farmhouse wall. At the very least, this section of the driveway is not adopted. Technically, Canal Court residents can ask SEAMAB staff cars and by foot not to walk or drive over this section of land.

The Charity therefore holds an incorrect understanding of its right of access along and over Canal Court whether by foot or by car.

Finally, I am aware that the above matters have been raised by Councillors Tom Conn, Sally Pattle and Pauline Orr. Our Community Council are also monitoring how the Council addresses these matters.

Many thanks

Gilly Macwhiter

Dear Sirs,

RE: **TOWN AND COUNTRY PLANNING (SCHEMES OF DELEGATION AND LOCAL REVIEW PROCEDURE) (SCOTLAND) REGULATIONS 2008**
APPLICATION NO.0130/H/23 – ERECTION OF A 1.9M HIGH FENCE AND GATES AND FORMATION OF A GRAVEL SURFACED CAR PARK (IN RETROSPECT), THREEMILETOWN FARMHOUSE, THREEMILETOWN, LINLITHGOW

Date: 10/07/23

I'm not entirely sure what sort of format to use here but if it's OK, I'll just provide my comments/objections directly to the statements provided by Seamab in their Notice of Review Application.

I understand that the current reasons for the refusal of Retrospective Planning Permission are:

Reason 1: The fence and car park by virtue of its scale and design will be visually detrimental to residential and the visual amenity of the C-listed building. The choice of materials (timber fence boards and light grey gravel) is not acceptable and would have an adverse impact on existing resident's amenity.

i) **Seamab's general response: "**It is important to highlight that as new tenants at Threemiletown we contacted our Landlord, Hopetoun Estate, prior to making the changes that are being discussed. We provided plans, photographs and sketches and gained approval from Hopetoun prior to undertaking the works. We were not made aware of the listed status of the building or we would have spoken with planners prior to undertaking any works."

My comments: Seamab have property developers and legal experts on their board of Trustees, so have both the resources and in-house expertise to navigate such a basic planning process. I therefore object to Seamab's claims of ignorance. A simple Google search would have revealed the listed nature of the property, even if Hopetoun did not make this clear in the Lease and this should have formed part of Seamab's process of due diligence & risk assessment whilst considering the suitability of the property/location and the requirement for any subsequent alterations needed to ensure the children's privacy/safety

ii) **FENCE**
Seamab's comments: "We can reduce the height of the fence that crosses the garden (B to D on map) by some 440mm; stain/paint the fence as noted above; and plant shrubs and flowers around the fence to soften the aspect. Reducing this fence and gate height would give a much better view of the farmhouse from the B9080 side of the property and would be visually more appealing in the countryside setting. From discussion with planners on site it was indicated that a height reduction of 440mm's (between the middle spar and the top spar of the fence structure) of this fence would make the property more visible as a C listed building."

My Comments/Objections: In my opinion, the style of the fence is industrial-looking and cheap and is not suitable for the front elevation of a Grade C listed building in a Conservation Area. Slightly reducing the height will not alter that, even with a change of colour. You can see from Fig.1 that the old picket-style fence was much lower and far more sympathetic to the front elevation. I do understand that the children require a safe area to play and should absolutely have their Privacy, but this was known about long before the children moved in.

iii) GRAVEL CAR PARK

Seamab's Comments: "Regarding the light grey gravel in the parking area, we opted for this so as to be as unobtrusive as possible within the surroundings. This has already weathered/toned down and the colour matches the slate roofing on surrounding buildings. This was commented on by planners at the site visit as was the fact that the materials that we chose for chips was in keeping with a C Listed building."

My Comments/Objections: Again, the gravel is industrial looking and not in keeping with the general character of the front elevation of the Farmhouse.

Finally, Seamab also justify their actions by saying: "I believe that any family moving into the property would wish to do the same for children and/or for pets."

My Comments/Objections: The property has been occupied as a Residential dwelling for quite a number of years now (as evidenced by Fig.1), by various different tenants, and no-one has needed to make such changes before now. I would therefore contend that the alterations required are directly due to Seamab's requirement for additional parking space for their employees' vehicles.

As you can see from Fig 1, the whole visual amenity and character of the property has been significantly changed and is not in any way complementary/sympathetic to that of a Grade C listed Building in a Conservation area.

As you know, when the old Steading buildings were refurbished and Canal Court developed, very careful consideration was given to the materials used, the styles of fencing & walls etc. I would like to think that the same high standards would also be applied to the Farmhouse itself.


Fig.1 2009(when front entrance was still in use)


Fig.2 2021 (removed & full Lawn)


Fig.3 2023 (with new fence & gravel car park)

Reason 2: The use of the vehicle entranceway on to B9080 will create a safety risk to road users

i) **Seamab's comments:** "The vehicle entrance on the B9080 has existed for many years and indeed was the original gateway to the Farmhouse. Our wish is only to re-instate the entranceway so that the house, in its modern context and current usage, can have the benefit of two separate entranceways."

My comments/Objections: This may have been the original entrance to the Farmhouse many years ago (as evidenced in Fig.1 from 2009), but I understand that at some point after 2011 it was decided that the entrance should no longer be used due to road safety concerns and the driveway completely removed (see Fig.2)? As you know, the road has become exponentially busier over the years and now sees a huge volume of traffic at peak times. It's a well-known accident black spot due to the poor visibility at the junction of the B8046 (from Ecclesmachan) onto the B9080, which is compounded by the speed of the traffic travelling along the B9080 in both directions. Even the junction from the north arm of the B8046 onto the B9080 is precarious, again due to the speed of the traffic and the blind corner to the right of the junction. Adding slow moving & turning vehicles to the mix would only increase the accident risk further.

ii) **Seamab's comments:** "We have only a small walled car park to the rear of the house, at the Canal Court side of the Farmhouse. There will be infrequent times when this will not be large enough for staff and house cars, plus anyone visiting the house. By creating additional parking off the B9080, at the traditional entrance to the Farmhouse, we intend to minimise inconvenience to our neighbours and avoid having an "adverse impact on existing resident's amenity". By using a small parking and turning area at the front entrance, we reduce the potential for poor relations with our neighbours."

My comments/objections: Even with the front car park (which is still currently being used by Seamab at the moment) there is still insufficient parking for Seamabs purposes. For example, one day last week there were five vehicles in the front car park, five vehicles in the rear car park and one vehicle that had parked in the designated 'turning circle' in Canal Court, which is privately owned by the plot of land to the west of the Farmhouse. There are regularly 4 cars parked in the rear car park (always three at night) and often there are two or three in the front car park. The front car park has not therefore reduced the need for Seamab employees to use Canal Court, as stated.

iii) **Seamab's comments:** "We have had one neighbour claim numerous times that we are not permitted to park any of our vehicles in Canal Court. We have been asked to move vehicles off what one neighbour views as a 'private road.' We have since checked with West Lothian Council and have been advised that Canal Court is an adopted road and free for anyone to use."

My comments/objections: Whilst the road is indeed adopted by the council, the road is still privately owned and it's our understanding that adoption does not negate the relevant servitude within the Title Deeds for the Development, which state that access to the Farmhouse, via Canal Court, is restricted to *private residential use*. Since none of the resident children own cars, nor signed the Lease, then it's clear that only Seamab staff are using Canal Court to access **their place of employment**.

iv) **Seamab's comments:** "Objectors to our application have stated that the road is busy and has the potential to be dangerous. However, there is very clear visibility to the right when exiting at this entranceway and a left-turn from that gate provides very clear visibility to the right-hand side. We have had a number of council employees visit the property and they have all expressed that to turn left is the most sensible, safe and practical way to manage this entranceway. We are very willing to instruct all of our staff to only turn left from this gate and we can attach signage to the fence or to the gate pillars (if it were to be the pillars we would lodge a planning application in keeping with the Listed status). These signs – one saying STOP and the other below TURN LEFT – would serve as a reminder to anyone leaving this exit. If wishing to travel to Linlithgow, for example, cars can turn left and left again into Canal Court and come out again so as to turn right at the main junction with the B9080. We are also happy to fit a convex mirror across from the entranceway to aid safe exit

My comments/Objections: It's not only the exit of the car park at the front that's concerning but the act of turning into the car park from either direction from the B9080. This front entrance is very narrow (as can be seen from the photographs provided by Seamab) and requires users to slow down to practically a stop to execute the left-hand turn (if travelling from Linlithgow). If a user misjudges this (as happened the other week) they need to manoeuvre back out onto the main road to try again. Again, this is a hazard as drivers from behind may be tempted to overtake the manoeuvring vehicle and therefore encroach into the path of oncoming vehicles (again, this has already happened). As you can see from the photograph below (taken from Google Maps) this is further compounded by a blind bend.

v) **Seamab's comments:** "Use of that parking/turning area at Canal Court will be minimal as we would generally keep the two "house cars" at the front and children going to school would always be a left turn. This would allow Staff and visitor cars to be parked to the rear of the house and staff could come into the house via the side kitchen door. This would mean that, by using the front car park, the children would avoid scrutiny by neighbours and have their privacy respected by coming in/out of the front door. This is what we outlined to the neighbours at a meeting that we held at the farmhouse in December 2022. After the meeting I had a very cordial discussion with the neighbours across from the side entranceway and they were happy if we fitted fencing to the existing low fence so that it was 6ft/1.82m high. This way both properties could have their privacy enhanced - see planning application 0235/LBC/23"

My comments/objections: As stated previously, even with the front car park still in use, the rear car park is consistently full and any overspill of vehicles continue to park in Canal Court (both in the private 'turning circle' and the layby's).

vi) **Seamab's comments:** We have breathed new life and invested significantly into reviving what is a wonderful historical farmhouse, **the first house in Threemiletown I would imagine**. We are invested in our young people having a bright future at this house and we wish to do this whilst respecting others within the community. The physical layout and how we practically deliver our care home with coming and goings of young people and staff is very important and will influence I believe just how we may be accepted by some of the neighbours. We wish to have good relationships and the practical steps that we have taken have been made with this in mind.

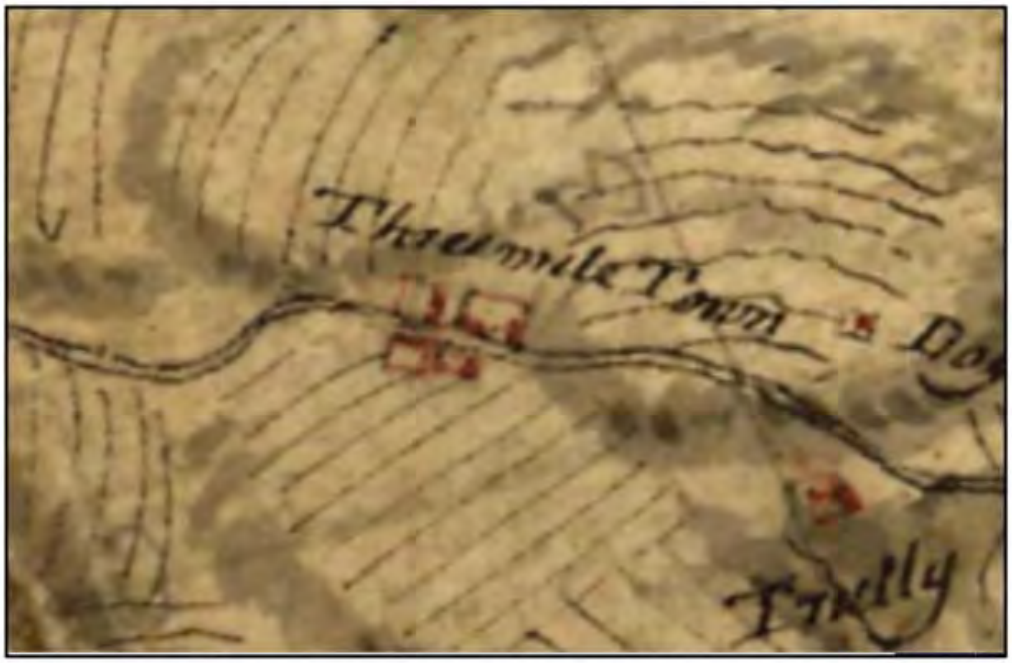
My comments/objections: The comments made by Seamab and highlighted in bold here are very relevant indeed and bring up a pertinent point about the importance of this particular site and its archaeological significance.

Part of the documentation included in the planning application for the plot to the west of the Farmhouse (1162FUL19 & 20) includes a report from West of Scotland Archaeology Service stating: "However, ground disturbance associated with the proposal would appear to have some potential to encounter and remove sub-surface deposits associated with earlier phases of occupation on the site. Some indication of this occupation is identified in the listing document, which notes that '**it is also clear that an earlier farmhouse stood on the same site as the present one; the remains of the E gable of the original building can still be seen'. This may relate to one of the structures depicted on Roy's Military Survey of Scotland, which was conducted in the period 1747-55 and would therefore pre-date the construction of the present farm complex in the later 18th century.**" (page 1, para 3). The report then goes on to say: "Government policy as set out in Scottish Planning Policy is that planning authorities should ensure that prospective developers arrange for the archaeological issues raised by their proposals to be adequately addressed. **Where the scale of the development is relatively limited, as in this case, I would advise the Council to consider attaching an archaeological watching brief condition to any consent they may be minded to grant.**"

Assuming this would also apply to the grounds of the Farmhouse itself (looking at the map provided by WOSAS below, it appears that the previous buildings lay adjacent to the road and exactly where the new car park has been formed), are there any consequences/implications for Seamab failing to take all reasonable steps to establish

the nature of the site before carrying out works which disturbed the top layer of soil/sub-soil?

Since the Council have prior knowledge of the Historical status of this site, what retrospective action will the Council take in this regard?



Extract from Roy's Military Survey of Scotland, reproduced with the permission of the National Library of Scotland

In summary, my objections are based on the following:

- It's clear that Seamab had adequate prior knowledge of the need to alter the property to better accommodate their staff parking and keep the children safe, well before any work was started/children moved in. This gave them ample time to take reasonable steps to 1. ascertain the need for planning permission and 2. follow the correct planning process. Seamab also benefit from the experience of in-house property development & legal experts, so appropriate advice would have been easy to obtain
- Reducing the height of the fence and changing the colour will not significantly reduce the negative impact on the front elevation of the Farmhouse. This combined with the car park gives a somewhat industrial look to the property, which is not considerate/sympathetic to the listing of the building nor that it lies within a conservation area
- The car park does not reduce the need for parking in the rear car park, as claimed
- No matter what precautions are taken to reduce the risk from vehicles exiting the car park onto the B9080, there will still be a significant road safety risk from vehicles turning IN to the car park from either direction due to the narrow entrance, high volume and speed of the traffic on the B9080. This is compounded by a blind bend slightly to the East of the car park entrance. This was highlighted to Seamab during the meeting at the Farmhouse in Nov 22 and it was made clear that the main concern was for the safety of the children and other road users. Again, this should have at least rung warning bells and prompted Seamab to seek consultation with the Council's Roads Department to find a workable solution

- Failure to follow proper planning procedure has meant that a site of local historical & archaeological Importance has been disturbed without the proper oversight in place to record and recover any relevant artefacts

I would also like to make it clear that I fully understand and sincerely believe that the security, safety and welfare of the children involved here is of utmost importance and should be everyone's top priority. I would hope that if the planning application is rejected once again, then time is given to Seamab to remedy the situation with as little impact on the children, as possible.

Kind regards,

Lorraine Porter

This is absolutely ridiculous the reason it is being reviewed is because it's already built and it's Hopeton Estate who far too much influence and corruption with West Lothian council …

Vicky Smith

(Received by email on 29th Jun at 8:30am)

Seamab Care & Education

Thank you for the opportunity to respond to the further representations made by neighbours on our planning application for fencing and a gravel parking area at Threemiletown Farmhouse.

In my response I will concentrate on matters directly relating to the planning application and the works for which we have requested planning permission. Comments regarding myself, our Board of Trustees; our awareness or otherwise of the Listed status of the building; the Certificate of Lawfulness; and access through/parking on Canal Court are not directly relevant to this application. However, I would note that if we are unable to use the new parking area at the traditional gateway, this would require staff and visitors to use only Canal Court and this would further exacerbate the access and parking issues on Canal Court raised by residents.

Fencing materials and height:

We feel that the choice of materials used is appropriate in a countryside setting and residential area. Although Canal Court residents have claimed otherwise, the property does not sit within a Conservation Area.

The style of the wooden fence matches an existing gate on the property and is a natural material that will weather over time – however we have offered to paint or stain this if planners feel the natural colour of the wood is of concern. We have also offered to reduce the height of the fence that crosses the garden by some 440mm, and plant shrubs and flowers around that fence to soften the aspect. Reducing this fence and gate height would give a better view of the farmhouse from the B9080 side of the property and may be considered to be visually more appealing by making this change.

Regarding the light grey gravel in the parking area, I again assert that we opted for this to be as unobtrusive as possible within the surroundings and this has already weathered/toned down, matching the slate roofing on surrounding buildings and we feel is in keeping with materials that are appropriate for use in these circumstances.

Entrance gate and car parking:

We believe there is sufficient visibility to the right when exiting at this entranceway and a left-turn from that gate can be undertaken very safely. We have instructed staff to only turn left from this gate and have attached appropriate signage to the fence as a reminder.

The speed limit on the B9080 road is restricted to 40MPH. We are not aware of any incidents caused by staff slowing down to turn into this entrance. The turning onto the B8046 is only a couple of hundred yards beyond this entranceway so, presumably, there is as much risk from cars turning off the B9080 into the B8046 as there is from cars turning into the Farmhouse entranceway.

One of the representations made states that “The said entrance existed in the days of horse and cart, being chained off for many years to prevent vehicular access and egress.” However, a quick Google search clearly shows that there has been vehicular access through that entranceway in recent times, as you can see from the photo below – a modern car parked outside of the house, sometime after the conversion of the steading buildings to the right.

Stuart Provan
Chief Executive

Seamab
Care & Education

Davidson Chalmers Stewart

Lawyers. For Business.

SUPPLEMENTARY STATEMENT IN SUPPORT

Council:	**West Lothian Council**
Matter:	**Local Review Body Appeal Hearing 30 August 2023**
Applicant:	**Seamab Care and Education**
Application:	**0130/H/23**
Works:	**Timber fence and gates and gravel surfaced car park (in retrospect)**
Site:	**Threemiletown Farmhouse, Linlithgow, West Lothian EH49 6NF**

We have been instructed by the Applicant to advise on planning law following the refusal by the Council of the above Application. Having reviewed the relevant background documents, we consider that:

- there have been procedural and factual errors in the determination of the Application;
- planning policy has been incorrectly applied; and
- the Council has not taken into account all relevant material considerations in coming to its decision, contrary to Section 25 of the Town and Country Planning (Scotland) Act 1997 (which requires planning applications to be determined in accordance with the Development Plan, unless material considerations indicate otherwise).

We request that the following points be used to inform the Local Review Body hearing scheduled for 30 August 2023 and that the Council reconsider its previous decision to refuse planning permission in light of them.

GENERAL ERRORS IN THE DETERMINATION OF THE APPLICATION

1. APPLICANT CIRCUMSTANCES AND PROTECTED CHARACTERISTICS OF SITE RESIDENTS

The Applicant provides a vital community function from the Site, in service of young people with protected characteristics and providing a high-quality benefit to the general public. This has not been given appropriate weight as a material consideration or balanced against unsubstantiated objections raised by neighbours. This omission contravenes the guidance in Scottish Government Planning Circular 3/2022 (Development Management Procedures) and the Equality Act 2010.

Section 149 of the Equality Act 2010 requires the Council to have due regard to the public sector equality duty ("**PSED**") in determining the Application (see R *(Brown) v Secretary of State for Work and Pensions [2008] EWHC 3158 (Admin))*. The PSED was not mentioned in the officer's Report of Handling for the Application so it is reasonable to assume it was overlooked. This constitutes an error of law. The refusal of the Application causes a significant disadvantage to Seamab service-users, who are vulnerably, young people requiring support. Had the Council's planning officer shown due regard to the PSED, she may have reached a different decision on the Application (see *LDRA et al v Secretary of*

State for Communities and Local Government, Cammell Laid Ship Repairs and Ship Builders Limited and Wirral borough Council [2016] EWHC 950 (Admin).)

2. VEXATIOUS OBJECTIONS

The request for the Application arose following a neighbour's notification to the Council of the fence works and gravelling. There were no prior complaints about the operation of the Site or disruption caused by the Works (and any construction works have been completed at the date of this Statement, in any event). The Application has been submitted on purely technical grounds, rather than being necessary to regulate the impacts of development.

The Council will be aware that a small but vocal minority of residents around Canal Court are fundamentally opposed to Seamab operating from the Site, in any circumstances. They have aggressively objected to all proposals at the Site, no matter how minor. Some individuals have been particularly vocal in their opposition with instances of people being abused verbally. While the Applicant welcomes constructive input on legitimate planning concerns, we suggest the Council should afford less weight to apparently vexatious objections in determining the Application.

3. FAILURE TO CONSIDER THE USE OF PLANNING CONDITIONS

The Council is empowered under Section 37(1) of the Town and Country Planning (Scotland) Act 1997 to impose suitable conditions on any planning permission it grants. Although conditions controlling the type of materials used and regulating car park and access arrangements are routinely imposed on planning permissions and could easily have been used to assuage concerns about the Works, they do not appear to have been considered in the Application. This is unreasonable in the circumstances and contrary to guidance in Scottish Government Circular 4/1998 (Planning Conditions).

SPECIFIC RESPONSES TO THE REASONS FOR REFUSAL

REASON FOR REFUSAL 1: THE FENCE AND CAR PARK BY VIRTUE OF ITS SCALE AND DESIGN WILL BE VISUALLY DETRIMENTAL TO RESIDENTIAL AND THE VISUAL AMENITY OF THE C-LISTED BUILDING. THE CHOICE OF MATERIALS (TIMBER FENCE BOARDS AND LIGHT GREY GRAVEL) IS NOT ACCEPTABLE AND WOULD HAVE AN ADVERSE IMPACT ON EXISTING RESIDENTS' AMENITY. THE PROPOSAL IS THEREFORE CONTRARY TO WEST LOTHIAN LOCAL DEVELOPMENT PLAN POLICIES DES 1 (DESIGN PRINCIPLES) AND ENV 28 (LISTED BUILDINGS), NATIONAL PLANNING FRAMEWORK 4 POLICIES 16G AND 16H AND GUIDANCE GIVEN IN THE EXTENSION AND ALTERATION DESIGN GUIDE 2020.

1. ESTABLISHED AND INCIDENTAL USES

The lawfulness of the use of the Site as a care home for children has been established and is not in question (see Certificate of Lawfulness reference 0917/CLU/22). The car park use and road access at both the front (along the B9080) and rear (leading to Canal Court) of the Site have been in use for a long period of time (see **Appendix 3** showing car park and vehicular access since at least 2009).

The car park use and fencing are incidental to and reasonably necessary for the lawful operation of a care home. They would not be necessary were the Site not used as a care home.

Fencing is also necessary for the safety and wellbeing of neighbours and Seamab residents alike, to clarify boundaries and prevent younger Seamab residents from leaving the Site unattended. The need

for the fence is enhanced by the age and vulnerability of Seamab's residents and especially important given the land adjacent to the Site to the west is currently unoccupied, unbuilt land abutting a B-road.

2. POSITIVE AMENITY IMPACT OF FRONT CAR PARK

Once full occupancy is achieved, the maximum number of cars likely to access the Site on a regular basis is 6. If most of these cars are diverted to the car park to the front of the Site, movements to the rear car park will reduce significantly.

As shown in **Appendix 3**, neighbours fronting the B9080 do not take access to the pavement along the front elevation. The land to the west of the Site is unbuilt, unoccupied, unused private land. The building to the east of the Site fronts on to Canal Court and its rear elevation runs along the B9080 and has no doors or other means of access to the pavement.

Pedestrian use of the pavement next to the B9080 is very low. Residents taking pedestrian and vehicular access to pavements, roads and turning areas do so to the rear of the Site in Canal Court. As such, diverting traffic to the front car park will greatly improve the amenity of Canal Court residents. This material consideration appears not to have been taken into account in the Council's decision.

3. NO MATERIAL VISUAL IMPACT

In terms of the timber used for the fence, the Works comply with the Design Guide 2020 cited by the Council: paragraph 2.42 of the Guide states "Fencing material should usually be timber".

Fencing and gravel identical in style to the Works are already used around neighbouring properties (see images at **Appendix 2** and **Appendix 4**). It is inconsistent and irrational for it to be unacceptable for the Site if it is in-keeping with the existing styles for individual houses and communal spaces in the area.

Regardless, no residential or visual amenity is compromised by the fencing and gravel as neither is visible from Canal Court to the rear of the Site, which is the only viewpoint for residents (see **Appendix 1** and **Appendix 3**). Further, the fence is set further back from the B9080 within the curtilage of the Site than previous boundary treatments, which reduces its visual impact.

4. PROCEDURAL ERRORS

It is not clear why impacts on the C-listed building were not considered in the context of a Listed Building Consent ("**LBC**") application instead of the present Application. The LBC statutory tests for approval are specific to heritage assets and more appropriate in the circumstances. The Site has been subject to LBC applications in the past, including for the recent erection of external lighting and timber gate and wall (reference 0235/LBC/23).

Consideration of the Works under the LBC regime would also be more likely to involve consultation with historic asset experts who could provide specialist input into the final design, finishes and materials for the Works. The Applicant sought to engage with the Council previously on potential amendments to details of the Works but has not received any substantive response.

5. INCORRECT INTERPRETATION OF NPF 4

Non-compliance with Policy 16 of NPF4 is cited as a reason for refusal. However, there is no need for the Works to comply with it. Policy 16 relates to development by householders and the Site is not a

household for those purposes as its residents are children. The maximum occupancy of the Site is 4 x children receiving support from staff. The staff work in shifts through the day and night, in rotation, and are not resident at the Site. The relationships between the staff and the residents are purely professional. Case law holds that children living alone cannot by themselves form a "household". As no adults are resident at the Site, it is not a "household", so Policy 16 does not apply. Further, see *Norfolk District Council v First Secretary of State* [2003] EWHC 157 Admin, 2003 WL 117107.

In any event, consideration of amenity impacts could be covered by the LBC process, as set out above, so there is no need to rely on Policy 16. No other NPF 4 policies appear to be relevant to the Application. As outlined elsewhere in this Statement, the Works would easily comply with relevant retained Local Development Plan policies had all material considerations been taken into account (including the possible use of planning conditions).

REASON FOR REFUSAL 2: THE USE OF THE VEHICLE ENTRANCE ON THE B9080 WILL CREATE A SAFETY RISK TO ROAD USERS. THE PROPOSAL IS THEREFORE CONTRARY TO WEST LOTHIAN LOCAL DEVELOPMENT PLAN POLICY DES 1(C) (DESIGN PRINCIPLES).

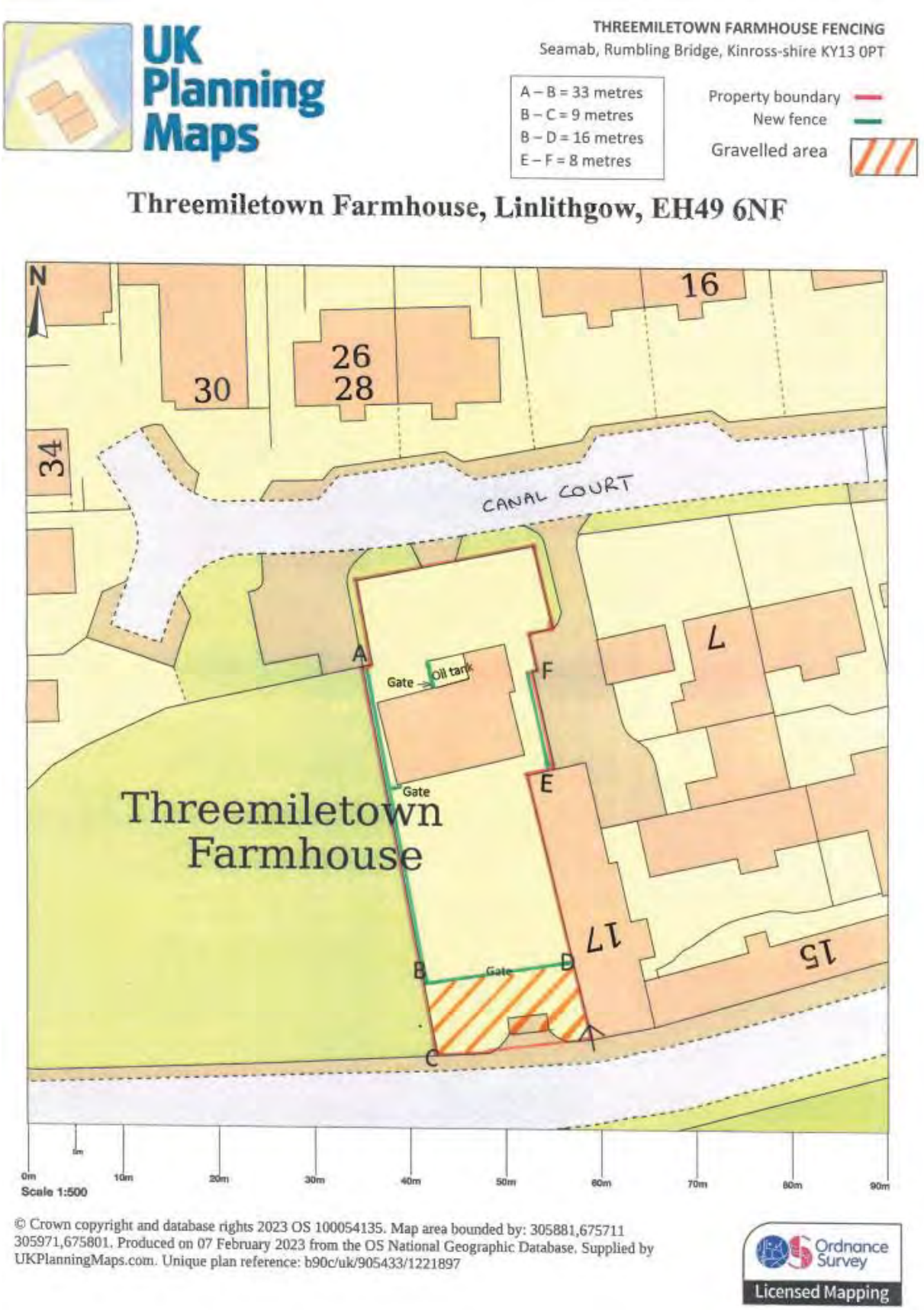
As shown in **Appendix 3**, the area to the front of the Site has been used as a car park, with vehicular access taken directly from B9080 to the Site since at least June 2009. As such, the proposal cannot be said to "create" a safety risk.

The B9080 is not a dangerous road in any event. Police Scotland's Raw Collision Datasheet shows 754 collisions were recorded in the West Lothian administrative area from January 2020 to March 2023. Not one of these were in the area of the Site. In any event, out of an abundance of caution and on its own initiative, the Applicant has erected signage on the inside of the fence to urge drivers exiting the Site to "Stop" and "Turn Left" on to the B9080.

The Works actually enhance and improve road safety. As noted above, the fence prevents children from running on to the road. The gravel means vegetation will not grow so as to block sightlines. On a right hand turn out of the Site, this represents an improvement from the position shown in 2011 (**Appendix 2**). Also as noted above, using the front car park will reduce vehicular movements to and from Canal Court. This will in turn improve safety as pedestrians infrequently use the pavement along the B9080 but are constantly present around Canal Court.

Davidson Chalmers Stewart LLP
17 August 2023

Appendix 1
Approved Plan showing the Site and the Works



CJAC/001/001_3879591_2

Appendix 2
Google Earth Images Showing Views from Canal Court to the rear of the Site

Image taken April 2023, showing the Site on the left.

Image taken April 2023.

Image taken April 2011

Image taken September 2010.

Image taken March 2009.

Appendix 3
Google Earth Images showing vehicular access to the Site from B9080

Image taken April 2023.

Image taken March 2021

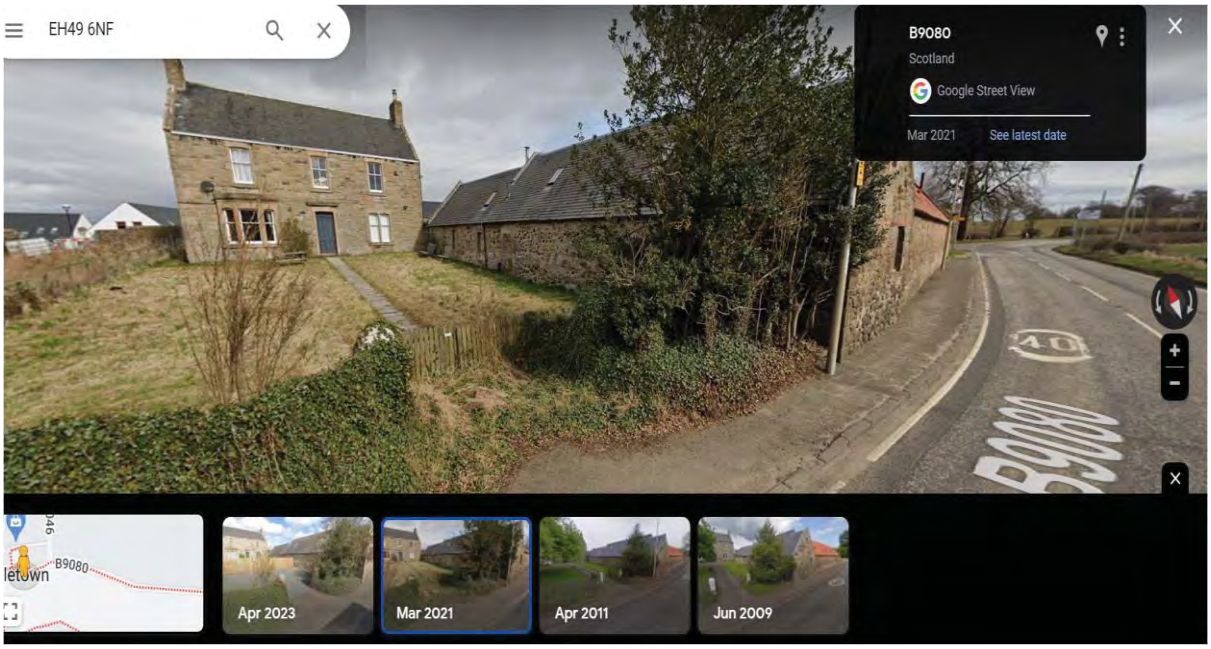


Image taken April 2011.

Image taken January 2009.

Appendix 4
Google Earth Images: Materials Used at Neighbouring Properties

Image showing view north from 28 Canal Court, taken April 2023. Note timber fencing around all three properties shown in this image and grey gravel in the communal area by the lamppost.

Image showing view south towards 1 Canal Court, taken April 2023. Note timber fencing and grey gravel.

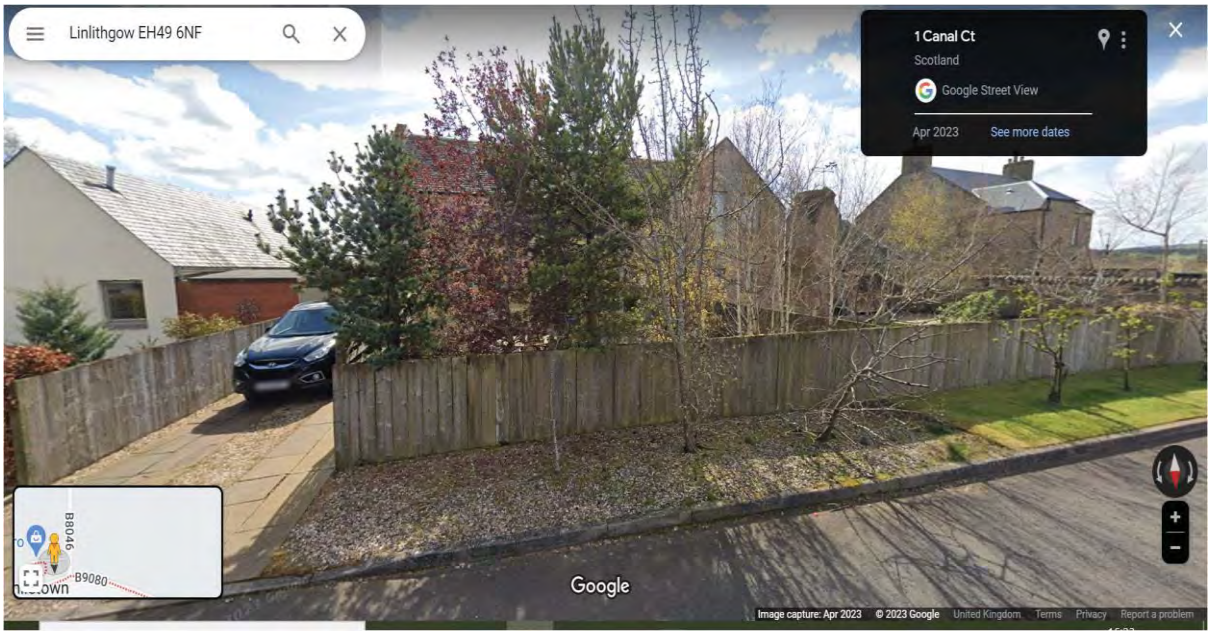


Image showing view towards south towards 28 Canal Court (right) and the Site (left), taken April 2023. Note timber fencing around 28 Canal Court and grey gravel in the communal areas.

Section 3 contains the following documents

- Procedure Note
- Response(s) to the Procedure Note from the Appointed Person, SEAMAB's legal representative, the council's Transportation Service and local neighbours
- Comments to Procedure Note response(s)
- Draft Conditions

LOCAL REVIEW BODY

PROCEDURE NOTICE

APPLICATION NO.0130/H/23 – TOWN AND COUNTRY PLANNING (SCHEMES OF DELEGATION AND LOCAL REVIEW PROCEDURE) (SCOTLAND) REGULATIONS 2008
APPLICATION NO.0130/H/23 – ERECTION OF A 1.9M HIGH FENCE AND GATES AND FORMATION OF A GRAVEL SURFACED CAR PARK (IN RETROSPECT), THREEMILETOWN FARMHOUSE, THREEMILETOWN, LINLITHGOW

The Local Review Body, at its meeting on 30 August 2023, decided to accept the submission made by Davidson, Chalmers & Stewart dated 17th August 2023, on behalf of the applicant, as the submission raised new information that was considered to be material to the determination of the review application.

The LRB determined that, under Regulation 15(1) of the Town and Country Planning (Schemes of Delegation and Local Review Body Procedure) (Scotland) Regulations 2013, further information should be provided to it by means of written submissions.

The Local Review Body agreed to continue the review application to request the following information: -

From the thirteen objectors to the review application (within 14 days of the date of this Procedure Note): -

1. Representations on the new information contained within the supporting statement submitted by Davidson, Chalmers & Stewart (solicitors acting on behalf of the applicant SEAMAB), dated 17th August 2023

From the Appointed Person and the applicant's agent (Davidson, Chalmers & Stewart Solicitors (within 14 days of the date of this Procedure Note) as to: -

1. The protected characteristics that it is considered are applicable in terms of the exercise of the Section 149 duty under the Equality Act 2010 (having particular regard to the exceptions set out in schedule 18 of the Equality Act 2010) and the potential equality impacts if the proposal is refused or approved;
2. The interpretation of policy 16 of NPF4 regarding householder applications in the context of the current use of the house and the application of policy 16 of NPF4 to the determination of the review application; and
3. Applicability of policies 7 and 14 of NPF4 to the determination of the review application and whether the development proposed complies with those policies, with this information also obtained from the interested parties.

Davidson, Chalmers & Stewart solicitors to provide copies of all caselaw cited within the submission.

From the council's Transportation Service (within 14 days of the date of this Procedure Note): -

1. Comments on road safety issues and the proposed access contained in the supporting statement submitted by Davidson, Chalmers & Stewart (solicitors acting on behalf of the applicant SEAMAB), dated 17th August 2023

The information is to be sent to the Clerk to the Local Review Body at val.johnston@westlothian.gov.uk **and to the other parties noted below** so that they have the opportunity to make comments in response: -

1. Mahlon Fautua (on behalf of the Appointed Person) at email address Mahlon.fautua@westlothian.gov.uk
2. Thirteen objectors – the Clerk will ensure this process is completed
3. Jacqueline Cook (on behalf of the Applicant (SEAMAB) at emails address jacqueline.cook@dcslegal.com

The information is to be provided on or before Tuesday 19 September 2023

The other parties will have 14 days from the date of receipt of any such information to make comments on it, but not to raise new matters (all comments to be submitted in writing via email) to the clerk to the Local Review Body at val.johnston@westlothian.gov.uk

Lesley Montague (Legal Adviser to the Local Review Body)
West Lothian Council
West Lothian Civic Centre
Howden South Road
Livingston
EH54 6FF

5 September 2023

Lesley.montague@westlothian.gov.uk

Dear Val,

Thanks for the opportunity to comment on the ongoing application **TOWN AND COUNTRY PLANNING (SCHEMES OF DELEGATION AND LOCAL REVIEW PROCEDURE) (SCOTLAND) REGULATIONS 2008**

APPLICATION NO.0130/H/23 – ERECTION OF A 1.9M HIGH FENCE AND GATES AND FORMATION OF A GRAVEL SURFACED CAR PARK (IN RETROSPECT), THREEMILETOWN FARMHOUSE, THREEMILETOWN, LINLITHGOW

REASON FOR REFUSAL 2: THE USE OF THE VEHICLE ENTRANCE ON THE B9080 WILL CREATE A SAFETY RISK TO ROAD USERS. THE PROPOSAL IS THEREFORE CONTRARY TO WEST LOTHIAN LOCAL DEVELOPMENT PLAN POLICY DES 1(C) (DESIGN PRINCIPLES).

re

The B9080 is not a dangerous road in any event. Police Scotland's Raw Collision Datasheet shows 754 collisions were recorded in the West Lothian administrative area from January 2020 to March 2023. Not one of these were in the area of the Site. In any event, out of an abundance of caution and on its own initiative, the Applicant has erected signage on the inside of the fence to urge drivers exiting the Site to "Stop" and "Turn Left" on to the B9080.

Comments Andy Sneddon

I personally witnessed the aftermath of an RTA outside the farmhouse front entrance on 31 August 2023.

Police Scotland were in attendance.

The scene contained 2 SUV cars badly damaged. One male clearing accident debris from close to the front of the farmhouse.

One SUV on the pavement a few yards west of the farmhouse. The driver was female and the passenger was an infant in a car seat.

This type of reported and witnessed event, I agree, may be less common than the unreported near misses that go on as wholly predictable events known well to locals.

Since risk exists therefore and the severity does not bear thinking about, perhaps Davidson Chalmers Stewart LLP would like to withdraw point 2.

Since the cost is £120 to access that report and is beyond the public's budget, perhaps Davidson Chalmers Stewart LLP facilitate its release for general consumption?

As shown in Appendix 3, the area to the front of the Site has been used as a car park, with vehicular access taken directly from B9080 to the Site since at least June 2009. As such, the proposal cannot be said to "create" a safety risk.

As the above is asserted only by Davidson Chalmers Stewart LLP, perhaps they could supply factual accounts of this unsubstantiated claim and their sources?

The increase in traffic and construction work volume since 2009 and supporting data would be welcome also.

Further, inspection of the remnants of the signage posts exiting the junction of the B8046 onto the B9080 tells its own story. they have been smashed into several times, I do not know if it was reported to the police unfortunately.

Thanks in advance

Andy Sneddon
12 Canal Court
Threemiletown
EH49 6LZ

Dear Madam

In response to the attached attachment from Davidson Chalmers Stewart, my points are the following –

Their point 1 – I fail to see how their own failures to be honest and upfront about the intended alterations they clearly knew they were going to make to the listed property contravene the 'Equality Act 2010'. They clearly knew what they wanted to do in regards to the fencing and car park from the outset. If anything, there are several people living here who fall under the Disability Discrimination Act's protected characteristics and whom Seamab and the Council should have considered before issuing a Certificate of Lawful Use.

Their Point 2 – they refer to a 'small minority of residents' being opposed and vocal- this is factually incorrect and out right lying on their part. Everyone in Canal Court feels let down, aggrieved and angry at how Hopetoun and Seamab have conducted this whole thing. Furthermore, there has been no verbal abuse and this is a slanderous claim. There has been no opportunity for constructive input on Seamab's part. We found Stewart Proven to be unhelpful, rude and not willing to engage sensibly.

Their point 3 – The car park to the front of the building is needed by them as they have clearly lied about how many cars come to and from the property and we have experienced as much as 10 cars one day. So on a busy day, they will need to use Canal Court and the front car park. Also I am surprised that they do not deem the B9080 a dangerous road when there are many accidents on this stretch of road and only a few weeks ago one of Seamab's cars pulled out in front of me (turning right when they said they would not do this) causing me to brake to avoid them. I would have thought and hoped that the safety of the children is the upmost priority and I fail to see how this is so when they continue to turn out on to this road. Are they also so naïve that the think every accident is reported to Police Scotland.

Also, the children have been seen out near the main road so I do not understand their comment about the fence preventing children running on the road.

I trust this confirms my position.

Regards

Fiona Irving

Subject: Re: Notice of Review Application No.0130/H/23 (Erection of a 1.9m fence & gates & formation of a gravel surfaced car park, Threemiletown Farm, Threemiletown) - [OFFICIAL]

Hello and thank you for your email. As requested, here are our comments based entirely on our experiences with Seamab to date:

Upon reading the letter, our first impression was that of a rant from someone who was not used to being told no. Naturally we are affronted by its contents, but not entirely surprised. In our opinion, Seamab have approached this business venture here in Canal Court with an entirely selfish attitude, and no consideration has been shown to the local residents whatsoever, despite their claims to the contrary. There has been no attempt at meaningful dialogue on their part. Canal Court has been in existence since 2006, having been initially designed for the over 55s. There are approximately 28 properties here, many of whom belong to older folk with serious health conditions, ourselves included. Naturally we were shocked, concerned and dismayed to discover, by chance, that Seamab intended to run a care home facility right in the heart of our hamlet, but the current planning process gave us no opportunity whatsoever to express these legitimate concerns. It has been very clear from the outset Seamab consider us to be mere NIMBYISTS and have treated us as such, but this is most certainly not the case. They have come here and imposed this facility upon us against both our will and advice, and their modus operandi appears to be their way or no way! We considered our concerns to be valid, especially in light of the fact many of us have experience of working in such an establishment and/or with such troubled residents. There appeared to have been little in the way of due diligence when considering the location, evident in the meeting with Seamab's CEO, who displayed a worrying lack of knowledge regarding suitability of the area. The young people being relocated here are isolated, both in terms of no facilities/amenities and no peers of a similar age. They have also to be transported on a daily basis for educational purposes to and from Rumbling Bridge, a journey taking approximately 45 minutes each way. Little wonder they need so many cars and car parks to put them all in. Where is the sense in this? Unfortunately these concerns have not been addressed by Seamab and hence we find ourselves in this unpleasant situation whereby the lives of the local residents have been impacted negatively to such an extent that some have moved and others are actively considering doing so, ourselves included.

Applicant circumstances and protected characteristics of site residents:

On point 1 "Seamab provides a vital community function on the site" - What is this exactly as it is of no benefit to the long standing residents of Canal Court? This also applies to their claim of "providing a high quality benefit to the general public"? Canal Court is totally unsuited to such an establishment and for a variety of reasons.

As far as the Equality Act 2010 is concerned, we too have the same rights, in particular for residents such as ourselves who are disabled. We refer in particular to "Taking steps to meet the needs of people from protected groups where these are different from the needs of other people." A basic requirement for us is the right to live a peaceful life, but are being denied this by the arrival of Seamab and its expanding entourage within our quiet residential development, bringing with them a notable increase in traffic and associated

noise, a litter problem never experienced before and, more importantly, a risk to those of us who are elderly and/or disabled. By Seamab's own admission, its residents are NOT supervised 24/7 and are therefore free to roam our neighbourhood unsupervised. There are no facilities at all here for these young people who have such challenging and complex social, emotional and behavioural needs, and common sense will tell you this is a very bad combination. Were we selected because we are easy targets on account of our vulnerability and consequent inability to fight back? Is it the hope that we will remain hidden indoors too frightened to speak out for fear of retribution? The peace and tranquility of our wee hamlet, something prized by many of us who moved here in order to improve both our lives and well being, have been completely shattered since the secretive arrival of Seamab into our midst. They claim to be proponents of living in harmony with neighbours - well we have seen none of that. In fact, they have simply taken over Canal Court without a second thought for its long standing residents and, by all accounts, have shown nothing but arrogance and contempt for the rest of us. Naturally they will claim otherwise but we know the truth of the matter and it is extremely unpleasant.

General errors in the determination of the application:

On point 2 "They have aggressively objected to all proposals at the Site, no matter how minor. Some individuals have been particularly vocal in their opposition with instances of people being abused verbally" - Who are Seamab referring to, what was said and when? We have most definitely NOT been abusive and are outraged at this accusation. We have had no direct contact with Seamab since the meeting requested by residents on December 1st last year when Seamab's CEO made it abundantly clear he was not interested in engaging with us as the lease on the property had already been signed some months prior to this.

Vexatious Objections point 2 "There were no prior complaints about the operation of the Site or disruption caused by the Works (and any construction works have been completed at the date of this Statement, in any event). - Is Seamab referring to the initial work done preceding making the Farmhouse fully operational? If this is the case then we, as local residents, welcomed the refurbishment of the building as it was long overdue in order to fit in with the attractive, well maintained properties surrounding it.

Specific responses to the reasons for refusal:

Established and incidental uses: "The car park use and road access at both the front (along the B9080) and rear (leading to Canal Court) of the Site have been in use for a long period of time (see Appendix 3 showing car park and vehicular access since at least 2009)." - The front access has NOT been in use since 2009 so this is incorrect. We know this on account of there only being a single track of stone slabs leading from the front door to the gate, with grass on either side, and totally unsuited to vehicles.

"Fencing is also necessary for the safety and wellbeing of neighbours and Seamab residents alike, to clarify boundaries and prevent younger Seamab residents from leaving the Site unattended." - We were told these young people have challenging and complex social, emotional and behavioural needs, and as such they would be supervised at all times - again this is NOT true. This now leaves the existing residents of Canal Court in a very unnerving

situation, as we do not know who is roaming our cul-de-sac, why or when, especially in light of the many and serious issues surrounding these young people. To exacerbate the situation, we are rapidly heading into winter and long dark nights. Let's be honest, these young people are not being relocated here because they are trouble free but exactly the opposite. That would explain why there has been a need for such high and extensive fencing as these young people are, by admission, free to roam for periods of time, not only within Canal Court but immediately next to a very busy and dangerous main road. What it the sense in this?

Positive amenity impact of front car park: "Once full occupancy is achieved, the maximum number of cars likely to access the Site on a regular basis is 6." - There are apparently only two residents currently living in the Farmhouse, yet there are many more than six cars parked and, on occasions, as many as eleven! All domestic properties within Canal Court have parking for no more than two vehicles. What other so called typical domestic residence requires six or more vehicles, including SUVs and minibuses? None, as they are not being run as a business! Why do they need so many vehicles for so few staff and residents? This flies in the face of protecting the environment, instead they are polluting our air with their fleet of vehicles, many of which are extremely large. What kind of example are they setting to both those who live within the Farmhouse and those of us in the wider community? Again, they appear to show no consideration for our health or the health of those in their care.

"Pedestrian use of the pavement next to the B9080 is very low." - When did they undertake such a survey? We have lived here for six years and this pavement is used on a daily basis by the public for a variety of reasons, including using public transport, dog walking, posting mail, etc.

"Diverting traffic to the front car park will greatly improve the amenity of Canal Court residents" - What do they mean? We interpret this as an admission that the residents of Canal Court are already being subjected to an excessive amount of both vehicles and their occupants as the situation stands, and all as a result of Seamab running a business in the middle of a residential area.

No material visual impact -

"No residential or visual amenity is compromised by the fencing and gravel as neither is visible from Canal Court to the rear of the Site, which is the only viewpoint for residents" - Most residents use this road and/or pavement on a daily basis so both ARE visible.

5. Incorrect interpretation of NPF 4 -
"Policy 16 relates to development by householders and the Site is not a household" - We agree, it's NOT a household, but a business providing residential care.

Reason for refusal 2 - "The B9080 is not a dangerous road in any event" - There was yet another accident as recent as last week! These dangers were confirmed by West Lothian Council in their recent inspection stating "The use of the vehicle entrance on the B9080 will create a safety risk to road users."

"The Works actually enhance and improve road safety." - Please explain as it does not meet minimum official safety requirements?

"Pedestrians infrequently use the pavement along the B9080 but are constantly present around Canal Court." - This is incorrect regarding the B9080. They are not pedestrians within Canal Court, but most likely residents and visitors, including many young children who are not used to the sudden increase in volume of traffic to this quiet cul-de-sac as a result of Seamab taking over.

We are extremely concerned at the tone used by Seamab towards us long standing residents, and wish to reiterate the point that they have made NO attempt to engage with us despite their claims to the contrary. We feel there is a common thread running through their claims - that of misinformation - and this is based on our experience of having them set up shop within our community and with no attempt at consultation. They will, no doubt, argue that this was not compulsory, but surely considering the massive permanent upheaval they have caused to our lives, this would have been the instinctive actions of so called "good neighbours", something they seem to prize so highly yet, in reality, are averse to. We, as residents, have been subjected to a "their way or no way" treatment at their hands. Surely this is a recipe for disaster? Certainly, to date, this is proving to be the case.

One final point to bear in mind: have Seamab involved a firm of solicitors because they didn't get their way with these alterations which, let us not forget, were done without the relevant permissions in place? No doubt this will come at a hefty financial cost to Seamab, a charity who could, in our opinion, have better spent this money on caring for their residents!

Regards,

Robin & Dianne Risbridger
3 Canal Court
Threemiletown
Linlithgow
EH49 6LZ

Dear Val,

APPLICATION NO.0130/H/23 – TOWN AND COUNTRY PLANNING (SCHEMES OF DELEGATION AND LOCAL REVIEW PROCEDURE) (SCOTLAND) REGULATIONS 2008 APPLICATION NO.0130/H/23 – ERECTION OF A 1.9M HIGH FENCE AND GATES AND FORMATION OF A GRAVEL SURFACED CAR PARK (IN RETROSPECT), THREEMILETOWN FARMHOUSE, THREEMILETOWN, LINLITHGOW

1. The protected characteristics that it is considered are applicable in terms of the exercise of the Section 149 duty under the Equality Act 2010 (having particular regard to the exceptions set out in schedule 18 of the Equality Act 2010) and the potential equality impacts if the proposal is refused or approved;

No specific detail or justification was provided within the supporting statement with the planning application of the protected characteristics. Nonetheless, the planning assessment was undertaken in the knowledge that the occupants of the house would be children under care.

It is considered that there is no conflict with section 149 Duty as there is no objection to the outdoor space and garden areas within the site.

2. The interpretation of policy 16 of NPF4 regarding householder applications in the context of the current use of the house and the application of policy 16 of NPF4 to the determination of the review application; and

The use of the property is considered to fall within Class 9 – Houses of The Town and Country Planning (Use Classes) (Scotland) Order 1997.

As such this was submitted and processed as a householder application.

See also attached decision from Court of Session relevant to use of the house: *Macintyre and Others v The Scottish Ministers [2021]*.

Policy 16g and 16h of NPF4 (below) refer to criteria to which householder development is assessed and set in the handling report.

g) Householder development proposals will be supported where they: i. do not have a detrimental impact on the character or environmental quality of the home and the surrounding area in terms of size, design and materials; and ii. do not have a detrimental effect on the neighbouring properties in terms of physical impact, overshadowing or overlooking.
h) Householder development proposals that provide adaptations in response to risks from a changing climate, or relating to people with health conditions that lead to particular accommodation needs will be supported.

The current use and occupants were not considered to be material in the assessment of the application.

3. Applicability of policies 7 and 14 of NPF4 to the determination of the review application and whether the development proposed complies with those policies, with this information also obtained from the interested parties.

The building is C listed.

Policy 7(a) does apply to the development.

Development proposals with a potentially significant impact on historic assets or places will be accompanied by an assessment which is based on an understanding of the cultural significance of the historic asset and/or place. The assessment should identify the likely visual or physical impact of any proposals for change, including cumulative effects and provide a sound basis for managing the impacts of change.

The development is considered contrary to Policy 7(a) as the overall impact of the fence and the car park are stark in contrast with the existing building which detract from the character of the listed building.

Policy 14 does apply to the development.

The development is considered contrary to Policy 14(c) in that the proposal in particular the fence is poorly designed and detrimental to the amenity of the surrounding area.

Regards,

Mahlon Fautua
Senior Planner
Development Management

FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2021] CSIH 10
XA125/19

Lord President
Lord Menzies
Lord Pentland

OPINION OF THE COURT

delivered by LORD MENZIES

in appeal under section 239 of the Town and Country Planning (Scotland) Act 1997 by

ALASTAIR MACINTYRE AND OTHERS

Appellants

against

THE SCOTTISH MINISTERS

Respondents

_____

Appellants: Burnet QC; DAC Beachcroft Scotland LLP (for Levy & McRae, Solicitors, Glasgow)
Respondents: N McLean (sol adv); The Scottish Government Legal Directorate

2 February 2021

The Issue

[1] The issue in this statutory appeal is whether the proposed use of a house as a dwelling house by not more than four looked after children living together with 24 hour care provided by two adult staff falls within Use Class No. 9 of the Schedule to the Town and Country Planning (Use Classes) (Scotland) Order 1997 ("the Order").

Background

[2] In March 2019 the Church of Scotland, through its Social Care Council (known as CrossReach) made an application to Stirling Council for a certificate of lawfulness of a proposed use or development in terms of section 151 of the Town and Country Planning (Scotland) Act 1997. The application related to Drumbrock House, Old Mugdock Road, Strathblane. This property was being renovated and upgraded having been unoccupied for some time. It would have four bedrooms upstairs and a communal living room and dining kitchen on the ground floor. It sits in relatively large garden grounds within a quiet residential area. The appellants, who live next door to Drumbrock House, objected to the application and expressed serious concerns about the proposal. By notice dated 19 June 2019 Stirling Council refused the application by the Church of Scotland.

[3] The Church of Scotland appealed against the decision by Stirling Council to the Scottish Ministers. By decision dated 16 October 2019 the reporter appointed by the Scottish Ministers allowed the appeal and granted a certificate of proposed lawful use. It is against this decision that the appellants have appealed to this court in terms of section 239 of the 1997 Act.

The relevant legislation

[4] The Town and Country Planning (Scotland) Act 1997 includes the following provisions.

[5] Section 26(2) provides as follows:

> "2 The following operations or uses of land shall not be taken for the purposes of this Act to involve development of the land - …
>
> (f) in the case of buildings or other land which are used for a purpose of any class specified in an order made by the [Scottish Ministers] under this section, the use of the buildings or other land or, subject to the provisions of

the order, of any part of the buildings or the other land, for any other purpose of the same class;".

[6] Section 151 provides as follows:

"151 Certificate of lawfulness of proposed use or development

(1) If any person wishes to ascertain whether –

(a) any proposed use of buildings or other land, or

(b) any operations proposed to be carried out in, on, over or under land,

would be lawful, he may make an application for the purpose to the planning authority specifying the land and describing the use or operations in question.

(2) If, on an application under this section, the planning authority are provided with information satisfying them that the use or operations described in the application would be lawful if instituted or begun at the time of the application they shall issue a certificate to that effect, and in any other case they shall refuse the application.

(3) A certificate under this section shall –

(a) specify the land to which it relates,

(b) describe the use or operations in question (in the case of any use falling within one of the classes specified in an order under section 26(2)(f), identifying it by reference to that class),

(c) give the reasons for determining the use or operations to be lawful, and

(d) specify the date of the application for the certificate. …".

[7] The Town and Country Planning (Use Classes) (Scotland) Order 1997 provides in Article 3 as follows:

"3- Use Classes

(1) Subject to the provisions of this Order, where a building or other land is used for a purpose in any class specified in the Schedule to this Order, the use of that building or that other land for any other purpose in the same class shall not be taken to involve development of the land.

(2) References in paragraph (1) to a building include references to land occupied with the building and used for the same purposes.

(3) A use included in and ordinarily incidental to any use in a class shall not be precluded from that use by virtue of being specified in another class.
…".

Paragraphs 8 and 9 of the Schedule to the Order provide as follows:

> "Class 8. Residential institutions
>
> Use –
>
> (a) for the provision of residential accommodation and care to people in need of care other than a use within class 9 (houses);
>
> (b) as a hospital or nursing home; or
>
> (c) as a residential school, college or training centre.
>
> …
>
> Class 9. Houses
>
> Use –
>
> (a) as a house, other than a flat, whether or not as a sole or main residence, by –
>
> (i) a single person or by people living together as a family, or
>
> (ii) not more than five residents living together including a household where care is provided for residents;
>
> …".

[8] The broadly equivalent provisions applicable in England are to be found in Article 2 and paragraph 3 of the Schedule to the Town and Country Planning (Use Classes) Order 1987/764. These are as follows:

> "Class C3. Dwellinghouses
>
> Use as a dwelling house (whether or not as a sole or main residence) by –
>
> (a) a single person or by people to be regarded as forming a single household;
>
> (b) not more than six residents living together as a single household where care is provided for residents; or
>
> (c) not more than six residents living together as a single household where no care is provided to residents (other than a use within Class C4).
>
> Interpretation of Class C3
>
> For the purposes of Class C3(a) "single household" is to be construed in accordance with section 258 of the Housing Act 2004."

The reporter's decision

[9] The reporter observed that it was important to note that in this case the appeal was

not assessed on its planning merits but rather on whether the intended use would be lawful. She stated (at paragraph 3):

> "Whilst neighbours raise other issues the determining issue in this case is whether the proposed use, to accommodate 4 children living together but cared for on a 24 hour basis by non-resident care workers, falls within the terms of Use Class 9. In the event that the proposed use would constitute a material change of use away from Class 9 then a certificate of lawful use could not be issued."

She found nothing conclusive to indicate that the children, who would live together and share communal facilities, could not be defined as residents living together as a household. However, the difference between the view of the Council and the Church of Scotland arises given the nature of the associated care provision. This would be provided on a shift basis and each shift would have three staff members with a wakened nightshift and a staff member sleeping over each night. The submissions indicate that internal rearrangement of the utility space downstairs would provide for a staff office and a single sleepover room with en suite facility. The Council took the view that the proposed care provision would add three additional occupants on a 24 hour basis bringing the total to seven and consequently outwith the terms of Class 9. Its decision also made reference to the professional nature of the care provision. The Church of Scotland relied on the fact that whilst there would be a sleepover facility for one carer, the staff members would not be residents. The reporter considered the pivotal question was whether the proposed staff members would be defined as "residents" and whether the presence of carers would amount to a material change of use. It was a matter of fact that the proposed care provision would have the effect of bringing the combined number of people living and working at the house to six during the night and seven during the day.

[10] The reporter noted the guidance in Scottish Government Circular 1/1998: Town and Country Planning (Use Classes) (Scotland) Order 1997. This states that:

> "In the case of small residential care homes or nursing homes, carers and residents will probably not live as a single household. That use will, therefore, fall into the residential institutions class, regardless of the size of the home".

It goes on to say that planning authorities should include "any resident staff in the calculation of the number of people accommodated". She accepted a degree of difficulty in interpretation between the terms of the Order and the wording of the Circular. She noted that the Order made a distinction between the residents living together as a household and the care being provided for those residents. She went on to observe:

> "Applying that distinction in this case indicates to me that the care providers can be considered separately from those resident at the property. The carers would not be resident as they would only attend the premises to work on a shift basis. The house would not be their residence even although the care would be provided on a 24 hour basis. Consequently, there would be 4 residents living together as a household where care would be provided for those residents."

She concluded that the planning authority's reasons in concluding that the proposed use would be unlawful are not well founded, and she found that the certificate should be granted.

Appeal to this court

[11] The appellants challenge the reporter's decision on three grounds, which are contained in paragraphs 9-11 of the appeal. These may be summarised as follows:

1. The reporter misunderstood, misinterpreted and/or misapplied the terms of the Order and the guidance in the Circular. She did not address the terms of paragraph 36 of the Circular, nor did she follow either of the approaches mentioned therein. If she regarded the carers as non-resident and/or not part of the household, the guidance indicates that the property is not being lived in as a single household and should be categorised as Use Class 8. If the carers are regarded as residents

and/or part of the household then they should be counted in the calculation and the number of residents would exceed that permitted in Use Class 9. The carers required to be present and they should therefore be included in the number of residents for the purposes of Use Class 9. The reporter erred in law.

2. The reporter failed to have regard to a relevant material consideration. She failed to take into account that the proposed use was for four children aged 8-14. She failed to give adequate reasons as to why children of that age could be regarded as functioning as a single household. The reporter did not take into account, *et separatim* failed to explain whether or not she considered it relevant to assess whether the children were capable of forming a single household or to be regarded as the only residents in the property in the absence of carers. In so failing the reporter erred in law.

3. The reporter failed to consider or to give adequate reasons for rejecting the submissions of the first appellant. The informed reader was left in real and substantial doubt as to whether or not the reporter has taken into account the representations of the appellant.

Submissions for the appellants

[12] Senior counsel for the appellants adopted his written note of argument and invited the court to quash the reporter's decision. The concept of people living together "as a family" or "as a household" are important elements in understanding the scope of Use Class 9. Persons living together as a family or household are regarded differently from residents in care homes where non-resident professional carers look after the residents. Children without adult supervision do not constitute a separate "household" in the absence

of carers. Children need to be looked after. They cannot run a house. They cannot be expected to deal with all the matters that go to running a home. As a matter of principle and approach children in residential care are regarded as needing full time care from an adult, someone to look after them, someone to run their lives for them and someone to make sure that the household operates as it should. Living together in a "household" in the context of Use Class 9 means more than merely the number of bodies – *North Devon District Council* v *First Secretary of State* [2004] 1 P & CR 38 at paragraphs 12 and 16. What constitutes a "household" is a question of fact and degree – *R (on the application of Crawley Borough Council)* v *Secretary of State for Transport and the Regions, Eve Helberg* [2004] EWHC 160 (Admin) at paras 31-34; *R (on the application of Hossack)* v *Kettering Borough Council* [2002] JPL 1206.

[13] If carers are regarded as residents or part of the household their presence should be included in the calculation of the number of members of the household. If they are not, and care is provided to children by non-residential carers, the appropriate classification of the use is as a "residential institution" under Class 8.

[14] With regard to the appellants' first ground of appeal, senior counsel pointed out that the certificate issued by the reporter stated that the reason for it was that:

> "As the 4 looked after children would live together as a single household and as the care provided would be on a non-resident basis, the proposed use would fall within the current use as a dwelling house under Class 9 …".

In stating this, the reporter misunderstood, misinterpreted and/or misapplied the terms of the Order and the Circular. Paragraph 36 of the Circular distinguishes between small residential care homes where the carers and residents will probably not live as a single household (and will therefore fall within Use Class 8) and instances where carers are resident and should therefore be counted in the calculation of the number of residents. The

reporter has followed neither of these approaches. If she regarded the carers as non-resident and/or not part of the household, the guidance indicates that the property is not being lived in "as a single household" and should be categorised as Use Class 8. If the carers are regarded as residents and/or part of the household then they should be included in the calculation of the numbers of residents, which would then exceed that permitted in Use Class 9. At paragraph 8 the reporter found that the combined number of people living and working in the house was six during the night and seven during the day. At paragraph 7 she found that the care providers would fulfil the parental role in the household to allow it to function as a household. She therefore found that in order to function as a household the carers required to be present. On either basis the use properly fell within Class 8. The reporter erred in law in her approach.

[15] With regard to the second ground of appeal, the reporter failed to have regard to a relevant material consideration, namely that the proposed use was for four children aged 8-14. Separately she failed to give proper, adequate and intelligible reasons as to why children of that age could be regarded as functioning as a single household; reference was made to *North Devon District Council* (*supra*) at paragraphs 16-19 where the age of the children was one of the major issues that led the court to conclude that they could not form a separate household in the absence of carers.

[16] Senior counsel accepted in answer to questions from the court that the interpretation for which he was arguing required Class 9(a)(ii) to be read as if it stated "not more than five residents living together in a single household", although the words "in a single household" were not actually mentioned. However, they were used in the application, and in the reporter's decision, and in the guidance in the circular. Properly construed, they should be read into the Order.

[17] Turning to his third ground of appeal, senior counsel submitted that it was not clear whether the reporter took into account the appellants' representations as to the proper interpretation of Use Class 9. The reporter referred at paragraph 3 of the decision to "neighbours" having raised other issues, but it was not clear whether she took account of the representations made on behalf of the appellants. The informed reader was left in real and substantial doubt as to whether the reporter had done so.

[18] In conclusion, senior counsel submitted that the guidance in relation to both the English and Scottish legislation makes the point that if there is not a single household, it does not matter how many people are in care. Paragraph 36 of the Scottish Circular only made sense if the concept of living in a single household was important. What would be the rationale for deciding that Use Class 9 comprehended five children living in a dwelling house supported by external carers, and only three children living there with resident carers? The statutory scheme was attempting to allow for a small family type arrangement; this was why carers had to be included in the numbers of residents. The reporter fell into error by including the carers for the purpose of making this a household, but excluding them when counting the numbers of residents.

[19] When the court asked what was the proper definition of a resident, and when did a carer become resident, senior counsel replied that this was a matter of judgement for the reporter; in order to form a household there needs to be a resident adult – a household cannot comprise just children. He submitted that four children with external care would clearly fall within Use Class 8; if the carers were staying in the house all night they could be regarded as resident, but if they were necessary to allow the household to function as a household they had to be included in the numbers. The reporter could not have it both ways.

Submissions for the respondents

[20] Mr McLean invited the court to refuse the appeal, and adopted his note of argument. What constitutes a household for the purposes of the Order is a question of fact and degree in every case – *R (on the application of Crawley Borough Council)* (*supra*) at paragraph 34; *R (on the application of Hossack*) (*supra*) at paragraphs 10 and 28. Whether or not a use falls within Class 9 is a matter of planning judgement, and so the court should only intervene if the decision is one which can be said to be *Wednesbury* irrational.

[21] In answer to the first ground of appeal, the reporter had correctly applied the terms of the Order, the Circular and the 1997 Act. She considered whether the proposed staff members would be defined as "residents" (paragraph 7) and concluded, exercising her planning judgement, that "the carers would not be resident as they would only attend the premises to work on a shift basis. The house would not be their residence even although the care would be provided on a 24 hour basis". The reporter having concluded there were no resident care staff did not need to include them within the number of people accommodated.

[22] In any event, *esto* the staff member sleeping at the property each night ought to be considered a resident, Class 9 of the Order provides for five residents living together. Accordingly, even if the reporter erred in her assessment of the number of residents, the proposed use fell within Class 9.

[23] With regard to the second ground of appeal, whether the children at the property could be regarded as a household for the purposes of the Order is a matter of fact and degree, requiring the reporter to exercise her planning judgement. It was to be noted that, in

contrast to the equivalent provision in England, the care of children is not excluded under Class 9 of the Order.

[24] The reporter undertook a site visit for the purpose of assessing whether the children could form a household. She observed that although being renovated the overall character of the property would not change. She reached the view that once occupied the property would be functioning as a household because: (1) the children would be living together in the property; (2) the children had a kitchen to cook in and a single dining room; (3) they would be involved in the household chores and tasks; and (4) the property would have the physical appearance of a house and would function as such. It would not have laundry, a catering kitchen, storage or any extent of staff or office accommodation typically associated with an institutional environment. There would be a staff office and an en suite sleepover room downstairs. She found nothing conclusive to indicate that the children, who would live together and share communal facilities, could not be defined as residents living together as a household. She was entitled to reach this view on the basis of her planning judgement.

[25] With regard to the third ground of appeal, the reporter gave proper and adequate reasons for her decision and dealt with the determining issues in an intelligible way. It is clear that she was aware of the representations made by the appellants; in any event, these representations were not of assistance in resolving the main or determining issues in the appeal. Even if the reporter gave inadequate reasons, the court should exercise its discretion not to reduce the decision.

[26] In all the circumstances, the court should refuse the appeal.

Discussion and decision

[27] The reporter was correct to note (at paragraph 3 of her decision) that in this case the

appeal is not assessed on its planning merits, but rather on whether the intended use would be lawful. She was also correct to identify the determining issue in this case as being whether the proposed use, to accommodate four children living together but cared for on a 24 hour basis by non-resident care workers, falls within the terms of Use Class 9. The determination of that issue involves a proper construction of Class 9 of the Order, applied to the facts of the present case. This does not appear to us to be an exercise involving planning judgement. It involves the interpretation of the law, and the application of it to the facts found by the reporter to be established.

[28] The relevant facts regarding the proposed use can be stated shortly. It is proposed that four children aged between 8 and 14 would be accommodated in the property, living together but cared for on a 24 hour basis by non-resident care workers. There are four bedrooms in the property, so each child would have sole occupancy of a bedroom. They would share communal facilities. Care would be provided on a shift basis, each shift would have three staff members with a wakened nightshift and a staff member sleeping over each night. The internal rearrangement of the utility space downstairs would provide for a staff office and a single sleepover room with en suite facility.

[29] On the basis of these facts, the Church of Scotland sought a certificate that the proposed use fell within Class 9 of the Order, and more particularly Class 9(a)(ii), namely "Use (a) as a house, other than a flat, whether or not as a sole or main residence, by … (ii) not more than 5 residents living together including a household where care is provided for residents".

[30] The word "including" is of importance in the construction of this provision. It makes it clear that what is provided for is a class, and a sub-class. The primary use is by not more than five residents living together. It then makes provision for a sub-class, by including a

household where care is provided for residents. What it does not do is require that the use must be by not more than five residents living together in a single household. Indeed, the term "single household" is nowhere mentioned.

[31] As can be seen from the provisions applicable in England (set out above), they are different from the Order in several important respects. Most importantly, the concept of a single household lies at the root of Class C3 of the English provision, and it is mentioned in each of the sub-paragraphs of the Class. It should also be noted that "care" is defined in paragraph 2 of the English Order as meaning "personal care for people in need of such care by reason of old age, disablement, past or present dependence on alcohol or drugs or past or present mental disorder, and in Class C2 also includes the personal care of children and medical care and treatment."

[32] References to care in Class 3 of the English Order do not therefore include the personal care of children. There is no such exclusion in the Scottish Order, Article 2 of which provides that "care" means "personal care including the provision of appropriate help with physical and social needs or support; and in Class 8 (residential institutions) includes medical care and treatment". There is no exclusion of care for children.

[33] It is therefore readily apparent that there are significant differences between the English and Scottish provisions. In the English provision, "care" is defined quite differently from the definition in the Scottish provision, and the term "single household" is construed in accordance with section 258 of the (English) Housing Act 2004. In the Scottish provision, the term "single household" is not used at all, and the word "household" is only used in the sub-class of Class 9(a)(ii). In view of these significant differences, we have not found any of the English authorities to which we were referred to be of any assistance to us.

[34] Class 9(a)(ii) of the Scottish Order governs the present appeal. It covers use "as a house, other than a flat, whether or not as a sole or main residence, by … not more than 5 residents living together". This includes a household where care is provided for residents. It does not apply only to use of a house by not more than five residents living together in a single household. The assessment is essentially an arithmetical calculation. The only question is the meaning of "residents", which is a term that is not expressly defined.

[35] In their submissions to this court, both parties devoted some time to the concept of a single household, and senior counsel for the appellants submitted that this was central to the proper interpretation of the Order. We consider that this is misconceived. If a house is used, whether or not as a sole or main residence, by five or fewer residents living together, we consider that it falls within Class 9. If it is used as a house, other than a flat, whether or not as a sole or main residence, by more than five residents living together, it does not fall within Class 9.

[36] We note that the reporter herself did touch in passing on the question of whether the children could be said to be living in a household. This may have been because of the way in which parties' submissions to her were presented, or it may have been because of the terms of Circular 1/1998. She indicated (at paragraph 11) that she found "a degree of difficulty in interpretation between the terms of the Use Classes Order and the wording of the Circular". We agree with this observation, and have sympathy with the reporter. Paragraph 36 of the Circular puts a gloss on the terms of the Order which is in our view quite unwarranted, and appears to proceed on the basis of a misinterpretation of the wording of the Order. It begins with the following statements:

> "The houses class groups together use as a house by a single person or any number of persons living together as a family and use as a house by no more than 5 persons living together as a single household … In the case of small residential care homes or

> nursing homes, staff and residents will probably not live as a single household. That use will, therefore, fall into the residential institutions class, regardless of the size of the home. The single household concept provides more certainty over the planning position of small group homes, which play a major role in the Government's community care policy aimed at enabling vulnerable people to live in touch with the community …".

[37] There is no support for these statements in the Order itself. There is no mention of a single household. There is no suggestion that use by no more than five persons living together must be as a single household. The single household "concept" is absent from the Scottish Order. This guidance might perhaps assist those looking at the English Order, but we can find no support for it in the Scottish Order.

[38] The guidance contained in a Government Circular such as Circular 1/1998 is just that – guidance. The terms of a circular published by the Government may amount to a material circumstance when a planning decision is being made involving the exercise of planning judgement. However, a Government Circular cannot supersede statutory provisions passed by the legislature, nor can it restrict, qualify or extend statutory provisions. Indeed, paragraph 1 of the introduction to the Circular correctly acknowledges that "where guidance is given amounting to an interpretation of the UCO, it should be borne in mind that only the courts can interpret the law authoritatively." As we have indicated, we do not agree with the guidance in its references to a "single household" in paragraph 36 of the Circular.

[39] The reporter in the present case did note the guidance in the Circular, but based her decision on her assessment of whether the use of the house, whether or not as a sole or main residence, would be by not more than five residents living together. She concluded that the care providers can be considered separately from those resident at the property. The carers would not be resident as they would only attend the premises to work on a shift basis. The

house would not be their residence even although the care would be provided on a 24 hour basis. Consequently, there would be four residents living together as a household where care would be provided for those residents.

[40] We consider that the approach taken by the reporter is consistent with and correctly applies the Order. We do not consider that the caring staff attending on a shift basis can properly be categorised as residents. Certainly, those members of staff who attend during the day would not in our view fall within the definition of a "resident", nor would a member of staff attending for the nightshift who is not provided with any bed or sleeping provision. We are inclined to the view that the single member of staff for whom a bed and en suite facilities are provided would also not fall to be categorised as a resident for the purposes of the Order. However, even if we are wrong in this, and that single member of staff is properly to be categorised as a resident, this would only bring the total number of residents to five, so the use would still fall within Class 9.

[41] For these reasons we do not consider that the reporter misunderstood, misinterpreted or misapplied the terms of the Order. We do not consider that she failed to take into account a material consideration, nor are we persuaded that there is any material lack of reasoning in her decision. We answer the questions of law in the appeal as follows: question 1 in the affirmative, and questions 2 to 5 in the negative. This appeal is refused.

Davidson Chalmers Stewart
Lawyers. For Business.

FURTHER INFORMATION STATEMENT

RESPONSE TO LRB PROCEDURAL NOTICE ISSUED 5 SEPTEMBER 2023

Council:	**West Lothian Council**
Matter:	**Local Review Body ("LRB") Appeal, Follow Up from Meeting 30 August 2023**
Applicant:	**Seamab Care and Education**
Application:	**0130/H/23**
Works:	**Timber fence and gates and gravel surfaced car park (in retrospect)**
Site:	**Threemiletown Farmhouse, Linlithgow, West Lothian EH49 6NF**

1. INTRODUCTION AND SUMMARY OF RESPONSES

BACKGROUND

- We are instructed by Seamab to respond to the LRB Procedural Notice issued on 5 September 2023. A summary of key points is in the table below, with details provided in **Sections 2 – 4**.
- This Further Information Statement ("**FIS**") refers to a number of other documents:
    - Care Inspectorate Report dated March 2022 relating to an existing Seamab facility in Kinross, referenced at paragraph 2.5 below and provided as **Appendix 1;**
    - Court judgments listed at **Section 5** are supplied in a separate ZIP folder, to be submitted with this FIS;
    - materials which are readily available in the public domain (such as legislation, statutory documents, local, Scottish and UK government guidance, policy documents) are not provided, for brevity;
    - this FIS is intended to be read with the Supplementary Statement of Support previously submitted to the Council on behalf of Seamab on 17 August 2023 (the "**SSS**").
- Unless otherwise stated, defined terms below have the same meanings as given to them in the SSS and references to statute are to the Equality Act 2010.

SUMMARY OF RESPONSES

	INFORMATION REQUESTED	SUMMARY OF APPLICANT RESPONSE
1	**Equality Act 2010** The protected characteristics relevant to this matter under Section 149, including the exceptions to the PSED in Schedule 18. Potential equality impacts if the proposal is refused or approved.	Seamab residents have the protected characteristics of age (13 years old or younger) and disability (as they have a "mental or physical impairment which has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities"). The Council has a duty under Section 149 to take these into account in determining the Application. No exceptions from the PSED at Schedule 18 apply. They relate to the provision of specified services to children. This matter relates to a planning decision and not to the provision of specified services. Failure to properly consider relevant protected characteristics is a breach of Section 19 (Indirect discrimination) and Section 20 (Duty to make adjustments), risking court action against the Council and enforcement by the Equality and Human Rights Commission. Such breaches would have practical as well as legal effects. They would adversely impact the quality of care provided to Seamab's residents and their clinical, social and educational outcomes. In the long term, this would cause irreparable harm to their prospects of independent living in future. There are several other potential breaches in respect of the Council's responsibilities for Health and Social Care, Education, Housing and Child Protection (including the UNCRC Convention on the Rights of the Child) but these are not covered here. This FIS is confined to planning issues.
2	**NPF4 Policy 16** Applicability in the context of the current use of the house and the LRB determination.	It is debatable whether Policy 16 is engaged at all. Assuming it is engaged, the relevant parts of it do not apply to the Works. These parts concern "householder development". The Works are not "householder development" because Seamab is the Applicant and Seamab is not a householder and case law holds that the Site is not a "household" as no carers live there. In any event, the Works comply with LDP Policy DES 1.
3	**NPF 4 Policies 7 and 14** Relevance to LRB determination and whether the development proposed complies.	Policy 7 relates to listed buildings. It sets out specific circumstances where consideration should be given to development which "significantly adversely impacts" aspects of the Site's special interest. Those specific circumstances are largely inapplicable to the Site/Works and any impact is not be "significant" enough to justify refusal. Policy 14 is a catch-all policy requiring development to reflect the Six Qualities of Successful Places. Details of the Works are in the Application and LRB documents previously submitted but a summary of how the Qualities are supported and enhanced is provided at **Section 4**, below.

2. FURTHER INFORMATION RELATING TO THE EQUALITY ACT 2010

PLANNING LAW CONTEXT

2.1 Although planning law is concerned with the use of land rather than the person using that land, the special circumstances of Seamab and its residents merit special attention. Case law confirms that personal circumstances can be a material consideration in the determination of a planning application, for example in *Westminster City Council v Great Portland Estates plc* [1985] 1 AC 661 at 670:

> *"Personal circumstances of an occupier, personal hardship […] are not to be ignored in the administration of planning control. It would be inhuman pedantry to exclude from the control of our environment the human factor. The human factor is always present, of course, indirectly as the background to the consideration of the character of land use. It can, however, and sometimes should, be given direct effect as an exceptional or special circumstance."*

ABOUT SEAMAB'S RESIDENTS

2.2 Children residents at Seamab are some of the most vulnerable in society. This is due to their young age (no more than 13 years old on arrival) and the long-lasting effects they suffer from trauma and neglect. Residents are unable to rely on the support networks most children usually take for granted - their relatives and communities – and must be removed from their home environment for appropriate care. By the time they arrive at Seamab, residents have tried alternative care arrangements without success. Residents are placed at Seamab by local authorities all over Scotland.

2.3 Residents suffer from poor mental health (including PTSD, depression and anxiety). They find day-to-day life more difficult than their peers who have not had comparable experiences. They may receive ongoing treatment (including being on medication and undergoing psychotherapy) and may require support with maintaining healthy daily routines and feeling safe. These routines encourage the residents to eat well, in turn supporting healthy sleeping patterns.

2.4 Seamab provides residents with stability, access to education and exemplary round-the-clock care from specialists, which they would not otherwise enjoy. Everyone at Seamab has an individual plan, focused on supporting the resident to heal, grow and learn. Daily work is informed by a detailed risk assessment and staff regularly discuss their work with the child. Residents commonly have difficulty with emotional regulation and in forming relationships with adults due to their early-life experiences. Consistency in staff attendance and staff retention are essential to the residents' care.

2.5 Further information about the unique type and high quality of Seamab's care is set out in the Care Inspectorate Report dated 17 March 2022 provided as **Appendix 1** (which relates to another Seamab residence in Kinross).

DAY TO DAY OPERATIONS

2.6 Staff must be able to access the facility easily at all times of day. Given the location and the fact that staff are scheduled to work in shifts, travel to and from the Site by private vehicle is unavoidable. As set out in the SSS dated 17 August 2023, the maximum number of vehicles that will regularly be at the Site is 6. As such, the impact this has on neighbours is no greater than it would be if a large, busy family were in occupation instead.

2.7 Using the area adjacent to the B9080 in front of the building for vehicles allows for direct access from the main road to the property. This affords the residents and neighbours alike increased privacy. It is the least disruptive option for the residents when they travel to and from their specialist school, attend external enrichment activities, meet with advocates and social workers and access medical treatment.

2.8 Transitions are a recognised flashpoint for many young people who have experience trauma. This is the case for many of the residents. Moving from one location to another can cause great anxiety and stress. Using the front for car parking will ease these transitions and make a significant, positive difference to the residents' everyday lives (and, by extension, to those working with them and those living near them).

2.9 This car park use also benefits neighbours, representing an improvement in amenity and safety by diverting footfall and vehicular traffic away from residential premises to the rear at Canal Court. Please see the SSS responses to Reason for Refusal 1 for further details.

REASONABLE USE AND ENJOYMENT OF THE SITE

2.10 The residents are entitled to access outside the space at the Site. This would be the case for any occupant at the Site but this is especially important for the residents of Seamab. They benefit immeasurably from fresh air, outdoor exercise and therapeutic play. However, they are young and may require assistance and encouragement to use outside spaces for health and well-being purposes. Residents may find it difficult to assess and appropriately respond to perceived environmental threats, such as from road traffic or strangers. Given the above, the fencing is necessary to protect residents, staff, road-users and neighbours whilst preserving access to the front garden.

LEGAL DUTIES OF THE COUNCIL AS PLANNING AUTHORITY

2.11 The 2010 Act is relevant to the LRB determination in two key respects. Firstly, the PSED at Section 149 applies directly to all planning functions and decisions (see *Barnsley MBC v Norton* [2011] EWCA Civ 834, *R (D and S) v Manchester CC* [2012] EWHC 17 (Admin), *R (Williams) v Caerphilly CBC* [2019] EWHC 1618 (Admin)).

2.12 Section 149 states:

> *"(1) A public authority must, in the exercise of its functions, have due regard to the need to—*
>
> *(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;*
>
> *(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;*
>
> *(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it. […]*
>
> *"(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—*

(a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;

(b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it; […]

(4) The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities. […]

"(6) Compliance with the duties in this section may involve treating some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act."

2.13 Secondly, the Seamab residents have protected characteristics which the PSED is designed to safeguard. These are relevant to the personal circumstances of Seamab, its residents and their families, who are indirectly supported by Seamab's work and who may have protected characteristics of their own. The relevant protected characteristics of the residents are:

2.13.1 their age, as they are children no older than 13 years old when they arrive at Seamab (Section 5); and

2.13.2 disability, because they have a "physical or mental impairment which has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities" (Section 6).

2.14 UK Government guidance "*Equality Act 2010 - Guidance on matters to be taken into account in determining questions relating to the definition of disability*" includes a list of factors which have a substantial adverse effect on normal day-to-day activities. These are provided in **Appendix 2** in full and include many of the issues faced by Seamab residents:

2.14.1 difficulty preparing a meal or eating, for example, because of an eating disorder;

2.14.2 difficulty going out of doors unaccompanied, for example, because of a phobia;

2.14.3 difficulty entering or staying in environments perceived as strange or frightening;

2.14.4 behaviour which challenges other people, making it hard to be accepted in public;

2.14.5 persistent difficulty crossing a road safely, for example, because of a failure to understand and manage the risk;

2.14.6 persistently wanting to avoid people or significant difficulty with normal social interaction or forming social relationships; and

2.14.7 persistent distractibility or difficulty concentrating.

2.15 None of the exceptions to the PSED in Schedule 18 apply. Part 1 of Schedule 18 excludes from the PSED the provision of certain services to children. It means that restricting the Seamab accommodation to children requiring care is not unlawful discrimination under the Act (for example against people who

are adults and/or not requiring care home accommodation). It is not relevant to this matter which concerns a planning decision rather than the provision of statutory services to children.

CONCLUSION

2.16 The Council must give due regard to the PSED in evaluating this appeal and treat the Seamab residents' protected characteristics as material considerations in determining if planning permission should be granted for the Application. There is no indication on the public record that the Council has done this. The courts have found that, in such circumstances, it is reasonable to assume that insufficient regard has been given to the PSED (*R (Brown) v Secretary of State for Work and Pensions [2008] EWHC 3158 (Admin)).*

2.17 Failure to do have due regard to the PSED constitutes prohibited conduct under Part 2 of the 2010 Act, specifically:

2.17.1 Section 19 relates to indirect discrimination, being when "*A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's".* Section 19(2) clarifies that *"a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if— (a) A applies, or would apply, it to persons with whom B does not share the characteristic, (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it, (c) it puts, or would put, B at that disadvantage, and (d) cannot show it to be a proportionate means of achieving a legitimate aim*."; and

2.17.2 Sections 20(3) and 21 which imposes a duty on the Council "*where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage*".

2.18 Had the PSED been appropriately considered, the Council could have reached a different decision on the Application (*LDRA et al v Secretary of State for Communities and Local Government, Cammell Laid Ship Repairs and Ship Builders Limited and Wirral Borough Council* [2016] EWHC 950 (Admin)).

2.19 A failure by the Council to comply with its PSED is a legal error and the resulting planning decision can be judicially reviewed in the courts and subject to enforcement action by the Equality and Human Rights Commission (with attendant cost and reputational risks).

3. FURTHER INFORMATION RELATING TO NPF 4 POLICY 16

RELEVANCE TO THE APPLICATION

3.1 It is not clear if NPF Policy 16 is engaged in these circumstances as the current LDP remains extant. There are ongoing arguments in Court about how Policy 16 has effect. Assuming Policy 16 is engaged, the only relevant parts are paragraphs (g) and (h), which state:

> *g) Householder development proposals will be supported where they:*
>
> > *i. do not have a detrimental impact on the character or environmental quality of the home and the surrounding area in terms of size, design and materials; and*
> >
> > *ii. do not have a detrimental effect on the neighbouring properties in terms of physical impact, overshadowing or overlooking.*
>
> *h) Householder development proposals that provide adaptations in response to risks from a changing climate, or relating to people with health conditions that lead to particular accommodation needs will be supported.*

IS IT "HOUSEHOLDER DEVELOPMENT"?

3.2 Most of Policy 16 applies to developers building homes on a commercial basis (e.g. for onward sale rather than occupation). However, paragraphs (g) and (h) clearly apply to householders instead. Householders carry out works to their own homes, rather than for commercial purposes. The person carrying out development to the Site is Seamab. Seamab operates the Site but its employees and contractors do not live there (see above and the SSS for descriptions of the working patterns of Seamab staff). Seamab is more akin to a commercial developer than a domestic one in this situation.

3.3 What qualifies as a household for planning purposes was established in *North Devon District Council v First Secretary of State* [2003] EWHC 157 (Admin), which clarified that, where a care home had no carers in residence, it was not a house but a residential institution in planning terms:

> *"…the Inspector's approach was […] correct, inasmuch as he was regarding the household as needing more than just children. Children need to be looked after. They cannot run a house. They cannot be expected to deal with all the matters that go to running a home. Sometimes, of course, one recognises they are forced to do so, but as a matter of principle and approach the whole point of these homes is that the children are regarded as needing full-time care from an adult, someone to look after them, someone to run their lives for them and someone to make sure that the household operates as it should. It seems to me that in the context "household" means more than merely the bodies. You have to consider whether the bodies are capable of being regarded in the true sense as a household. The same would apply to those who suffer, for example, from physical or mental disability and who need care in the community. They, if they are not capable of looking after themselves, would not be regarded as a household, hence the need for the carer, hence the need for that addition to make it a household within the meaning of the relevant class.*

> *"One has to have regard to the need that they be living together as a single household. The question then arises whether carers who do not live but who provide, not necessarily through the same person, a continuous 24-hour care can be regarded as living together. In my view, the answer to that is no. "(*per Collins J at 16-17*)*

3.4 This case clarifies that reference to the Site being in Use Class 9 (Houses) under Certificate of Lawfulness reference 0917/CLU/22 is not accurate. Functionally, the Site falls within Use Class 8 ("*residential accommodation and care to people in need of care other than a use within Class 9 (Houses)*"). It is not a household occupied by householders:

> *"It is apparent that the size of the institution is irrelevant for the purposes of C2 [residential institution use class under English law]. If it falls within that definition it is not to be regarded as a dwellinghouse, then whether there are 1, 2, 10 or 15 children makes no difference to the Class."(North Devon DC* case, per Collins J at 19*)*

3.5 Seamab is not a resident and it is Seamab progressing the Application. Accordingly, the Works are not "householder" development and Policies 16(g)-(h) do not apply.

LDP POLICY DES 1

3.6 Instead of NPF Policy 16, the relevant policy is under the Council's LDP. Reason for Refusal 1 assesses the Application against Policy DES 1, paragraphs (a) and (c). These state:

> *"When assessing development proposals, the developer will be required to ensure that:*
>
> *a. there is no significant adverse impact on adjacent buildings or streetscape in terms of layout, scale, massing, design, external materials or amenity; […]*
>
> *c. the proposed development is accessible for all, provides suitable access and parking, encourages active travel and has no adverse implications for public safety";*

3.7 Paragraph (a) provides that development is acceptable unless its design has a "significant adverse impact" on adjacent buildings or streetscape. The design of the Works does not make any impact on the Canal Court streetscape to the rear of the Site as the Works are not visible from that area (see SSS Appendix 2).

3.8 There is one adjacent building, to the east of the Site. The only elevation of the adjacent building facing the Works is a solid stone wall with no windows (see **SSS Appendix 2**). It is not physically affected by the Works and there is no other amenity impact made by the design of the Works to the adjacent building.

3.9 The only potential receptor it is possible to impact under DES 1 Paragraph (a) is the streetscape including the B9080 to the front of the Site. The existing use of the B9080 as a thoroughfare rather than an area where people might linger means that no adverse impact is likely to arise at all, let alone an impact that is "significant" enough to justify refusal of the Application.

3.10 As explained in the SSS, all elements of Paragraph (c) are satisfied by the Application. The Works actually represent an improvement in accessibility and safety and merely formalise the existing use of the garden and access, which have been in ongoing use for several years already.

4. FURTHER INFORMATION RELATING TO NPF 4 POLICIES 7 AND 14

LISTED BUILDINGS

4.1 NPF 4 Policy 7 concerns listed buildings. The only parts of it that are potentially relevant to the Application are Paragraphs (a) and (c).

4.2 Paragraph (a) states "*Development proposals with a potentially significant impact on historic assets or places will be accompanied by an assessment which is based on an understanding of the cultural significance of the historic asset and/or place*." No such assessment was required for the Application so it is reasonable to infer that the Council did not consider there to be any potentially significant impact on historic assets. It would also be disproportionate to demand one of the Application given the minor nature of the Works and the circumstances of the Application.

4.3 Paragraph (c) states "*Development proposals for the reuse, alteration or extension of a listed building will only be supported where they will preserve its character, special architectural or historic interest and setting. Development proposals affecting the setting of a listed building should preserve its character, and its special architectural or historic interest*."

4.4 Historic Environment Scotland ("**HES**")'s Guidance "*Managing Change in the Historic Environment: Use and Adaptation of Listed Buildings*" (updated February 2020) provides direction on how to approach decisions about listed buildings. Its Key Messages on page 4 clarify that:

> *3. Decisions about listed buildings should always focus on the qualities that make them important – their special interest. Lots of things can contribute to a building's special interest, but the key factor when we're thinking about making changes will be its overall historic character.*
>
> *4. For a building to stay in use over the long term, change will be necessary. This reflects changes over time in how we use our buildings and what we expect of them. This should always be considered carefully and avoid harming the building's special interest. A building's long-term future is at risk when it becomes hard to alter and adapt it when needed. Proposals that keep buildings in use, or bring them back into use, should be supported as long as they do the least possible harm[…] Understanding what is important about a listed building is an essential first step in working out how to protect its special interest.*

4.5 This focus on the special historical interest of an asset is reflected in LDP Policy ENV 28, cited in Reason for Refusal 2. ENV 28 states:

> *"The council will protect listed buildings and will have particular regard for their special architectural, historic features and, where appropriate, archaeological interest in considering proposals for their alteration, extension or change of use. There is a presumption in favour of the retention and sympathetic restoration, correct maintenance and sensitive management of listed buildings to enable them to remain in active use, and any proposed alterations or adaptations to help sustain or enhance a building's beneficial use should not adversely affect its special interest."* (per Collins J at 16-17).

SPECIAL INTEREST OF THE SITE

4.6 The Site is one part of a larger asset (including the steading) which is C-Listed under HES reference LB49074. C listing is the lowest level of listed building protection in Scotland, applying to lesser examples of any period, style or building type, as originally constructed or moderately altered. The Site is C-listed, meaning it is not considered historically important enough for more protection. Much of its value is stated in HES' listing particulars to depend on its forming part of a settlement (along with the steading). Even so, neither is within a designated Conservation Area. The garden around the farmhouse is not registered or protected or mentioned in the Statement of Special Interest ("**SSI**", which summarises which features of the Site merit its listing).

4.7 The SSI does not mention the outside space immediately around the Site (apart from referring to its previous use as a kitchen garden). The Works do not affect the farmhouse but only the outside space surrounding it. There is no protection afforded to any development in the garden due to the listing.

SITE SETTING

4.8 Although not protected by the listing itself, consideration must be given to the setting of the Site. ENV 28 states: "*In considering proposals for development within the vicinity of listed buildings, the council will have particular regard to the setting of listed buildings. The layout, design, materials, scale, siting and use of any development which will affect a listed building or its setting should be appropriate to the buildings character, appearance and setting*."

4.9 The Works will have no material adverse effect on the historical value in the setting of the Site:

4.9.1 The fence and gravel are not permanent structures. If they are no longer required in future, they can be easily removed without any residual harm to the Site or its setting. The SSI says: "*When the farm ceased to operate it was converted to hunt kennels; however this function has not unduly altered the character of the farm as no permanent structures, save a mounting block, have been erected*." This confirms that structures which are not permanent, such as the fence and gravel, will not be considered to alter the character of the Site.

4.9.2 The fence and gravel are consistent in terms of style, massing and materials used with fencing and gravel at properties around Canal Court (see **SSS Appendix 2**).

4.9.3 The fence was only erected to enable beneficial use of the Site, which the Council has already determined is lawful. The fence is only as high as is required for the protection of the residents. The Council's *Planning Guidance on the Historic Environment* (adopted April 2021) confirms that planning control "is not meant to stifle change to listed buildings" (paragraph 5.8) and they should be brought into use where possible.

NDP POLICY 14

4.10 Policy 14 is a general, catch-all policy which sets out the overall intentions of development management Scotland. Paragraph (a) requires "*development to be designed to improve the quality of an area whether in urban or rural locations and regardless of scale*". The details which comply with and advance policy objectives relevant to listed buildings. The overall re-purposing of the Site, of which the fence and gravel form a part, are undoubtedly improvements for the area, physically and in terms of use. It has led to the quality renovation of a run-down historic building, enabling ongoing use while providing a valuable service to the community.

4.11 Policy 14 Paragraph (b) states that "Development proposals will be supported where they are consistent with the six qualities of successful places […]", as elaborated on at Annex D to NPF 4. The

detail of how the Application and the wider use of the Site are not rehearsed here and reference should be made to the documents supplied in support of the Application and LRB Appeal previously. However, in case it assists, a list of the key aspects of the Six Qualities of Successful Places which are satisfied or enhanced at the Site (per NPF 4 Annex D) are listed below:

1. Healthy: Supporting the prioritisation of women's safety and improving physical and mental health, designing for:

- *lifelong wellbeing through ensuring spaces, routes and buildings feel safe and welcoming e.g. […] use of physical safety measures*
- *healthy and active lifestyles, through […] access to nature and greenspace*
- *accessibility and inclusion for everyone regardless of gender, sexual orientation, age, ability and culture*
- *social connectivity*

2. Pleasant: Supporting attractive natural and built spaces, designing for:

- *positive social interactions including quality of public realm, civic spaces, streets and ensuring a lively and inclusive experience*
- *variety and quality of play and recreation spaces for people of all ages and abilities*
- *enjoyment, enabling people to feel at ease, spend more time outdoors and take inspiration from their surroundings*

3. Connected: Supporting well connected networks that make moving around easy and reduce car dependency, designing for:

- *connectivity including […] accessibility and catering for different needs and abilities*
- *convenient connections including […] supporting easy modal shifts in transport*
- *pedestrian experience including safe crossing, pedestrian priority […] inclusive design and surfaces, assistive technology […] catering for suitable vehicular parking and management of loading/unloading …*

4. Distinctive: Supporting attention to detail of local architectural styles and natural landscapes to be interpreted into designs to reinforce identity

5. Sustainable: Supporting the efficient use of resources that will allow people to live, play, work and stay in their area, ensuring climate resilience and integrating nature positive biodiversity solutions, designing for:

- *transition to net-zero including […] retrofitting, reuse and repurposing and sharing of existing infrastructure and resources*
- *active local economy including opportunities for local jobs and training […] supporting community enterprise and third sector*
- *community and local living including access to local services and facilities, education, community growing and healthy food options, play and recreation*

5 Adaptable: Supporting commitment to investing in the long-term value of buildings, streets and spaces by allowing for flexibility so that they can meet the changing needs and accommodate different uses over time, designing for:

- *quality and function, ensuring fitness for purpose, design for high quality and durability*
- *longevity and resilience including recognising the role of user centred design to cater for changing needs over time and to respond to social, economic and environmental priorities*
- *long-term maintenance including effective engagement, clarity of rights and responsibilities, community ownership/stewardship, continuous upkeep and improvements.*

CONCLUSION

4.12 Taking into account all material considerations, the Application complies with the development plan (the LDP and NPF 4). It would be unreasonable and irrational not to grant approval for the Application, especially in light of the PSED addressed in **Section 2** above. As set out in the SSS, there are also procedural errors in the way the refusal was reached, as appropriate planning conditions relating to design and the need, if any, for Listed Building Consent, were not properly considered. Should the Application be refused by the LRB, we consider there would be merit in a challenge by way of judicial review in the Court.

5. CASE LAW REFERENCES

The following cases, referenced above and in the SSS, are provided in a separate ZIP file accompanying FIS:

- *R (Williams) v Caerphilly County Borough Council* [2019] EWHC 1618 (Admin)
- *LDRA et al v Secretary of State for Communities and Local Government, Cammell Laid Ship Repairs and Ship Builders Limited and Wirral Borough Council* [2016] EWHC 950 (Admin)
- *R (D and S) v Manchester City Council* [2012] EWHC 17 (Admin)
- *Barnsley Metropolitan Borough Council v Norton* [2011] EWCA Civ 834
- *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin))
- *North Devon District Council v First Secretary of State* [2003] EWHC 157 Admin, 2003 WL 117107
- *Westminster City Council v Great Portland Estates plc* [1985] 1 AC 661 at 670

DAVIDSON CHALMERS STEWART LLP
19 SEPTEMBER 2023

Barnsley Metropolitan Borough Council v Darren Norton, Louise Norton, Samantha Norton

Positive/Neutral Judicial Consideration

Court
Court of Appeal (Civil Division)

Judgment Date
21 July 2011

Case No: B5/2011/0033

Court of Appeal (Civil Division)

[2011] EWCA Civ 834, 2011 WL 2747701

Before: Lord Justice Maurice Kay , Vice President of the Court of Appeal Civil Division Lord Justice Carnwath and Lord Justice Lloyd

Date: 21 July 2011

On Appeal from Barnsley County Court

His Honour Judge Swanson

Hearing date: 25 May 2011

Representation

Mr Simon Read (instructed by Shelter South Yorkshire (Sheffield) for the Appellants.
Mr Adam Fullwood (instructed by Borough Secretary's Department) for the Respondent.

Judgment

Lord Justice Lloyd:

1. This appeal is brought against an order for possession dated 17th December 2010, made by His Honour Judge Swanson in the Barnsley County Court. The Defendant, now Appellants, are Mr Darren Norton, his wife Mrs Louise Norton and their daughter Miss Samantha Norton, who we were told is known as Sam, and to whom I will refer by that name. Mr Norton was employed by Barnsley Metropolitan Borough Council (the Council) as the caretaker at a Primary School in Carlton in Barnsley. He had a tenancy of the caretaker's house which he was required to occupy for the purposes of his employment. He lived there with his wife and daughter. The employment started in 1992 and came to an end in November 2009 on the grounds of his misconduct. The Council then sought possession of the house in order that they could accommodate a new caretaker. In the county court there was an issue as to whether he was entitled to security of tenure but that was decided against him and is not challenged on the appeal. There is no issue, at this stage, that the Council is entitled to possession of the house. The appeal does not put forward any private or property law defence to the claim. Rather it amounts to a public law challenge to the decision to bring and continue the proceedings.

2. There are two grounds of appeal, for which permission was given by Rimer LJ. The first is that the Council was in breach of its duty under section 49A of the Disability Discrimination Act 1995 (the DDA). The second is that to make an order

for possession was disproportionate having regard to Article 8 of the European Convention on Human Rights and to the Human Rights Act 1998 .

3. The disability issue arises because Sam was born with cerebral palsy in 1991 and she developed epilepsy as a baby. It is common ground that she suffers from a disability for the purposes of the DDA , though fortunately it seems that she is no longer seriously affected by epilepsy. Her mobility is restricted, as are her learning and cognitive abilities. She receives the highest rate for the care and the mobility components of disability living allowance. The premises are safe for her. When she was very young they were specifically adapted for her in some respects by the Council's social services department, with rails and grab handles to enable her to manage steps and stairs for example. There was evidence that she has no sense of danger and needs to be accompanied at all times. At the time of the hearing she was pregnant, with the birth expected in March this year. That birth happened in due course so the household now includes a small baby. (We have been told that, very recently, she and the baby's father have married.) Sam lives and intends to continue to live with her parents together with her child. There was no evidence before the county court of any recent assessment of Sam's needs as regards accommodation. It was said that she could cope safely with stairs.

4. Section 49A of the DDA imposed a duty, relevantly, as follows:

> "(1) Every public authority shall in carrying out its functions have due regard to …
>
> (d) the need to take steps to take account of disabled persons' disabilities, even where that involves treating disabled persons more favourably than other persons."

5. As of 5 April 2011 the same duty has been imposed instead by section 149 of the Equality Act 2010 : see subsections (1)(b), (3)(b), (4) and (7) .

6. In *Pieretti v. Enfield Borough Council [2010] EWCA Civ 1104, [2011] HLR 3, the Court of Appeal* rejected an argument that section 49A only imposed a generalised duty as regards the formulation of policy rather than a duty to be implemented in relation to action taken or to be taken by a public authority in particular cases. In that case the point arose because a housing authority's reviewing officer had failed to take account of the disability of applicants for assistance under Part 7 of the Housing Act 1996 (Part 7). There was material from which it could and should have occurred to the officer that the applicants were disabled and that this was relevant, on the particular facts, to the question of whether they were to be regarded as having become homeless intentionally.

7. Here the point arises more starkly because there is no doubt that the Council well knew that Sam was disabled, and seriously so. At the time when Mr Norton's employment had been terminated but before he received a notice to quit he and his wife went to see Ms Jill Barton, a housing adviser employed by the Council. She became aware from this, if she did not already know, that Sam was disabled and that she received the highest rates of disability living allowance, and had severe learning disabilities. Later she was informed that the legal department had decided to take possession proceedings but there is no suggestion in the papers that she was in any way involved in the taking of that decision.

8. The judge said there was no evidence either way as to whether the individual or individuals making the decision to seek possession positively considered Sam's disability. From that I take it that the Council did not seek to show that any specific regard had been had to her position under section 49A at the time that the decision to start proceedings was considered and taken. Accordingly the court must proceed on the footing, as the judge did, that the Council did not, in this case, have any regard to the need to take steps to take account of Sam's disability at that stage.

9. The judge held that this was of no consequence because, whatever consideration had been given to that factor, the decision must have been to the same effect, namely to seek possession.

10. Clearly there can be situations to which one or other of the six paragraphs of section 49A(1) may be relevant where it can properly be said that, although no regard was had to the particular factor, it could have made no difference. A point under section 49A on very different facts from the present was raised and dealt with in somewhat that way in *London Borough of Brent v. Corcoran [2010] EWCA Civ 774* .

11. The judge went on to explain his conclusion in the present case at paragraph 19 of his judgment as follows, after having referred to the decision in Pieretti :

> "These proceedings are not brought under Part 7 but assuming its general applicability, I note that in his judgment Lord Justice Wilson said at para. 33:—
>
> > "But the law does not require that in every case decision makers … must take active steps to inquire into whether the person to be subject to the decision is disabled and if so, is disabled in a way relevant to the decision. That would be absurd."
>
> The duty must be relevant to the decision to be made and the level of relevance itself will vary. In this case the local authority felt a pressing need to free the School House so that a new caretaker could take up his duties. Samantha's disability at this point was less relevant than it would be when considering an application for housing under the homelessness provisions. I do not consider that the action of the local authority was illegal."

12. The Council, in a respondent's notice, makes a more fundamental submission, namely that in taking the decision whether or not, and if so when and how, to bring proceedings for possession, the Council was not subject to the duty under section 49A(1)(d) at all. That argument is based on what Lord Justice Wilson said in paragraph 31 of Pieretti :

> "I therefore have no hesitation in concluding that the duty in section 49A(1) of the Act of 1995 applies to local authorities in carrying out their functions – all of their functions – under Part 7 of the Act of 1996. Although others of the five aspects of the duty set out in the subsection *could* be relevant to the exercise of those functions (Ms Monaghan, for example, refers in this regard to the

> aspect specified at (a), namely the need to eliminate such discrimination as is unlawful under the Act), I am clear that the substantial effect of my conclusion is in relation to the aspect specified at (d), namely that, in making determinations under Part 7 in the areas in which a person's disability could be of relevance, a local authority shall "have due regard to … the need to take steps to take account of disabled persons' disabilities". As indicated in [27] above, Mr Rutledge himself identifies three such areas in particular: the priority of need, the intentionality of homelessness and the suitability of accommodation."

13. For the Council, Mr Fullwood argued that Sam's disability could not be of any relevance to the decision whether or not to seek possession of property in a case where the Council had, as it contended, an absolute right to possession and a sound need to obtain the possession, and where, if and when a possession order were made, the position of Sam and her parents would be within the scope of Part 7 .

14. Mr Fullwood pointed out that, in deciding that the duty under section 49A applied to all aspects of a public authority's functions, Wilson LJ did not decide that it created any new individual right as opposed to holding that it affected a person's rights under other legislation. That is clear from paragraph 26 of the judgment in Pieretti as follows:

> "Mr Rutledge's first submission is clearly wrong. "The duty in section 49A applies both when the local authority is drawing up its criteria and when it applies them in an individual case, both of those being an aspect of carrying out its functions": per Black J in *R (JL) v. Islington LBC [2009] EWHC 458 (Admin)* at [114]. There is no scope for depriving the word "functions" of much of its normal meaning. There would, for example, be no need for section 49C(3)(a) of the Act of 1995 to exclude the application of section 49A(1)(d) from acts done in connection with recruitment to the armed forces if the section did not apply in principle to individual decisions. Of course public bodies must factor their duty under section 49A(1) into the planning of their services; and it may well be that the section does not create new individual rights. The part of it with which we are concerned is designed to secure the brighter illumination of a person's disability so that, to the extent that it bears upon his rights under other laws, it attracts a full appraisal."

15. In that case the question arose specifically in relation to obligations under Part 7 , so it was unnecessary for the court to consider whether the duty under the DDA applied more widely. For my part, it seems to me clear that the duty does apply more widely and that it is not something which has to be considered only when a public authority is exercising functions that bear on the rights of a disabled person under some other specific legislation. In terms, the section is entirely general. It applies to the carrying out of any function of any public authority. On the other hand, it does not necessarily follow that whenever a public authority is considering or exercising any function, whatever it may be and in whatever circumstances, it must give conscious thought to how it might affect a disabled person. It is not necessary for us to decide what is the scope of the circumstances in which the duty would come into play. In the present case it would have been obvious to any person considering whether or not to start possession proceedings, and if so when and in what way and what circumstances, that if a possession order were obtained as a result of those proceedings, Sam's way of life and wellbeing might be substantially affected by the outcome.

16. In Pieretti Lord Justice Wilson spoke at paragraphs 33 – 35 of the scope and application of the duty under section 49A . He did so in the context of Part 7 . In doing so he drew on the judgments of the *Administrative Court in R (Brown) v. Secretary*

of State for Work and Pensions [2008] EWHC 3158 (Admin) , a case concerned with a general policy, namely the closure of post offices. As he said, at paragraphs 90 – 96 of that judgment the Divisional Court set out a number of factors that were relevant to the duty to have regard under section 49A . Not all of these are equally applicable to the way that the duty operates in relation to a particular set of facts such as those presently under consideration as opposed to the formulation of a general policy. However at paragraph 90 of the judgment in Brown , Aikens LJ pointed out that those in the public authority who have to take decisions which do or might affect disabled people must be made aware of their duty to have due regard to the identified goals, so that an incomplete or erroneous appreciation of the duties will mean that due regard has not been given to them. Secondly, at paragraph 91, he pointed out that the duty to have regard involves a conscious approach and state of mind. Thirdly, at paragraph 92, he made the point that the duty must be exercised in substance, with rigour and with an open mind. At paragraph 95 he made the obvious point that the duty to have regard is a continuing one and at paragraph 96 he pointed out that it is good practice for those exercising public functions in public authorities to keep an adequate record showing that they had actually considered their disability equality duties and addressed relevant questions.

17. I would reject the primary contention of the Council that the duty did not apply when the decision was taken to commence the proceedings for possession. I do not accept, for reasons already given, that the duty only applies when rights of the disabled person under other legislation are involved. Given that Sam's position could be critically affected by the Council obtaining an order for possession, it seems to me that the Council was clearly under a duty to have due regard to the need to take steps to take account of her disability, pursuant to the section 49A(1)(d) duty at that time. As indicated at paragraph 33 of the judgment in Pieretti (and as endorsed by Lord Brown of Eaton-under-Heywood in *R (Macdonald) v Royal Borough of Kensington and Chelsea [2011] UKSC 33* at paragraph 23) due regard means such regard as is appropriate in all the circumstances.

18. Mr Fullwood's essential position, whether in support of his more radical submission or his alternative submission, was that the Council, being entitled to possession as a matter of private law and having a good and even a compelling need to obtain possession for the purposes of its other functions, was entitled to take the stance, consciously or not, that the need to see that Sam, with her parents and eventually her child, was properly accommodated once possession was obtained would be satisfactorily dealt with under Part 7 . He submitted that the distinct functions of the Council ought to be kept separate for this purpose and that even if section 49A had some relevance to the decision whether to start proceedings, at any rate Part 7 provided the whole answer to the question, because that is the statutory provision which imposes on the local authority duties relevant to the particular case, dealing with the situation in which a person, including in particular a disabled person and a person with a young child, needs to be housed because of being homeless or threatened with homelessness.

19. In this context it needs to be remembered that, although in a general sense the Norton family was threatened with homelessness as soon as possession proceedings were brought against them, for the purposes of Part 7 a person is threatened with homelessness only if he or she is likely to become homeless within 28 days: see section 175(4) of the 1996 Act. It was for that reason that the homelessness file opened in 2010 was closed in May of that year, although proceedings were under way, because it did not seem likely that they would come to an early conclusion. Thus under Part 7 one has to wait not just for the commencement of proceedings, and not just for the commencement of proceedings to which there is no private law defence, but in effect for the making of the possession order.

20. Understandably, given the extent and complexity of the duties incumbent on a housing authority and the relatively elaborate and well-developed structure of the obligations under Part 7 , a council which is a housing authority may take the view that the issue of homelessness is one which arises and is dealt with within the ambit of Part 7 , is therefore dealt with by the homeless persons unit of the local authority and is dealt with them, it is to be hoped reasonably competently, consistently with the resources available, but in strict accordance with the 1996 Act. As Mr Fullwood submitted to us, that requires that the person seeking assistance should apply to the local authority for help, because not all homeless people do want or even need help from the local authority. It requires the local authority to consider the position of the applicant, as to whether he or she is someone in priority need and whether he or she became homeless intentionally, among other factors. It requires offers of accommodation to be made, depending on the result of the initial enquiry and investigation, and the offer of such accommodation must be of suitable accommodation. The range of accommodation available to a housing authority may be limited and there is sometimes a substantial excess of demand over supply. In particular, where the person needing

accommodation has special needs, as Sam plainly has, it may be the more difficult to find accommodation that is suitable for those needs; to do so may take more rather than less time. It may involve a relatively lengthy search and it might require the adaptation of a particular property once it has been identified and found to be available and otherwise suitable.

21. It is understandable that Mr Read for the appellants should have expressed to us the concern of the Norton family as being that, if they are left to the ordinary operation of Part 7 to provide them with accommodation once the possession order takes effect, it may take longer, perhaps a good deal longer, than the short time that might ordinarily be available at that point to find accommodation that really is sensibly to be regarded as suitable for Sam and her needs and circumstances. If that were to prove to be the case, it would of course be unsatisfactory for the family to have to live in temporary accommodation that is less than suitable, if that might have serious adverse effects on the welfare of Sam and her child.

22. However, in the discharge of its duties under Part 7 the Council is subject to the duty under section 49A(1)(d) , and now under section 149 of the 2010 Act, as is shown by the decision in Pieretti itself. In any event, since the Council is aware that Sam has special needs because of her disability, it will have to take those into account in deciding whether accommodation to be offered to her is suitable, and it may need to undertake an up-to-date assessment of those needs for this purpose. Because the accommodation in which Sam is currently housed belongs to the Council, the Council will have control over the process of enforcing any possession order, and any decision to enforce that order would itself be subject to the duty now imposed by section 149 .

23. I note that, when the judge came to deal with the article 8 argument, at paragraph 23 of his judgment, he said this:

> "Samantha is not so disabled that she cannot be safely moved to another property. The Defendant and his family live in a jurisdiction where the state seeks to assist homeless persons and evidence was given that particularly having regard to Samantha's pregnancy this family will receive a high degree of priority."

24. The first of those sentences is plainly correct, and the contrary is not suggested. As to the second, the question is whether it was sufficient for the Council to leave the question of Sam's accommodation to be dealt with under Part 7 in due course, so that even if due regard was had to the factors required under section 49A(1)(d) it would make no difference at the outset of, or during the course of, the proceedings.

25. We do not know exactly how the point was put to the judge below, but in paragraph 36 of the Appellants' skeleton argument, it is said that they acknowledged that the court was likely not to find that Mr Norton had security of tenure, and that the Council would want possession in order to house the new caretaker. In the light of that the line taken was that the judge should suspend the execution of any possession order pending the making of appropriate enquiries and taking steps in order to find suitable accommodation into which Sam could move once the order took effect.

26. If the Council's position had been that it did not have regard to the section 49A duty when commencing the proceedings because, for example, it needed to establish its right to possession first, which was not in the event accepted by Mr Norton, and that once that was accepted or proved it would then give consideration to the implications of Sam's disability before pressing for an order for possession, that could have been a proper and rational position to take, so long as it did give such consideration at the later stage. As was accepted on both sides it is not the case that a public authority's obligations in this

sort of respect are necessarily to be discharged by a decision once and for all at the outset: compare *Central Bedfordshire Council v. Taylor [2009] EWCA Civ 613, [2010] 1 WLR 446* .

27. But that was not the Council's position. It seeks to establish that it does not need to address the implications of possession proceedings for an occupant known to be severely disabled, on the basis that if it gets a possession order the disability will fall to be addressed if and when the occupants apply under Part 7 . Mr Fullwood went so far as to submit that it was difficult to see how the Council could be under a duty to consider Sam's disabilities in respect of functions which were not being performed and which had not yet therefore fallen for consideration by the Council, namely the functions under Part 7 .

28. As I have said, I reject the submission that functions in section 49A(1) are limited to functions under some particular aspect of a public authority's operations. The decision to seek possession of the school house was an exercise of a function of the public authority. It seems to me that knowing, as the Council did, that if successful this could pose potentially serious problems for Sam, who had been safely housed at the school house with the help of adaptations provided by the Council itself, it was incumbent on the Council to have regard to the need to take steps to take account of her disability. To what conclusion this would lead the Council is not for the court to say and of course the need for the premises to be used by a new caretaker was highly relevant.

29. In support of that approach, Mr Read referred us to paragraph 64 of Lord Neuberger's judgment in *Manchester City Council v Pinnock [2010] UKSC 45, [2010] 3 W.L.R. 1441* , which was said about article 8 but seems to me to be relevant also by analogy to section 49A of the DDA :

> "Sixthly, the suggestions put forward on behalf of the Equality and Human Rights Commission, that proportionality is more likely to be a relevant issue 'in respect of occupants who are vulnerable as a result of mental illness, physical or learning disability, poor health or frailty', and that 'the issue may also require the local authority to explain why they are not securing alternative accommodation in such cases' seem to us well made."

30. For his part Mr Fullwood referred us, by contrast, to paragraphs 52 and 54 of the same speech. I accept that, as he submitted, there is a high burden on a Defendant who relies on article 8 as a defence to a claim for possession. Nevertheless, in relation to a disabled person for whose benefit the section 49A(1)(d) duty has to be undertaken, in the present sort of context, the obvious question is where that person is going to live after the possession order to be sought has been obtained and has taken effect. Of course, Part 7 is particularly relevant, as it would not always be for a defendant to possession proceedings, because Sam would be a person in priority need for the purposes of Part 7 . But it does not follow that section 49A(1)(d) allows the Council to leave the question of her future accommodation and provision over to be coped with under Part 7 in the end, if it comes to that.

31. For these reasons it seems to me that it was a breach of duty for the Council to fail to address the duty under section 49A(1)(d) before commencing the proceedings, or at any stage during the proceedings.

32. On that basis I would hold that the first of the grounds of appeal is made out. In those circumstances I do not find it necessary to deal with the second ground of appeal concerned with Article 8 of the ECHR . Mr Read accepted that if he was

unable to succeed under the DDA , his claim under Article 8 was seriously difficult to address and if he was able to succeed under the DDA he did not need his separate Article 8 claim.

33. However, the question then arises as to what should be the consequence of the Council having failed, hitherto, to have due regard to its duty under section 49A(1)(d) , a duty to which it is still subject in carrying out its functions, as they may have an impact on Sam.

34. Mr Read submitted that the possession order should be set aside and the possession proceedings dismissed. I can see no proper basis for such an order. Even though, on the basis on which I proceed, the Council was in breach of its duty before the proceedings were started, it would be open to it to remedy that breach by giving proper consideration to the question at any later stage, including now in the light of our decision. What is needed is for the Council to give proper consideration to the factors which are relevant under section 49A(1)(d) , above all to the need for suitable accommodation to be found for Sam, her parents and her baby. We were told that an application has now been made for assistance under Part 7 , though only as recently as the week before the hearing of the appeal. In practical terms the Council will have to offer reasonably suitable alternative accommodation to the Norton family, and the Norton family must accept that it will have to move when suitable alternative accommodation is made available. One side-effect of the relatively active debate between Counsel and the court in the course of the hearing was that it will have become clear that what is needed is that both sides should address, in a collaborative way, the need for suitable alternative accommodation to be made available, sooner rather than later. As mentioned earlier, the Council can decide whether, and if so when, the possession order is to be enforced, and its decision in that respect is also one in taking which it is under the section 49A(1)(d) duty, or rather, now, the equivalent duty under the Equality Act, section 149 .

35. A possible course would be to set aside the possession order, so as to leave it to the Council to take up the proceedings again in the county court once it had given proper consideration to its duty under the section. That course, too, seems to me inappropriate. The Council has a sound need for the property and in terms of private law an unqualified right to obtain possession. It must now discharge its duties to Sam under Part 7 , or for that matter those under Part 6 of the 1996 Act as regards long-term housing as opposed to the temporary arrangements that tend to be typical under Part 7 . The decision of this appeal may serve to reinforce that which the courts have been saying for some time, calling on public authorities to face up to their obligations under section 49A and now section 149 of the 2010 Act. It seems to me that the practical problem needs to be resolved by proper consideration being given by the Council, with the cooperation of the Norton family, to the question where they are to be accommodated in the future, whether under Part 7 or under Part 6 . Sam's circumstances are such that she is likely to qualify for high priority treatment under either of these statutory regimes, and I would regard it as wrong to assume that the Council will not have proper regard to the extent and nature of her disability and her other needs in assessing what accommodation would be suitable for her, and in making an offer to her accordingly.

36. If the Council's failure to comply with its duties under section 49A(1)(d) had been challenged by an application for judicial review rather than by way of a defence to the possession claim, it would have been open to the Administrative Court to conclude that, despite a proven past breach, the Council's decisions already taken should not be set aside, if the court considered that the Council could now be relied on to exercise its relevant future functions properly, with (of course) the sanction — if it were not to do so — of further proceedings whether by way of judicial review or under (if relevant) Part 7 itself.

37. By analogy, given that a breach of a public law duty is relied on by way of defence in the present case, it seems to me that it is open to the court in this situation to take the view that, if the decision would not have been set aside on an application for judicial review, it should not provide a basis for a defence to the proceedings for possession. In *Wandsworth Borough Council v Winder [1985] AC 461* , in which the availability of a public law defence in private law proceedings was established by the House of Lords, the decision at issue had been taken once and for all, namely to increase the level of the rent payable by council tenants, including the Defendant. Here, by contrast, the Council's duty to Sam is a continuing duty, and the time when

a possession order has been made is in practice the most significant stage at which the duty needs to be discharged properly. Before that, it is a question of looking to the future, with an imperative for the Council of establishing that the house could be made available for a new caretaker. Once an order for possession has been made it is up to the Council to deal with its functions of providing suitable accommodation for Sam and her family (being entitled to it, whether under Part 7 or Part 6 of the 1996 Act) and to do so in proper accordance with the applicable duties under the Housing Act as well as under (now) the Equality Act . In practice I do not see that the position could or should be different under article 8 .

38. I quoted above, at paragraph [29], words of Lord Neuberger in Manchester City Council v Pinnock , relied on by Mr Read for the Appellants, in which he referred to the possible relevance of alternative accommodation. In the present case, alternative accommodation is directly relevant, but the Council is under a duty to provide such accommodation under Part 7 , and possibly also under Part 6 . At paragraph 57 of his judgment in the same case, Lord Neuberger also said this, about the working out of the implications of article 8 :

> "As in many situations, that is best left to the good sense and experience of judges sitting in the county court."

39. My analysis of the present case is not the same as that of the judge in the court below but the submissions to us have, no doubt, been differently articulated. However, my reasoning and analysis leads me to the same conclusion as that of the judge, namely that it was right to make an order for possession, and to leave it to the Council to deal properly with the logically consequent issue of Sam's need for new accommodation.

40. At the conclusion of the hearing the court urged the parties not to wait, during the period for which judgment was reserved, before engaging with the question of suitable replacement accommodation for Sam and the Norton family. We have been provided with a witness statement from the Council which indicates the steps which have been taken since then, from which we learn that Part 6 of the Housing Act 1996 has been under discussion as well as Part 7 . In that context, steps have been taken recently to identify Sam's particular needs. I am glad to learn of that, though I do not in any way rely on it in reaching my decision.

41. For the reasons given above, although I accept that the first ground of appeal has been made out, I would dismiss the appeal because I consider that it was appropriate, in the circumstances, for the judge to make the possession order that he did. It is now up to the Council to discharge properly its duties under the Housing Act 1996 , having proper regard also to its duty in relation to Sam under section 149 of the Equality Act 2010 .

Lord Justice Carnwath

42. On the issue of statutory construction, I agree that the Act is intended to apply whenever an authority is taking decisions which may have adverse effects on people within its scope. The decision to seek possession of Sam's home was such a decision. The authority ought to have been advised of its duties under the Act. To that extent their decision to seek possession was defective in law. Nothing in what follows should detract from the importance of authorities' being alive to the duties under the Act, and to the risks of default.

43. On the other hand, the content of the duty should not be overstated. It required the authority to have "due regard": in other words, such regard as was "appropriate in the circumstances" (Pieretti para 33). Further, it did not necessarily require them to take any immediate action to secure suitable alternative accommodation. Their "due regard" was to be to "the need to take steps to take account of (her) disabilities". As I read it, it was enough that they should have in mind the need to take such steps at the appropriate time. They were also entitled to take account of the practicalities.

44. They would have been aware that, in a contested case such as this, the need for suitable alternative accommodation would not arise for some time (in this case, 8 months elapsed between the issue of the claim and the possession order); and that, when it did, a different set of responsibilities, also subject to the Disability Act , would fall on them under the other legislation. They would also have been aware that the timing of actual possession, even following a court order, would be within their own control as landlord. There would therefore have been no reason to think that the date fixed by the order itself would be an obstacle to securing what was needed.

45. The judge was entitled to take the common sense view that, on the issue directly before him, namely the possession of the school house, there was only one possible answer, in view of the school's pressing need to replace its care-taker. The only other issue was what provision was to be made thereafter for the family. He understandably did not see it as part of his functions to police the performance of the authority's separate duties towards the vulnerable homeless under the housing legislation. He was satisfied on the evidence that:

> "…particularly having regard to Samantha's pregnancy this family will receive a high degree of priority".

46. In my view the issues in this case were and are straightforward. Once it was decided that there was no valid defence to possession, and the need for the school's need for possession was compelling, there was no reason to delay a possession order. The judge was entitled to trust the authority to carry out is duties under the housing legislation. Lloyd LJ has referred to Lord Neuberger's advice to leave such questions "to the good sense and experience of judges sitting in the County Court." This in my view was such a case. Applying a practical approach the judge was entitled to find that consideration of Sam's disability would not have made any difference to the authority's decision to seek possession.

Lord Justice Maurice Kay

47. I entirely agree with the judgment of Lloyd LJ.

Ldra Limited, Dr Michael Hennell, Colin Evans, Priory Wharf Management Company Limited v Secretary of State for Communities and Local Government, Cammell Laird Shiprepairs and Shipbuilders Limited, Wirral Borough Council

No Substantial Judicial Treatment

Court
Queen's Bench Division (Administrative Court)

Judgment Date
6 May 2016

Case No: CO/5680/2015

High Court of Justice Queen's Bench Division Planning Court

[2016] EWHC 950 (Admin), 2016 WL 01745179

Before: Mrs Justice Lang DBE

Date: 6 May 2016

Hearing date: 14 April 2016

Representation

Timothy Jones (instructed by Richard Buxton Solicitors) for the Claimants.
Stephen Whale (instructed by The Government Legal Department) for the First Defendant.
The Second and Third Defendants did not appear and were not represented.

Judgment

Mrs Justice Lang:

1. In this claim under section 288 of the Town and Country Planning Act 1990 ("TCPA 1990"), the Claimants applied to quash the decision of the Secretary of State for Communities and Local Government, dated 13 October 2015, made on his behalf by an Inspector (Mr Richard Clegg), in which he allowed an appeal by Cammell Laird Shiprepairers & Shipbuilders Ltd ("the developer"), and granted planning permission for an on-shore office and warehouse building at the car park, Alabama Way, Birkenhead, Merseyside, CH41 5LJ ("the Site"), to serve as a marine operations and maintenance facility for off-shore projects The off-shore projects to be serviced by the development were windfarms in Liverpool Bay and the Irish Sea. A marine licence had been granted for the proposed floating pontoon and linkspan structure.

2. The Site is immediately adjacent to the River Mersey. Once the site of a railway, the car park and the adjacent Monks Ferry slipway are now owned by Wirrall Borough Council ("WBC"). The public currently enjoy access to the car park. Charter boat companies use the slipway with the knowledge of WBC. WBC has resolved that its freehold interest in the Site could be sold to the developer. However, planning permission for this development was refused by WBC on 23 July 2014, on the grounds that it would result in an unacceptable loss of amenity for the occupiers at the adjacent residential development at Priory Wharf by virtue of increased noise, general disturbance and poor outlook.

3. The site is within an area designated as a Primarily Industrial Area in the adopted Wirral Unitary Development Plan ("Wirral UDP"). Policy EM6 provides that applications for new employment development (defined as falling within Classes B1, B2 and B8 of the Town and Country Planning (Use Classes) Order 1987)) will be permitted, provided it does not lead to an unacceptable loss of amenity or have an adverse effect upon neighbouring uses. WBC concluded that the potential impact upon occupants of Priory Wharf would be contrary to Policy EM6.

4. On appeal by the developer, the Inspector identified six main issues (Appeal Decision ("AD") [7]):

i) The effect of the proposed development on the living conditions of nearby residents of Priory Wharf.
ii) The effect of the proposed development on the operation of LRDA Ltd, the occupier of the offices to the south of the site.
iii) The effect of the proposed development on nature conservation.
iv) The effect of the proposed development on heritage assets.
v) The suitability of the site for development, having regard to flood risk.
vi) The effect of other considerations in the overall planning balance.

5. The appeal was opposed by the Claimants, who were adversely affected by the proposal, and had previously objected to WBC.

6. The First Claimant operates a high technology business on the industrial park immediately to the south of the Site. The Second Claimant, Dr Hennell, is the managing director and founder of the First Claimant company.

7. The Third Claimant, Mr Evans, is a member of the Mersey Charter Boat Association, a qualified yacht master and a charter-boat operator. He operates the "Mersey Lass" on the River Mersey for fishing trips and wreck diving. He has operated a charter boat service on the River Mersey since 1991.

8. The Fourth Claimant is the Priory Wharf Management Company Ltd which operates for the benefit of residents of Priory Wharf, the four storey residential complex located immediately to the north of the Site.

9. After a hearing lasting two days, and two site visits, the Inspector decided that the appeal should be allowed and planning permission should be granted, subject to conditions. His overall conclusions were as follows:

> "75. The appeal site lies within a primary industrial area on the UDP Proposals Map. Within this designation, the proposed offices and warehouse would be acceptable in principle. However the criteria in Policies EM6 and EM7 apply to new employment development and are also relevant. The development of the site at Alabama Way for a marine operations and maintenance facility would not cause unacceptable harm to the living conditions of nearby residents at Priory Wharf, nor would it result in material harm to the operations of LDRA Ltd. Insofar as nature conservation interests are concerned, there would be no significant adverse effect, and I have found no conflict with Policies EM6 and EM7.
>
> 76. The proposal would not detract from the significance of heritage assets, and there would be no conflict with Policy CH1 of the UDP which seeks to safeguard listed buildings. Policies in the

> UDP concerning the developed coastal zone and the inter-tidal zone are also relevant to the appeal proposal. Whilst there is compliance with most provisions of Policies CO1 and COI7, the closure of about 40m of the riverside footway would conflict with the requirement to preserve public access to the coast.
>
> 77. As a consequence of the conflict with Policy CO1 concerning public access to the coast the proposal would not be fully consistent with the Development Plan. I consider that the effect on jobs is of neutral significance in the planning balance, but the proposal would contribute to the implementation of off-shore renewable energy projects, and it would thereby accord with a core planning principle of the NPPF. This is a significant benefit of the proposal which clearly outweighs the limited harm of conflict with Policy CO1 arising from the loss of a short stretch of footway."

10. In their application under section 288 TCPA 1990 , the Claimants submitted that the Inspector erred in respect of his approach to:

i) The adverse impact of vibration on the First Claimant's business;
ii) The adverse impact on disabled persons, because of loss of the car park, and access to the riverside.
iii) The loss of access to the slipway by charter-boat operators.
iv) The proposed condition excluding B2 uses in the building.
v) An alternative available site.

11. Ground 5 was added by way of a late amendment, and both parties filed late witness statements in respect of the issues which it raised.

12. The First Defendant's response was that the decision did not disclose any error of law on the part of the Inspector, who had considered all relevant matters, giving them such weight as he found appropriate, and reached conclusions on the planning merits of the proposal which could not be successfully challenged.

Legal framework

13. Under section 288 TCPA 1990 , a person aggrieved may apply to quash a decision on the grounds that (a) it is not within the powers of the Act; or (b) any of the relevant requirements have not been complied with and in consequence, the interests of the applicant have been substantially prejudiced.

14. The general principles of judicial review are applicable to a challenge under section 288 TCPA 1990 . Thus, the Claimants must establish that the Secretary of State misdirected himself in law or acted irrationally or failed to have regard to relevant considerations or that there was some procedural impropriety.

15. 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 v Secretary of State for the Environment (1978) 42 P &CR 26* . As Sullivan J. said in *Newsmith v Secretary of State for the Environment, Transport and the Regions [2001] EWHC Admin 74* , at [6]:

> "An application under section 288 is not an opportunity for a review of the planning merits of an Inspector's decision."

16. The determination of an application for planning permission is to be made in accordance with the development plan, unless material considerations indicate otherwise: section 38(6) of the Planning and Compulsory Purchase Act 2004 , read together with section 70(2) TCPA 1990 . The NPPF is a material consideration for these purposes.

17. An Inspector's decision letter must be read (1) fairly and in good faith, and as a whole; (2) in a straightforward down-to-earth manner, without excessive legalism or criticism; (3) as if by a well-informed reader who understands the principal controversial issues in the case: see Lord Bridge in *South Lakeland v Secretary of State for the Environment [1992] 2 AC 141* , at 148G-H; Sir Thomas Bingham MR in *Clarke Homes v Secretary of State for the Environment (1993) 66 P & CR 263* , at 271; *Seddon Properties v Secretary of State for the Environment (1981) 42 P & CR 26* , at 28; and *South Somerset District Council v Secretary of State for the Environment (1993) 66 P & CR 83* .

Ground 1: Vibration

18. The First Claimant operates an international high technology business, including testing of bespoke computer programmes intended to ensure the safety of both civil and military aircraft. The equipment used for this is highly sensitive. The evidence of Dr Hennell was that the vibration generated by the proposed development, particularly during the construction phase, but also when in operation, would irrevocably harm its computer discs. It would have to re-locate to another site if the development went ahead.

19. The developer commissioned consultants who prepared a detailed "Construction Noise and Vibration Assessment" which referenced British Standard 5228–2 on Vibration, and the Approved Code of Practice, including best practice vibration mitigation requirements. BS 5228–2 addresses vibration limits for buildings, and contents of buildings, such as disc drives which are sensitive to vibration below the level directly perceptible to people. Because of uncertainty concerning the level of transmitted vibration, and its acceptability to the particular environment, preliminary trials and monitoring may have to be designed to establish a suitable procedure for the work. The report recommended a Noise and Vibration Management Plan, which would be incorporated into the Construction Environmental Management Plan, proposed as a condition of planning consent.

20. The Inspector accepted the evidence from the consultants that the risk of damaging vibration from the movement and engines of the crew transfer vessels was negligible. Vibration during construction would present a risk but it could be acceptably mitigated by use of the less intensive methods of work recommended in the report, and by monitoring. The Inspector imposed the conditions recommended by the consultants which provided that development could not take place until there was an approved plan addressing "construction noise and vibration management, monitoring and mitigation measures" which was to be adhered to throughout the construction period. In the light of this condition, he was not certain that it would be necessary for the business to re-locate. Even if it did, the loss of jobs would be balanced by about 65 new jobs created by the development proposal.

21. The Claimants criticised the Inspector's decision, on the grounds that he failed adequately to address their concerns, and erred in his approach to the British Standards, and relied on monitoring instead of prevention. In my judgment, these criticisms were not justified. The Inspector gave proper consideration to the issue, and reached conclusions which were supported by the consultants' evidence.

Ground 2: Disabled persons' access to the riverside

22. The Claimants submitted that the Inspector failed to appreciate and/or take into account that the likely impact of the development was that disabled persons would no longer be able to access the riverside. This was contrary to Policy CO1 of the adopted Wirral UDP which states that " *Public access to the coast will be expected to be preserved and where practical and safe to do so, enhanced* ." Paragraph 20.19 of the reasoned justification provides that " *No development ... should lead to a reduction in public access to the coast, and indeed where possible, should enhance it.* " In reaching his conclusions on this issue, the Inspector failed to discharge the public sector equality duty under section 149 of the Equality Act 2010 , in particular subsections (1)(a) and (b) and (3)(a) and (b) .

23. The Secretary of State agreed that section 149 of the Equality Act 2010 applied but submitted that the Inspector had discharged the duty by having due regard to the needs identified in subsections (1) and (3) . There was no error of law in his approach to access by disabled persons.

24. Section 149 of the Equality Act 2010 provides:

"149 Public sector equality duty

(1) A public authority must, in the exercise of its functions, have due regard to the need to—

(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;

(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;

(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

(2) A person who is not a public authority but who exercises public functions must, in the exercise of those functions, have due regard to the matters mentioned in subsection (1).

(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—

(a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;

(b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;

(c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.

(4) The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.

(5) Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—

(a) tackle prejudice, and

(b) promote understanding.

(6) Compliance with the duties in this section may involve treating some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act.

(7) The relevant protected characteristics are—

age;

disability;

gender reassignment;

pregnancy and maternity;

race;

religion or belief;

sex;

sexual orientation.

…"

25. The public sector equality duty has been the subject of detailed consideration by the courts over the years. Mr Whale referred me to *R (Coleman) v London Borough of Barnet [2012] EWHC 3725 (Admin)* , in which Lindblom J. (as he then was) held that the local planning authority had due regard to the statutory equality duty which had been fully set out in the planning officers' report. Lindblom J. set out the principles to be applied as follows:

"65. The relevant jurisprudence is clear and not controversial.

66. As Dyson LJ said in [*R (Baker) v Secretary of State for Communities and Local G overnment [2009] PTSR 809*] (in paragraph 31), the duty is not a duty to achieve a result, but to have due regard to the need to achieve the statutory goals. This distinction, said Dyson LJ, is "vital". The failure of a decision-maker to make explicit reference to the relevant statutory provision (in that case section 71(1) of the Race Relations Act 1976) would not determine whether the duty under the statute had been performed, for this "would be to sacrifice substance to form" (ibid., paragraph 36). Dyson LJ went on to say this:

"37 The question in every case is whether the decision-maker has in substance had due regard to the relevant statutory need. Just as the use of a mantra referring to the statutory provision does not of itself show that the duty has been performed, so too a failure to refer expressly to

> the statute does not of itself show that the duty has not been performed. … To see whether the duty has been performed, it is necessary to turn to the substance of the decision and its reasoning.
>
> 38 Nevertheless, although a reference to section 71(1) may not be sufficient to show that the duty has been performed, in my judgment it is good practice for an inspector (and indeed any decision-maker who is subject to the duty) to make reference to the provision … in all cases where section 71(1) is in play. In this way, the decision-maker is more likely to ensure that the relevant factors are taken into account and the scope for argument as to whether the duty has been performed will be reduced."

67. The court must consider whether due regard has been paid to the equality duty, and not simply whether the failure to have due regard to that duty was *Wednesbury* unreasonable (*R (Child Poverty Action Group) v Secretary of State for Work and Pensions [2011] EWHC 2616 (Admin)* , at paragraphs 70 to 72). "Due" regard means, as Dyson LJ said in Baker (at paragraph 31), "the regard that is appropriate in all the circumstances". The circumstances include "the importance of the areas of life of the members of the disadvantaged … group that are affected by the inequality of opportunity and the extent of the inequality" and "such countervailing factors as are relevant to the function which the decision-maker is performing" (ibid.).

68. As Aikens LJ said in [*R (Brown) v Secretary of State for Work and Pensions [2009] PTSR 1506*] (at paragraph 35), "the general duty [in section 49A(1) of the Disability Discrimination Act 1995] is expressed in broad and wide-ranging terms of the needs or targets to bring about a change of climate, but the section is silent as to how it should be done". He emphasized (at paragraph 82) the need for the decision-maker to "pay regard to any countervailing factors which, in the context of the function being exercised, it is proper and reasonable for the public authority to consider". What these factors are in a particular case will depend on the function being exercised and all the circumstances that bear upon it. Aikens LJ added:

> "… Clearly, economic and practical factors will often be important be important. Moreover, the weight to be given to the countervailing factors is a matter for the public authority concerned, rather then the court, unless the assessment by the public authority is unreasonable or irrational …"

…

70. Performance of the due regard duty must be an integral part of the formation of the decision, not merely the justification for the making of that decision (see *R (Kaur) v Ealing LBC [2008] EWHC 2062 (Admin)* , at paragraph 24). Because the performance of the duty is a matter of substance, to be judged according to the facts of the case in hand, there must be enough information to enable the necessary balancing exercise to be carried out, and that information must be before the decision-maker (see Child Poverty Action Group , at paragraphs 70 to 76). In Brown it was held that the underlying objective of the general duty under section 49A(1) of the 1995 Act was "to create a greater awareness on the part of public authorities of the need to take account of disability in *all* its

forms and to ensure that it is brought into "the mix" as a relevant factor when decisions are taken that may affect disabled people" (paragraph 30).

71. The decision under challenge in this case is a planning decision, the decision of a local planning authority to approve a scheme of development. It is not a decision of a public body to withdraw or reduce a particular service, such as the court had to consider, for example, in the Birmingham case, which concerned the provision made for disabilities in the then current budget of Birmingham City Council. Much of the case law is concerned with decisions of that kind. This is not to say that the public sector equality duty is less onerous in a planning case than it is in others. It is not. But in such a case the circumstances in which the authority's performance of the duty has to be scrutinized will inevitably be different."

26. More recently, in *Moore and Coates v Secretary of State for Communities and Local Government & Ors [2015] EWHC 44 (Admin)* , another planning case, Gilbart J. provided a helpful summary of the law on the public sector equality duty:

"109. In *Bracking v Secretary of State for Work and Pensions [2013] EWCA Civ 1345* , para 26 McCombe LJ summarised the principles to be derived from the authorities on s 149 , as follows:

"(1) As stated by Arden LJ in *R (Elias) v Secretary of State for Defence [2006] EWCA Civ 1293 at 274, [2006] IRLR 934, [2006] 1 WLR 3213* , equality duties are an integral and important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation.

(2) An important evidential element in the demonstration of the discharge of the duty is the recording of the steps taken by the decision maker in seeking to meet the statutory requirements: *R (BAPIO Action Ltd) v Secretary of State for the Home Department [2006] EWCA Civ 1293, [2006] IRLR 934, [2006] 1 WLR 3213* (Stanley Burnton J (as he then was)).

(3) The relevant duty is upon the Minister or other decision maker personally. What matters is what he or she took into account and what he or she knew. Thus, the Minister or decision maker cannot be taken to know what his or her officials know or what may have been in the minds of officials in proffering their advice: *R (National Association of Health Stores) v Department of Health [2005] EWCA Civ 154* at 26–27] per Sedley LJ.

(4) A Minister must assess the risk and extent of any adverse impact and the ways in which such risk may be eliminated before the adoption of a proposed policy and not merely as a "rearguard action", following a concluded decision: per Moses LJ, sitting as a Judge of the Administrative Court, in *Kaur & Shah v LB Ealing [2008] EWHC 2062 (Admin)* at 23–24.

(5) These and other points were reviewed by Aikens LJ, giving the judgment of the Divisional Court, in *R (Brown) v Secretary of State for Work and Pensions [2008] EWHC 3158 (Admin), [2009] PTSR 1506* , as follows:

i) The public authority decision maker must be aware of the duty to have "due regard" to the relevant matters;

ii) The duty must be fulfilled before and at the time when a particular policy is being considered;

iii) The duty must be "exercised in substance, with rigour, and with an open mind". It is not a question of "ticking boxes"; while there is no duty to make express reference to the regard paid to the relevant duty, reference to it and to the relevant criteria reduces the scope for argument;

iv) The duty is non-delegable; and

v) Is a continuing one.

vi) It is good practice for a decision maker to keep records demonstrating consideration of the duty.

(6) [G]eneral regard to issues of equality is not the same as having specific regard, by way of conscious approach to the statutory criteria." (per Davis J (as he then was) in *R (Meany) v Harlow DC [2009] EWHC 559 (Admin)* at 84, approved in this court in *R (Bailey) v Brent LBC [2011] EWCA Civ 1586* at 74–75.)

(7) Officials reporting to or advising Ministers/other public authority decision makers, on matters material to the discharge of the duty, must not merely tell the Minister/decision maker what he/she wants to hear but they have to be "rigorous in both enquiring and reporting to them": *R (Domb) v Hammersmith & Fulham LBC [2009] EWCA Civ 941* at 79 per Sedley LJ."

110. McCombe LJ went on to identify three further principles, which may be summarised as follows:

(8) It is for the Court to decide for itself if due regard has been had, but providing this is done it is for the decision maker to decide what weight to give to the equality implications of the decision (following *R (Hurley & Moore) v Secretary of State for Business, Innovation and Skills [2012] EWHC 201 (Admin)* , per Elias LJ @ [77]-[78]).

(9) "[T]he duty of due regard under the statute requires public authorities to be properly informed before taking a decision. If the relevant material is not available, there will be a duty to acquire it and this will frequently mean that some further consideration with appropriate groups is required" (*R (Hurley & Moore) v Secretary of State for Business, Innovation and Skills [2012] EWHC 201 (Admin)* , per Elias LJ @ [89]).

(10) The duty to have due regard concerns the impact of the proposal on all persons with the protected characteristic and also, specifically, upon any particular class of persons within a protected category who might most obviously be adversely affected by the proposal (Bracking , *per* McCombe LJ @ [40]).

111. As to the importance of the second principle, McCombe LJ stated @ [60]-[61]:

> "it seems to me that the 2010 Act imposes a heavy burden upon public authorities in discharging the PSED and in ensuring that there is evidence available, if necessary, to demonstrate that discharge. It seems to have been the intention of Parliament that these considerations of equality of opportunity (where they arise) are now to be placed at the centre of formulation of policy by all public authorities, side by side with all other pressing circumstances of whatever magnitude" and "In the absence of evidence of a 'structured attempt to focus upon the details of equality issues' (per my Lord, Elias LJ in Hurley & Moore) a decision maker is likely to be in difficulties if his or her subsequent decision is challenged"."

27. In this case, the evidence before the Inspector was that public access to the river from Birkenhead is very limited. The Site is the only place in the area where public parking next to the river is readily available. The large car park is immediately beside the River Mersey, thus enabling disabled people and their carers to enjoy the river and the fine views across it, and to watch the activities of ships and smaller boats. Disabled people can remain in the car park area (which is built on two levels) or if they are sufficiently mobile, they can proceed a short distance to the riverside promenade (which forms part of the Wirral Circular Trail) either in a wheelchair or on foot. There was clear evidence before the Inspector from several sources that this car park, and the access which it gave to the river, was an amenity which was both regularly used and valued by disabled people (both adults and children with special needs). I am unable to accept Mr Whale's submission that there was insufficient evidence of use of the car park by disabled persons for this ground to succeed.

28. The proposed development will be built on the car park, and so visitors will no longer be able to drive and park by the riverside. Visitors will have to find street parking in Church Street or Ivy Street. From there they will have to proceed on foot along the streets and down a steep footpath for a distance of about 119 metres to reach the riverside. The Statement of Common Ground ("SCG") recorded at paragraph 3.3, " *a steep gradient across the site with the highest elevation in the west of the site approximately 14m Above Ordnance Datum (AOD) sloping to approximately 5.5 AOD in the north east of the site* ". In a different context, when considering the impact of the development on Priory Wharf at AD [16], the Inspector said that the appeal Site " *slopes down towards the waterfront from about 14m above Ordnance datum (AOD) at the junction of Alabama Way and Monks Ferry to above 6–7 AOD by the riverside wall* ". The discrepancy between the agreed figure of 5.5 AOD in the SCG, and the figure of "above 6–7 AOD" stated by the Inspector, was unexplained, as the SCG figure was not disputed at the hearing.

29. The Inspector's findings were as follows:

> "59. Policy CO1 expects that public access to the coast will be at least preserved, and Policy CO7 requires that public access should be preserved unless this would be impractical. The greater part of the appeal site comprises a public car park, and a riverside footway from the north continues across the site to its southern boundary. Plan AL16 identifies these areas as highway, which it is proposed would be stopped up. The justification to Policy CO1 refers to an objective of the Council to complete a continuous coastal route for pedestrians and cyclists. The proposal would not sever the riverside route, since a gate prevents access to the south beyond the appeal site. The footway between Priory Wharf and the appeal site would continue to provide public access from the surrounding area to the riverside and the route to the north to Woodside. Only a short stretch of footway would be excluded from public use by virtue of the proposal, and there would still be the opportunity to reach the riverside immediately to the north of the existing slipway. Nevertheless there would be a loss of public access across the site, a distance of about 40m, contrary to the requirement of Policy CO1 to preserve public access to the coast. I appreciate that it would be impractical to permit public access on foot within the operational site, and for this reason I find no conflict with Policy CO7.
>
> 60. There is disagreement between the parties concerning the usage of the public car park at Alabama Way. The car park is a pay and display facility, and the Council's evidence, endorsed by the Appellant, is that it is little used. Information from ticket sales for the period from January 2011 to April 2014 indicates that on average only 2–4 vehicles a day are parked on the site. Local residents reported that at times there could be up to 30 cars present, and it was suggested that the discrepancy with ticket sales could be due to use of the car park by disabled persons who are exempt from charges, and the non-purchase of tickets for some short stays. I note that photographs 9 and 10 in the Appellant's LVIA show use of the car park by at least 6 and 8 cars respectively, in excess of the Council's evidence but markedly less than the number suggested by local residents. There are opportunities to park on nearby streets, and the Council is satisfied that space here would accommodate parking displaced from Alabama Way. No parking survey of the locality has been submitted, but I anticipate that in the evening and at weekends, when there may be more people wishing to reach the riverside by car, competition for on-street spaces with vehicles associated with the industrial and commercial premises in the locality would be less than during the normal working day. That said, the off-street spaces are further from the riverside and less convenient to use, particularly for disabled persons.

> 61. As a consequence of redevelopment of the appeal site, there would be no direct access to a short stretch of riverside footway, and the loss of the car park would make it less convenient for those travelling to this part of the riverside by car to reach their destination. I conclude that the proposal would not preserve public access to the coast, and that it would conflict with Policy CO1 of the UDP. This is a matter to which I give limited weight, bearing in mind the short length of footway affected and the continuing opportunity to reach the riverside in the vicinity of Monks Ferry."

30. The Claimants submitted that the Inspector's approach displayed a serious failure to understand the reality of the impact on disabled people. The proposed development was not merely inconvenient, as it would be for able-bodied people; rather it would prevent access to the riverside. Only able-bodied people would have the " *continuing opportunity to reach the riverside in the vicinity of Monks Ferry* ", referred to by the Inspector at AD [61].

31. In my judgment, there was a strong argument, based on the written and photographic evidence, that disabled people with impaired mobility would find it very difficult or impossible to go down to the riverside if the development is built because (a) they would be parked too far away; and (b) the footpath down to the riverside, and back up, would be too steep for disabled people and their carers to manage. Even a disabled resident at nearby Priory Wharf said she would find it too difficult. Mrs Cartwright, resident at Priory Wharf, stated in her letter objecting to the development:

> "My husband unfortunately suffered a stroke two years ago so obviously he has restricted movement. We use that car park regularly, it is so convenient for me to run him round in the car …. I push him along the promenade because it is nice and flat. I could not do this otherwise because I am no longer young myself. The steep slope down to the car park on foot and with a wheelchair is out of the question for me. I am at a loss to understand the thinking on these plans because that area is used by many, it is the only open space left here that is not taken up by industry."

32. Applying the legal principles set out above, I have concluded that the Inspector did not have due regard to the duty under section 149 in this case. In particular, because of the lack of any detailed consideration of the value of the existing amenity to disabled persons (including, for the immobile, being able to sit in the car and look at the river); the lack of any other comparable amenity in the Birkenhead area; the practical difficulties which would be experienced by persons with restricted mobility and their carers in descending and climbing the steep footpath to the riverside; and the apparent failure to consider whether the loss of the car park would not be merely "less convenient" for disabled persons but might well mean that they would be unable to access the riverside at all. If the Inspector was not fully appraised of the relevant information, he was under an obligation to seek the information required. The statutory equality duty was not mentioned in the planning officers' report, nor in the Inspector's decision. Of course, the Inspector could comply with the duty without specifically referring to it. But there is no indication in the decision that the Inspector considered the factors set out in section 149 , and tellingly there is no reference, express or implied, to the statutory considerations of removing or minimising disadvantages suffered by disabled persons, and taking steps to meet the needs of disabled persons. I consider it is likely that the Inspector overlooked section 149 in reaching his decision, and thus made an error of law.

33. I am unable to accept Mr Whale's submission that I should not quash the decision because this was only a sub-issue, not a main issue in the appeal, and if the Inspector had performed his statutory duty, the decision would have been the same in any event. In my view, the evidence of disadvantage to disabled persons was significant, and the Inspector failed to recognise its importance. I cannot say with confidence that the Inspector's conclusion as to the weight to be accorded to the factor of coastal access would have been the same if the Inspector had properly applied his mind to the considerations set out in section 149 . Moreover, the section 149 duty is concerned with the manner in which decisions are made, not merely outcomes.

Ground 3: Loss of access to the slipway by charter-boat operators

34. The Claimants submitted that the Inspector failed adequately to address the adverse impact of the proposed development on charter-boat operators who would no longer be able to operate their businesses from Monks Ferry slipway. Mr Flint, who

owns Discovery Charters Ltd, gave evidence that, because of the tides, Monks Ferry slipway was the only location within 60 miles where 24 hour access was feasible throughout the year. He used it regularly. The Third Claimant, Mr Evans, who runs diving and fishing trips from Monks Ferry throughout the year, confirmed that there was no suitable alternative access because of tidal conditions. Mr Dickinson, who runs a single hull boat with a capacity of 10 passengers from Monks Ferry, also uses it full-time. He explained that there were eleven local charter boats and another 5 or 6 Welsh boats that used the slipway. Mr Parry, of Jensen Sea Angling, sent an objection in writing saying that although he mainly worked out of Liverpool Marina, he had to use the slipway when he could not access the Marina because of tides.

35. According to the Council, the slipway is not open to the public (it is gated); it is intended for use by the emergency services and the Council. The Claimants submitted that the 24 hour emergency access to and from the river at Monks Ferry ought, in the interests of safety, to be maintained. Use of the Monks Ferry slipway by the charter-boat operators is not officially authorised by WBC, but the Council has been aware of it for many years, and has not objected. A public or private right of access is now being investigated by the charter-boat owners.

36. The Inspector's conclusions were as follows:

> "64. I have also considered the implications of the proposal for charter boat operators who use the slipway to collect and disembark customers. Representatives of the Mersey Charter Boats Association explained that the slipway is used by about 11 local boats and 5/6 Welsh boats, principally in connection with fishing trips. The three operators who appeared at the hearing explained that there is no place other than the Monks Ferry slipway where they are able to gain 24 hours access to the Mersey. This is important since fishing trips do not typically last from one high tide to another, and each considered that inability to use the slipway would threaten the future of his business. However no detailed assessments have been submitted to demonstrate that the operation of these businesses cannot be adjusted to withstand the loss of access to the Monks Ferry slipway. Another operator, although objecting to the proposal, has stated that he uses the slipway on rare occasions and works out of Liverpool Marina during the winter months.
>
> 65. Although the charter boat operators make use of the slipway, their right to do so has been questioned by the Appellant. The slipway is owned by the Council, which has explained that the slipway is not open to the public, that there are no recorded permit holders, and that it is intended for use by the Council, emergency services and Government agencies. At the hearing the legal representatives of the Appellant and LDRA/ Dr Hennell agreed that private rights of way could be established if there was evidence of uninterrupted use over a period of 20 years. That is not a matter for consideration as part of this appeal. However, if a private right to access the slipway by the charter boat operators were established they should be able to continue using it irrespective of the development. On the other hand, if no such right were found to exist, there would appear to be no basis for their use of the slipway.
>
> 66. The proposal would create up to 65 new jobs, but there is a possibility that jobs at LDRA would be moved out of the area if redevelopment went ahead. The number of jobs created by Cammell Laird would be less than the number potentially affected at LDRA; however in my judgement there would be greater certainty attached to job creation by the development on the appeal site, and I consider that these factors carry equivalent weight. From what I have heard, the ability of the charter boat operators to continue to use the slipway by is not dependent on the outcome of this appeal. Overall, the implications of the proposal for jobs are a neutral factor in the planning balance."

37. I understand why the charter boat operators were aggrieved at the Inspector's approach to this issue, in particular, because he did not fully accept their evidence. However, this is not a re-hearing of the appeal before the Inspector and the Inspector's conclusions can only be successfully challenged if there is an error of law. I am unable to identify any error of law in the Inspector's approach. In my view, he was not persuaded by their evidence as to the likely impact on their businesses. On

my reading of the decision, he did not decide this issue on the basis of whether there were or were not any rights of access to the slipway.

38. The point concerning provision for emergency access to the slipway was not pursued at the hearing before me. It ought to be addressed at any re-hearing of the appeal, if it remains a live issue.

Ground 4: B2 use

39. The Claimants submitted that the Inspector erred in refusing to impose a condition restricting use of the building to B1 and B8 uses, excluding B2 use.

40. The application for planning permission was made upon the basis of proposed B1, B2 and B8 uses. The Design and Access Statement referred to a building within B2 use. This was consistent with the Site's allocation. The Statement of Common Ground recorded at paragraph 4.2: "1,500 sq m storage and office building (use class B2: general industry)".

41. The Inspector refused to impose the condition proposed by the Claimants, and previously agreed by the developer, restricting the use of the building to B1 and B8 uses. He held:

> "74. The Appellant has put forward the proposal as a blend of B1, B2 and B8 uses. A condition restricting the use of the site to B1 and B8 uses would therefore be unreasonable. In any event conditions requiring a construction management plan and noise mitigation measures should protect the amenities of adjacent occupiers, and they would also render a condition concerning loud individual noises unnecessary."

42. In my judgment, the Inspector's decision was correct. Although the evidence pointed to primarily B1 and B8 use, it was clear that the developer at all times sought B2 use as well. I do not consider that the Inspector misunderstood the Claimants' suggestion that the condition be limited to the building, despite his use of the word "site". I find it inconceivable that the Inspector overlooked potential B2 use at this Site, when he granted planning permission and imposed conditions to protect the amenities of neighbouring occupants.

Ground 5: An alternative available site

43. It was common ground at the appeal that it was appropriate for possible alternative sites to be considered and the developer presented a report considering six alternative locations. The Claimants submitted that the Inspector erred in his approach to a potential alternative site, running between Pacific Road, Woodside (near the Irish ferry terminal), and Seacombe (an area which includes the Mersey Ferry jetty and a derelict riverside site known as Kings Wharf/Fishermen's Wharf). This area was not considered by the developer.

44. The Inspector, at AD [67] to [70], considered the alternative sites presented by the developer and then said, at [70]:

> "Dr Hennell has pointed to unused land and foreshore between Pacific Road at Woodside and Seacombe, and has also made reference to the Liverpool side of the river. However there are no details of specific locations in these extensive areas. The information before me does not indicate that any of the alternative locations put forward would be more appropriate for the proposed marine operation and maintenance facility than the appeal site."

45. It was not in dispute that the Inspector had the following material before him:

i) The appeal statement of Dr Hennell referred to " *extensive unused land and foreshore area between Pacific Road, Birkenhead and the Seacombe Ferry, Wallasey. This is already an area for deep-water operations, such as ferries to Ireland.* "
ii) Dr Hennell's written presentation to the WBC Planning Committee stated " *there is an extensive unused land and foreshore area between Pacific Road and the Seacombe ferry. This is already an area for deep water operations (ferries to Ireland, etc). This land may also be in the possession of another company related to Cammell Laird* ."

46. During the hearing before me, Dr Hennell's solicitors' notes were produced. They were good quality notes, and their accuracy was not disputed by the Secretary of State. After the site visits, the note summarised a roundtable discussion about alternative sites, in which Dr Hennell referred to " *North of Irish Ferry terminal. Land available* ". The Irish ferry terminal is at Woodside. The Claimants submitted that this was a further means of identifying the site to the Inspector.

47. The Inspector conducted an accompanied site visit by boat, travelling across the River Mersey from Liverpool towards Birkenhead, and back. According to the evidence of Mr Flint and Mr Dickinson, as they reached a point approximately 500m from the Site, it was possible to see the coastline from Woodside to Seacombe, north of the appeal Site. Mr Dickinson explained to the Inspector that WBC had suggested that the charter-boats could use Seacombe Ferry jetty but that it was too high for their boats. Mr Dickinson then pointed out the derelict land at Kings Wharf (also known as Fishermen's Wharf because of the public house there) and said that it could be used for the on-shore maintenance operations for the wind farms and the Seacombe Ferry jetty could be used for access to the river. At this point, Mr Vitkovitch of Cammell Laird interrupted and told the Inspector that Kings Wharf was not a suitable site. Dr Hennell was also present on the boat and has filed a witness statement confirming that the site which he referred to in his evidence was pointed out to the Inspector on the boat trip.

48. The Inspector has filed two witness statements dealing with this and other issues. In his first witness statement at paragraph 5, he stated that he interpreted Dr Hennell's description of an alternative location in his statement (set out above) as extending up to but not including the Seacombe Ferry. In paragraph 7, he stated that at the site visit, the hearing did not continue and so no evidence could be given. Those present were restricted to pointing out places and features. He said:

> "the boat travelled across the river from Liverpool Marina towards the appeal site and it then went upstream to Rock Ferry to enable views of possible alternative sites to the south of the appeal site. Seacombe Ferry is, by contrast, downstream and to the north of the appeal site. After Rock Ferry, the boat followed the same course in reverse back to Liverpool Marina. I have no recollection of a site at Seacombe Ferry being pointed out during the site visit."

49. In his second statement, the Inspector repeated his description of the route of the boat, saying he had no recollection of Seacombe Ferry being pointed out to him. At paragraph 11, he stated that he was unclear as to whether the Kings Wharf site was the same site as the Seacombe Ferry site, or a different one.

50. Mr Vitkovitch has filed a brief statement which did not state in terms whether or not he recalls the conversation described by Messrs Flint and Dickinson. However, he stated that he agreed with the Inspector's statements.

51. On considering the witness statements, looking at the maps, and hearing submissions, I am satisfied, on the balance of probabilities, that when they were on the site visit, Messrs Dickinson and Flint pointed out to the Inspector the location of Seacombe Ferry and the land south of it, known as Kings Wharf or Fishermen's Wharf. I found their evidence detailed, plausible and convincing. It appeared to me that the Inspector either did not understand the significance of what he was being shown, or subsequently forgot about it. Contrary to the Inspector's recollection, I am satisfied that, as the boat was coming over from Liverpool, there would have been a clear view of the coastline north of the appeal Site, before the vessel turned south to look at the alternative sites referred to by the developer.

52. The purpose of the site visit was to identify and view possible alternative sites. Those accompanying the Inspector were permitted to point out the sites and identify features. In my view, there was a breach of natural justice/procedural fairness in that the Inspector did not take into account the identification of the Seacombe Ferry/Kings Wharf site. The Inspector subsequently dismissed Dr Hennell's evidence on the basis that his proposed alternative site had not been properly identified to him. In my view, the Inspector's witness statements demonstrated that he was confused about the area which Dr Hennell

was referring to, and he did not understand the location of the potential alternative site. Rather than dismiss it out of hand, he ought to have asked for further assistance by way of maps or photographs or conducted a site visit on land, so that he could give it due consideration.

53. If due consideration had been given to this alternative site, the outcome might have been different, and in my view the Claimants have been substantially prejudiced. If the alternative site had been found to be suitable and did not have the adverse impacts of the appeal Site, planning permission might not have been given. Subsequent events lend support to Dr Hennell's submission that this was a suitable alternative site. Dong Energy, which holds the contracts for the servicing of off-shore wind turbines located in the Irish Sea, was granted planning permission by WBC on 7 December 2015 for a wind turbine servicing facility to be built at Kings Wharf, Seacombe, with sea access via Seacombe Ferry terminal. These were the locations shown to the Inspector by Mr Dickinson on the boat trip, and the alternative site proposed by Dr Hennell. Mrs Lawson, who is the Chair of the Priory Wharf Management Company Ltd, has stated in her witness statement:

> "I refer to the witness statement of Dr Hennell in relation to the alternative facility at Seacombe Ferry, which is before the Council at the date of this witness statement. The leader of Wirral Borough Council, Cllr Phillip Davies, has confirmed to me personally that the Council supports the Dong Energy facility so as to avoid the adverse residential amenity impacts the development at Alabama Way would give rise to. "

54. As the developer and WBC did not appear before me, it was not known what were the future plans for the appeal Site, and obviously that is not an issue for me in this application.

Conclusion

55. The Claimants' application succeeds on Grounds 2 and 5 and the decision of the Inspector must be quashed.

North Devon District Council v The First Secretary of State

Court
Queen's Bench Division (Administrative Court)

Judgment Date
30 January 2003

CO/4245/02

High Court of Justice Queen's Bench Division The Administrative Court

Neutral Citation Number: [2003] EWHC 157 Admin, 2003 WL 117107

Before: Mr Justice Collins

Thursday 30th January, 2003

Representation

Mr DH Fletcher (instructed by North Devon District Council, Civic Centre, Barnstaple, Devon EX31 1EA) appeared on behalf of the Claimant.
Mr M Gibbons (instructed by Treasury Solicitors) appeared on behalf of the Defendant.

JUDGMENT

MR JUSTICE COLLINS:

1.. This appeal raises a short but not at all easy point of construction of two classes set out in the Use Classes Order of 1987 . The two classes are contained in Part C and are: Class C2, which is headed “residential institutions”, and Class C3 which is headed “dwelling houses”. The question is whether the situation in this case fell within C2 or C3. There is a subsidiary question relating to whether even if it was within C2, nonetheless there was a material change of use from its C3 use as a dwelling house. That, of course, is a question which depends entirely on the facts of this individual case.

2.. The facts are straightforward and, indeed, are agreed. The premises in question are an address in Barnstaple in North Devon. They comprise a semi-detached 3 bedroom dwellinghouse in a residential area. A company called Southern Childcare Limited runs a business operating registered children's homes. Since 2000, as a result of provisions contained in section 40 of the Care Standards Act 2000 , which amended section 63 of the Children Act 1989 , children's homes which provide for three or less children are required to be registered. That was not the position before that change in the law.

3.. I gather from the information before me that there are a number of such small homes, that is to say homes catering for three children or less, which have sprung up. The reason for that is not entirely clear. It may have something to do with a lack of foster parents, or with the increased concern about the welfare of children and the need for them to be looked after in small units rather than in the larger children's homes that used to be in existence in the past. In any event, the local planning authority, in this case North Devon District Council, are concerned about the effect on residential areas of these homes, and are concerned that there should be the possibility of planning control to deal with applications to set up these homes in residential areas.

4.. In February 2000 Southern Childcare Limited began to use the premises to provide residential care for two children aged between 10 and 17. The Inspector who eventually had to decide on the issue described the premises. Outside was a semi-detached 3 bedroom house which looks like any other house in the street. Internally, it is in good decorative order; there is a small office downstairs, otherwise it is laid out as an ordinary house. The children sleep in individual bedrooms. There is the usual kitchen and bathroom facilities.

5.. Southern Childcare Limited provide in the premises residential care for two children placed in their care by various local authorities. Two non-resident staff are on duty at all times and the house is under the supervision of a team of 6 or 7 adult carers who operate 8-hour shifts. The result is the children are never unsupervised whilst in the building. That means of course that the various carers will come and leave at the beginning and end of their shifts but otherwise the building is to all intents and purposes used as any other family house would be with two children there: shopping trips are needed; children have to be taken to school; the children assist to an extent in the preparation of meals and so on.

6.. Because there was a question raised as to whether the use required planning permission, Southern Childcare Limited applied under section 191 of the Planning Act for a certificate of lawful use. That application was refused by the local planning authority. Southern Childcare Limited appealed and an inspector determined the appeal in their favour on 5th August of last year. Against that decision the Council appeals to this court.

7.. I should go straightaway to the relevant provisions in the Use Classes Order . The purpose behind the Use Classes Order is well-known and is conveniently set out in Circular 13/87 , issued by the Department in May 1987 when the Use Classes Order was about to come into effect. The purpose is set out in paragraph 3, and it is there indicated:

> "The aim of the new Order is twofold:—
>
> (i) to reduce the number of classes while retaining effective control over changes of use which, because of environmental consequences or relationship with other uses, need to be subject to specific planning applications and;
> (ii) to ensure that the scope of each class is wide enough to take in changes of use which generally do not need to be subject to specific control.
>
> It serves no-one's interest to require planning permission for types of development that generally do not damage amenity. Equally, the Secretaries of State are in no doubt that effective control must be retained over changes of use that would have a material impact, in land-use planning terms, on the local amenity or environment."

That is doing no more in reality than setting out the general approach to planning control, but it helpfully indicates the rationale behind the Use Classes Order . By section 55 of the Act, provided that a use falls within a particular designated class, then no planning permission is needed for any change which falls within the same class.

8.. The two classes are C2 and C3. C2 reads:

> "Use for the provision of residential accommodation and care to people in need of care (other than a use within class C3 (dwelling houses)).
>
> Use as a hospital or nursing home.
>
> Use as a residential school, college or training centre."

C3 reads:

> "Use as a dwellinghouse (whether or not as a sole or main residence)
>
> (a) by a single person or by people living together as a family, or

> (b) by not more than 6 residents living together as a single household (including a household where care is provide for residents)."

It will be noted that there is reference to care in both C2 and C3. Care is in fact defined in paragraph 2 (the interpretation clause of the Order) this:

> "'care' means personal care for people in need of such care by reason of old age, disablement, past or present dependence on alcohol or drugs or past or present mental disorder, and in class C2 also includes the personal care of children and medical care and treatment."

It is to be noted that that definition appears to exclude the personal care of children from the definition of care except in class C2. In class C3 there is reference (in the parenthesis to C3(b)) to care provided for residents. That care will not by the definition clause include care of children. Of course if the children happen to be disabled or to suffer from mental disorder, then care for them will fall within class C3(b), but it is not suggested that the children with whom this case is concerned would fall within that category. They are children who, for whatever reason, have been put into the care of the local authority, and the local authority is required to find somewhere for them to live and to be cared for during their minority.

9.. The application by Southern Childcare Limited was "use as a dwelling providing care for up to 3 children living together as a single household with care provided by up to two non-resident staff." So it appears that the application was based on the contention that the children would constitute the single household living together and thus fall within C3(b), and that the non-resident staff would provide care but would not be regarded as part of the household because that would not be necessary.

10.. When the matter came before the Inspector he considered the correct construction of the Order between paragraphs 12 and 19 of his determination. I do not propose to read them in any detail, but some parts I shall cite because they indicate the way in which the Inspector approached his task. In paragraph 16 he said:

> "Living together incorporates dining together, sharing the kitchen, lounge and garden etc. A functioning family (parents and children/adopted children/foster children) is almost by definition a caring unit. Whilst clearly a husband and wife with two foster children would be considered as falling within Class C3(a) of the UCO, there is a close similarity with the situation on the appeal site except that the carers (guardians) whilst present all the time, are not resident in the same way as a husband and wife. The dictionary definition of a household is 'the occupants of a house regarded as a unit'. Although the care element in a household is less than that for a family there are joint shared responsibilities, the security of the house, the buying of food, the preparation of meals, the paying of bills and the maintenance of the property are some examples. There has to be a thread of care running through a household for it to function effectively."

In paragraph 19 he states:

> "If one includes the children and the adults on the appeal premises, there are then four residents living together as a single household. The *High Court judgment in the case of R v Bromley London Borough Council ex parte Sinclair [1991] 3 PLR60* has accepted that staff providing care for residents need not themselves be resident. 'Care' as defined in Art 2 does not come into play on the appeal site and I find

> that the use is within the constraints of Class 3(b) of the UCO; namely the use as a dwellinghouse by not more than six residents living together as a single household."

It seems to me that the natural meaning of what the Inspector says in paragraph 19 is that he is regarding (and what he sets out in paragraph 16 supports this conclusion) the household as being the children plus the carers. But, in his view, the case of *Sinclair* means that carers need not be resident carers, in the sense that they need not have the premises as their residence, and live there as well as the children. That, in his view, is not necessary; provided they are present on the premises then they can be regarded as part of the household. It is true that when he came to give the lawful development certificate it was in these terms:

> "The use of the premises as a dwelling house providing care for up to two children living together as a single household with care provided by up to two non-resident staff."

That, of course, is more consistent with the way in which the application was framed. Nonetheless the natural meaning of paragraphs 16 and 19 seem to me to point clearly in the direction that the Inspector is finding that the household includes both children and carers, but that carers do not need to be resident carers.

11.. Mr Fletcher contends that that is wrong, and that insofar as *Sinclair* may appear to support that approach it is wrongly decided. He submits that the purpose behind the division of classes C2 and C3, insofar as it applies in the circumstances of this case, is that small homes used for care in the community should not be regarded as falling outside the class as a dwellinghouse merely because there are carers, provided that those carers are resident. He submits that if one looks at the natural meaning of the words used in the Use Classes Order and couples that with the guidance given by the Circular, that conclusion is inevitable. The Circular in paragraph 5 states:

> "The new Order is also intended to clarify the circumstances in which the establishment of small community care homes and hostels will require planning permission. For example, it provides that development is not involved when a dwellinghouse becomes used as a small community care home, provided that all the residents live together as a single household and that they number no more than 6 including resident staff."

That certainly on its face appears to me to be more consistent with the approach that Mr Fletcher submits is the correct one.

12.. In paragraphs 25, 26, and 27 the Circular deals specifically with classes C2 and C3. In discussing C2 in paragraph 25 it states:

> "The *residential institutions class* combines classes XX11 and XIV of the 1972 Order. Apart from educational establishments, the characteristic of the uses contained in this class that sets them apart from those in the hotels and hostels and dwellinghouses classes is, in the case of the former the provision of personal care and treatment, and in the case of the latter that the residents and staff do not form a single household."

In paragraph 27, which deals with class C3, it is said:

> "The new *dwellinghouses class* groups together use as a dwellinghouse — whether or not as a sole or main residence — by a single person or any number of persons living together as a family, with use as a dwellinghouse by no more than 6 persons living together as a single household. The key element in the use of a dwellinghouse for other than family purposes is the concept of a single household. In the case of small residential care homes or nursing homes, staff and residents will probably not live as a single household and the use will therefore fall into the residential institutions class, regardless of the size of the home. The single household concept will provide more certainty over the planning position of small group homes which play a major role in the Government's community care policy which is aimed at enabling disabled and mentally disordered people to live as normal lives as possible in touch with the community … Local planning authorities should include any resident care staff in their calculation of the number of people accommodated. The class includes not only families or people living together under arrangements for providing care and support within the community, but also other groups of people such as students, not necessarily related to each other, who choose to live on a communal basis as a single household."

That again, Mr Fletcher submits, and I agree, points in the direction of resident care staff and small residential homes and, indeed, the reference to the need for certainty over the planning position of small group homes playing a major role in the Government's community care policy, gives a clue why the definition of "care" as not including children should be applicable to C2 and not to C3 because children do not fall into the community care policy because they are not disabled or mentally disordered.

13.. It seems to me that it is essential that all the words of the Order are given some meaning. There is no doubt that unless the circumstances here mean that it falls within C3, the activity in question would clearly fall within C2, because it is use for the provision of residential accommodation and care to people in need of care. The definition of "care" which is applicable to C2 includes care of children. So unless it falls within Class C3, it clearly will fall within C2. The question, therefore, is whether it does fall within C3.

14.. It is not contended that it falls within C3(a) and the Inspector did not so find. Clearly, it is not being used by people living together as a family. The question therefore is whether it falls within C3(b). There are certainly not more than 6 residents. But are they living together as a single household, including a household where care is provided for residents? The parenthesises does not directly apply because care does not include care of children. Thus, it is not a household where care is provided for residents. The first question, as it seems to me, is what is the meaning in the context of C3(b) of "household"?

15.. It is submitted by Mr Gibbon that the children can constitute the household. The children are living together as a single household and, therefore, it is a dwellinghouse. The parenthesis does not apply and, on the straightforward meaning of the words, you have here not more than 6 residents living together as a single household. Of course if any of the carers were resident, then they would have to be brought into account, but there would be no problem because obviously a resident carer would be properly regarded as part of the household, but the absence of a resident carer does not prevent it being a household.

16.. It seems to me that the Inspector's approach was, in this respect, correct, inasmuch as he was regarding the household as needing more than just children. Children need to be looked after. They cannot run a house. They cannot be expected to deal with all the matters that go to running a home. Sometimes, of course, one recognises they are forced to do so, but as a matter of principle and approach the whole point of these homes is that the children are regarded as needing full-time care from an adult, someone to look after them, someone to run their lives for them and someone to make sure that the household operates as it should. It seems to me that in the context "household" means more than merely the bodies. You have to consider whether the bodies are capable of being regarded in the true sense as a household. The same would apply to those who suffer, for example, from physical or mental disability and who need care in the community. They, if they are not capable of looking after themselves, would not be regarded as a household, hence the need for the carer, hence the need for that addition to make it a household within the meaning of the relevant class.

17.. One has to have regard to the need that they be living together as a single household. The question then arises whether carers who do not live but who provide, not necessarily through the same person, a continuous 24-hour care can be regarded as

living together. In my view, the answer to that is no. Consistent with the approach indicated by the Circular, what is required is indeed residential care with a carer living in full-time and looking after those in the premises who otherwise would be unable to live as a household.

18.. Now that I recognise is an approach which may well not accord with that set out by Popplewell J in the *Sinclair* case, which I have already mentioned. In that case the Council proposed to use a house as a family home for three mentally handicapped persons. Twenty-four hour a day supervision was to be provided by social workers attending on a rota basis. They would not be living at the property although a room would be used as a bedroom by the care assistant who was there at night.

19.. An application for judicial review of the decision that the proposed use was within Class C3(b), and so did not require planning permission, was made by a local resident. Permission had been refused on paper and the matter came before Popplewell J as a renewed application for permission to apply for judicial review. He cited Class C3(b), the relevant parts of paragraphs 25 and 27 of the Circular and went on at page 62B:

> "The order does not say that the staff have to live together as a single household. It says the residents 'living together as a single household'. The residents here are the three residents and the staff come in from time to time. I do not find anything in the order which takes into account the presence of the staff as being involved in the concept of a single household. The bracketed words are simply '(including a household where care is provided for residents).'
>
> I do not take the view that the staff have to be living together with the residents. I am of the view that this can properly be determined as a Class C3(b) case."

I am afraid I cannot agree with that approach. It seems to me that the concept of living together as a household means that, as I have put it, a proper functioning household must exist and, in the context of a case such as this, that must mean that the children and a carer must reside in the premises. Otherwise, as it seems to me, it clearly falls within Class C2. It is apparent that the size of the institution is irrelevant for the purposes of C2. If it falls within that definition it is not to be regarded as a dwellinghouse, then whether there are 1, 2, 10 or 15 children makes no difference to the Class. It does, however, clearly make a difference in planning terms when one considers the second point, which is whether there was, in the context of this case, a material change of use.

20.. Although it may sound somewhat illogical, it is accepted by both Mr Fletcher and Mr Gibbon that, notwithstanding that this may fall within Class C2 rather than Class C3, nonetheless planning permission may not be required if the change of use was not a material change of use. I am bound to say that if an Inspector is satisfied that the use falls within C2 rather than C3, then it would appear that there is *prima facie* a change of use. Nonetheless, the Inspector is entitled, as indeed are the local planning authority, to consider whether that change of use was material. It will only be material if, as a matter of fact and degree in the circumstances of an individual case, the change of use was material.

21.. The Inspector understandably deals with this very briefly. In paragraph 20 he states:

> "In the alternative, the Council state that the change of use is a significant factor which when weighed with other changes to the character of the use of the premises amounts to a material change of use. Since I have found that the use is as a dwelling house, the alternative does not fall to be considered. There is nevertheless no indication from my consideration of all the representations and from my detailed inspection of the site and the surroundings, that there has been a change of use from a dwelling house which could, as a matter of fact and degree, be considered as being a material one."

Mr Fletcher attacks that on the basis that it is unreasoned, and the Inspector appears to be saying from the use of the word "could" that there is not even an arguable case that there has been a change of use.

22.. The parties put forward extensive submissions to the Inspector and he clearly had them before him and had regard to them. The Council dealt with materiality over some four pages of its submissions. It set out what it submitted were the principles referred to and cases in support, in particular in paragraph 6.9 of its submissions. It made the point that the case law established that whether there had been a material change was a question of fact and degree and the fact that, in the broadest sense, the property continued to be used for residential purposes did not mean that there could not have been a material change of use. The court in the case of *London Borough of Richmond upon Thames v Secretary of State [2001] JPL 84* indicated that matters which could be planning considerations might include the effects on the residential character of the area, strain on the welfare services and reduction on the stock of private accommodation available for renting. Points were made about traffic movements and various other factors were put forward.

23.. True it is that the Inspector dealt very briefly with those matters. But it is plain that he had before him all the relevant submissions and all the relevant representations. He had inspected the site and he had considered all the issues. He sets out at the beginning of his determination a description of the site and surroundings and of the background. It would have been better, no doubt, had he referred in more detail to the submissions which had been made and explained why he rejected them. Nevertheless, it is, in my view, clearly implicit in what he says that he had considered them and that he had rejected them as being matters which indicated a material change of use.

24.. Mr Fletcher accepts that it would have been open to the Inspector to have decided that the change of use was not material but he should, if he was to reach that conclusion, have indicated more clearly why. I do not dissent from that proposition in the sense that I too would have preferred that he had indicated more clearly why. But one has to be careful in accepting a reasons challenge. It seems to me that if, in reality, it is plain that the Inspector has considered the matters and has reached a decision, which in law was open to him, then it would take a very strong case to quash that purely on the ground that the reasons were not as extensively set out as they should have been.

25.. The only matter which has given possible cause for concern is the use of the word “could.” But, in my view, it does not bear the construction which Mr Fletcher suggests is the possible one. All that the Inspector is saying is that in his judgment the matters put forward do not mean that the change of use is a material one. It is true he does not express himself as happily as he might, but as a matter of pure English reading that sentence does not, in my view, lead one to conclude that he had misdirected himself in approaching it on the basis of arguability rather than fact.

26.. Accordingly, in my view, the Inspector was wrong to regard this as falling within C3(b) rather than C2, and that the Council's contentions are and were correct. C3 does require at least one residential carer, together with of course those who are being cared for. On the facts of this case, and I emphasise limited to the facts of this case, the Inspector was correct to decide that there was no material change of use in the circumstances.

27.. Accordingly, although it may be expressed slightly unhappily in the context of my decision, and indeed in the way the Inspector approached it in his decision, the use for up to two children, with care provided by up two non-resident staff at these premises, and only at these premises, is, in the circumstances, a lawful use.

28.. Accordingly, for those reasons, I dismiss this appeal.

29.. MR GIBBONS: My Lord, in the light of that may I seek brief instructions before I make any further submissions?

30.. MR JUSTICE COLLINS: Yes .

31.. MR GIBBONS: My Lord, the question of costs arises from my point of view. Now the usual situation clearly, as your Lordship is aware, not only because the principal argument today is on Use Classes Order but also the Inspector, clearly I am entitled to make the formal submission that I have succeeded even though there has not been—

32.. MR JUSTICE COLLINS: Yes, but nowadays we split costs rather more, do we not?

33.. MR GIBBONS: My Lord, you have anticipated my very next observation, which is, if your Lordship is inclined, as it were, to take the CPR approach to this rather than the more old-fashioned approach.

34.. MR JUSTICE COLLINS: I think I have to, do I not?

35.. MR GIBBONS: Clearly, my fallback position would be no order as to costs.

36.. MR JUSTICE COLLINS: I am thinking along those lines.

37.. MR FLETCHER: My Lord, I am very happy with my learned friend's fallback position.

38.. MR JUSTICE COLLINS: I think that in the circumstances, and having regard to the issues, I know it is palm tree to some extent, but costs almost always is. I think no order for costs is the fair order. No further applications?

39.. MR FLETCHER: No, my Lord.

Neutral Citation Number: [2011] EWHC 17 (Admin)

Case No: CO/5169/2011

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

Sitting in Manchester

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/01/2012

Before:

Mr Justice RYDER

- -

Between:

The Queen (on the application of 'D' and 'S')	**Claimants**
- and -	
Manchester City Council	**Defendant**

- -
- -

Mr Ian Wise QC and Mr Stephen Broach (instructed by **Irwin Mitchell LLP**) for the **Claimants**
Mr John Howell QC and Mr Tom Hickman (instructed by the **City Solicitor**) for the **Defendant**

Hearing dates: 24 & 25 October 2011

- -

Judgment

Mr Justice Ryder :

Introduction:

1. By this claim, the claimants, two disabled elderly people (who I shall refer to as 'D' and 'S'), act through their sons as litigation friends to challenge the defendant local authority's budget-setting and consultation processes in relation to adult social care services. Specifically, the claimants contend that:

   i) The defendant's decision to reduce its budget for the division which provides adult social care by £17m over the next two years, with £8.8m of savings from frontline services, is unlawful because it was taken without due regard to the disability equality duty in section 49A of the Disability Discrimination Act 1995 (DDA 1995); and

   ii) The defendant's ongoing consultation on its 'Revised Social Care Offer' breaches the common law duty of fairness because it lacks sufficient information as to the nature and consequences of the proposals to allow respondents to make an intelligent response.

2. The claimants also seek permission with respect to their contention that the consultation was further flawed because of the defendant's alleged non-compliance with the single equality duty in section 149 of the Equality Act 2010 (EQ 2010), in particular in relation to the alleged failure to have any or any proper regard to the likely impact of the proposals on elderly and disabled persons such as the claimants. This issue was raised in the claimants' Amended Grounds but permission was refused by His Honour Judge Pelling QC on 12 August 2011.

3. The claimants are both disabled elderly people in receipt of social care services from the adult services department of Manchester City Council, the defendant local authority.

4. The first claimant, D, is a 75 year old man who lives in the North of Manchester with his son AD who is his litigation friend. D had a stroke in 1999 which paralysed the left side of his body as a consequence of which he wears a caliper on his left foot and has a splint on his left arm. He walks with the aid of a tripod walking stick. D has uncontrolled epilepsy, severe depression, dizzy spells and has a poor memory and a history of falls. He has sustained severe back injuries as a consequence. D requires 1:1 care at all times and AD has been providing him roughly 70 hours care each week.

5. D's difficulties are described in his latest needs assessment dated 17 February 2011. He is assessed as having 'substantial' needs by reference to the adult social care eligibility criteria. The assessment records that D would like to go out more often 'as I often feel depressed and too dependent on my son to provide for my needs'. D has significant personal care needs, for example, he requires the assistance of two people for showering. He also needs a wheelchair to move around outdoors. The assessment also records a wide range of aspects of daily living with which D requires support, including non-personal care services such as shopping, laundry, housework and the need for constant supervision during the day.

6. The second claimant, S, is a 79 year old woman who lives in the South East of Manchester next door to her son, 'SS', who as well as being her litigation friend provides her with practical and emotional support and social stimulation. S uses her personal budget to employ SS as a personal assistant. S has an acquired brain injury, serious physical disabilities (including an age related degeneration of the spine), is incontinent and has inoperable breast cancer. She has no long or short term memory, no ability to concentrate and must wear a helmet when she leaves the house. In 2010 she suffered two strokes affecting mobility and dexterity in her left side.

7. In the social care documents filed with the court it is recorded that S needs support 'with all personal care and daily living tasks' and requires support to use the toilet during the night. She is 'at risk of falls which could result in readmission into hospital'. She cannot manage a weekly shop 'as she is unable to weight bear' and as a result of her mobility difficulties she is unable to do laundry or housework. Her support plan demonstrates that she requires assistance in every aspect of daily life, including personal care, mobility, eating and drinking, housework and health.

8. Examples are provided in the documents filed of other disabled people who have in common with the claimants a constellation of needs, both in relation to personal care and other important areas of daily life. It is contended that the defendant's budgetary

decisions will potentially affect many of the more than 7,000 disabled adults in the City.

9. In pre-proceedings correspondence, ongoing disputes between the claimants and the local authority were identified either as to the care packages for the claimants and/or the quantum of payments made. These have either been resolved or may be the subject of separate proceedings but are not live issues within these proceedings.

10. The essential background to the case is, of course, the financial constraints placed on all local authorities including the defendant. As a result of the recent Government spending review the defendant seeks to cut £39.5m from its adult social care budget by 2012/13 of which £25m is to be cut by 2011/12. If it needs to be said, it is common ground that lack of resources is no excuse for unlawful or unfair decision making and no matter how pressing economic problems may be, they do not provide an overriding reason not to consult or act fairly: *R (Luton LBC & Ors) v SoS for Education* [2011] EWHC 217 (Admin) per Holman J at [96] and *R (Rahman & Ors) v Birmingham CC* [2011] EWHC 944 (Admin) per Blake J at [46].

11. The defendant set its budget on 9 March 2011 within which an amendment was carried requiring 'any additional resources which become available to the Council during 2011/12' to be allocated to services for vulnerable people including adult social care. The proposals which were adopted in the budget were published on 8 February 2011 and approved by the Executive on 16 February 2011. There is no evidence that equality impact (needs) assessments (EIAs or EINAs) were completed before the budget was approved, indeed, the defendant asserted in response to questions posed in March and April 2011 that EIAs would be completed before the 'relevant element of the budget is implemented'. A consultation about the adult social care proposals was launched on 9 May 2011 to run until 8 August 2011. The defendant said that an EIA would be completed 'once the consultation exercise has ended'.

Adult social care policy background

12. Provision for the elderly and infirm has a long history going back to the Poor Laws. The modern scheme for providing assistance has developed out of the baseline duties in the National Assistance Act 1948, specificity being provided by the Chronically Sick and Disabled Persons Act 1970. The concept of care in the community was introduced in the National Health Service and Community Care Act 1990 (the 1990 Act), (see, for example the definition of community care services to be found at section 46(3) of the 1990 Act and the duty to assess any person who may be in need of services at section 47).

13. The statutory scheme governing adults can be categorised into three duties:

    i) A duty to assess the presenting needs of individuals who may be eligible for adult social care services;

    ii) A duty following assessment to determine whether the individual is eligible for adult social care services; and

iii) If the individual's presenting needs satisfy the eligibility criteria, a duty to provide services to meet the individual's eligible needs, whether through direct payments or direct services.

14. Directions have been issued pursuant to section 47(4) of the 1990 Act to prescribe some of the elements of a community care assessment, to consult with the person being assessed and to take all reasonable steps to reach an agreement with that person about the support which may be provided. Statutory guidance has been issued under section 7(1) of the Local Authority Social Services Act 1970 by the Secretary of State entitled: *'Prioritising need in the context of Putting People First: A whole system approach to eligibility for social care'* (the 'prioritising need guidance'). This replaces the well known *Fair Access to Care Services* (FACS) guidance which was issued in 2002. Section 7 guidance under which local authorities act is general and not mandatory i.e. it does not compel any particular decision, but an authority can only depart from it for good reason on admissible grounds if its decision is not to be amenable to judicial review: *R v London Borough of Islington ex p Rixon* [1997] ELR 66 at 71 per Sedley J and *R (Munjaz) v Mersey Care NHS Trust* [2005] UKHL 58 at [21] per Lord Bingham and at [68]-[69] per Lord Hope.

15. The prioritising need guidance re-iterates (at [19]) that 'a decision about a person's eligibility for support is (to be) taken following an appropriate community care assessment' and at [68] that 'transparent allocation of available resources depends on effective assessment'. The prioritising need guidance describes a process which has become known as 'personalisation', for example, by the allocation of individual budgets to disabled people and resource allocation schemes (RAS) to determine indicative budgets from which disabled people can procure the support necessary to meet their needs.

16. Every local authority is required to set its eligibility criteria, following consultation, according to four bands prescribed by the guidance as follows:

i) Critical

ii) Substantial

iii) Moderate; or

iv) Low.

17. In doing so, they should take account, *inter alia*, of their own resources and consultations with service users and others. The distinction between budgetary review of the criteria based upon how eligibility criteria are set and transparent allocation of available resources based upon individual assessment is clear. The guidance helpfully summarises how the eligibility criteria are to be set and reviewed as follows:

> "[44]…In setting their eligibility criteria, councils should take account of their own resources, local expectations and local costs. Councils should take account of agreements with the NHS, including those covering transfers of care and hospital

> discharge. They should also take account of other agreements with other agencies, as well as other local and national factors.
>
> [45] Although final decisions remain with councils, to promote greater clarity and transparency, they should consult service users, carers and appropriate local agencies and organisations about their eligibility criteria and how information about the criteria is presented and made available.
>
> [46] Councils should review their eligibility criteria in line with their usual budget cycles. Such reviews may be brought forward if there are major or unexpected changes, including those with significant resource consequences. However, councils should be mindful of the evidence cited above which suggests that raising eligibility thresholds without a parallel investment in preventative strategies may lead to increasing demand for services in the longer term.
>
> [47] In this guidance, the issues and support needs that are identified when individuals approach, or are referred to, councils seeking social care support are defined as "presenting needs". Those presenting needs for which a council will provide help because they fall within the council's eligibility criteria, are defined as "eligible needs". Eligibility criteria therefore describe the full range of eligible needs that will be met by councils, taking their resources into account. Councils should work with individuals to identify the outcomes they wish to achieve, and to identify where unmet needs are preventing the realisation of such outcomes."

18. In the cases of D and S, their presenting needs have been assessed as against the defendant's eligibility criteria as substantial and it is the policy of the defendant to provide services to meet critical and substantial need. Accordingly, the duty to provide services to meet eligible needs is engaged in the case of both claimants. The guidance confirms at [61] that 'with the exception of life threatening circumstances or where there are serious safeguarding concerns, there is no hierarchy of needs'. Furthermore, the duty to provide services to meet eligible needs is not to be constrained by resources: *R v Gloucestershire CC ex parte Mahfood* (1997) 1 CCLR 7 as was confirmed by their Lordships' House: *R v Gloucestershire CC, ex parte Barry* [1997] AC 584 i.e. there is an absolute duty to meet eligible needs; see also *R (Savva) v Royal Borough of Kensington and Chelsea* [2010] EWCA Civ 1209; (2011) 14 CCLR 75 at [7].

19. Finally, in so far as it is relevant, individual budgets are a form of direct payment promoted by the policy guidance which derives from section 57 of the Health and Social Care Act 2001. By section 57(4)(a) of that Act, direct payments should be paid at a rate which the local authority estimates to be 'equivalent to the reasonable cost of securing the provision of the service concerned'.

Financial decision making

20. Local authorities finance their expenditure in a number of ways; principally through a) fees and charges, b) specific government grants such as the 'early intervention grant' to support disadvantaged children and families, c) non-domestic rates, d) council tax and e) general Government grants now known as the 'Formula Grant'.

21. In each financial year a local authority is required to set an amount of council tax before 11 March in the financial year preceding that for which it is set, although it is not invalid if made later: section 30(1)(6) of the Local Government Finance Act 1992 (LGFA 1992). For the current financial year, which began on 1 April 2011, the Council was required to set an amount of council tax before 11 March 2011.

22. The amount of council tax has to be calculated by a local authority *inter alia* in accordance with sections 32 to 36 of the LGFA 1992: see section 30(2)(a). Section 32 requires an authority to make certain calculations to identify its 'budget requirement' for the year. In simple terms, its budget requirement is the amount by which (i) the expenditure which will be charged to the revenue account that the authority estimates it will incur in performing its functions in the year and certain other items for which it estimates it must find resources exceeds (ii) the income and other resources it estimates it will have available to meet expenditure charged to the revenue account (other than certain payments made by the Government): see sections 32(1), (2), (3) and (4). It is the Council's budget calculations for 2011/12 (which it made on 9 March 2011) that the claimants seek to impugn.

23. The basic amount of a local authority's council tax for the year is calculated so that the amount raised meets the authority's budget requirement to the extent that it is not defrayed by certain payments made by the Government: section 33(1) LGFA 1992. This basic amount determines the amount to be raised by council tax in respect of each category of dwelling in the authority's area: section 36(1) LGFA 1992. The Council set the amount of its council tax for 2011/12 at the same meeting on 9 March 2011 as it made its budget calculations and based on them.

24. A calculation made in accordance with any of sections 32 to 37 LGFA 1992 may only be questioned by an application for judicial review: sections 66(1) and 66(2)(c) LGFA 1992. Section 66(3) LGFA 1992 provides that "if on an application for judicial review the court decides to grant relief in respect of [such a calculation], it shall quash the…calculation..".

25. The effect of quashing the budget calculations made under section 32, including the calculation of an authority's budget requirement, is that the purported setting of an amount of council tax must be treated as if it had not occurred: sections 30(8) and 30(9) LGFA 1992. If the budget calculations under section 32 are quashed, the Council will be obliged to recalculate its budget requirement under that section and this recalculation will give rise in turn to an obligation to recalculate the basic amount of its council tax and then to reset the amount of council tax: sections 32(1), 33(1) and 36(1) LGFA 1992. This will then require service of new demand notices on those liable to pay the reset amount (whether it is the same or a different amount).

26. The defendant Council is a large local authority with anticipated expenditure in 2011/12 of £581m, of which £166m or approximately 35% is to be spent on adult

social care. The Council has a pre-existing programme of efficiency savings known as 'Analyse and Improve Manchester' (AIM). These savings were introduced in February 2010 when the Council approved a medium term financial plan on the pre-election assumption that after May 2010 it would need to reduce public expenditure. The City Treasurer normally starts to prepare the Council's business plan in July each year with a view to a first draft being prepared for each directorate in October. On 20 October 2010 and in line with the assumptions made by the Council, central Government announced its Comprehensive Spending Review setting out anticipated reductions in central Government support for local authorities of up to 28% for the succeeding three financial years. On 25 November 2010 the defendant launched a consultation about its 2011/12 budget entitled '*there is less money, so how should we spend it*'. On 13 December 2010 the provisional sum for central Government support for the defendant was announced which had the consequence of a 25% reduction in expenditure by the end of 2012/13.

27. Following the announcement of the provisional settlement, officers and leading Members of the Council reviewed the Council's financial position and priorities to consider how to identify savings. A framework and set of principles was identified which was informed by the pre-budget consultation. The framework included the aims to "continue to promote independence and reduce dependency, including through early intervention and preventative action" and to "continue to safeguard those in greatest need". The principles included the "need to provide sufficient resources to provide for effective safeguarding and to protect the most vulnerable residents".

28. An initial report was presented to the Council's Executive on 22 December 2010 and thereafter each directorate prepared plans. These were published for public consultation on 8 February 2011 and considered by the Executive on 16 February 2011. The minutes of that meeting show that the Executive recommended the proposals to the Council. The proposals involved revenue budget savings for adult care services in 2011/12 of £25.785m of which £11.090m was to be found from existing AIM savings followed in 2012/13 by savings of £13.734m of which £7.255m were to come from AIM.

29. The 8 February 2011 reports included the 'Report on the Implications of and Strategic Response to the Local Government Settlement' which sets out the framework and principles and the 'Report on the Revenue Budget' which sets out the estimated proposed savings for each of the Council's four directorates including adult social care. This latter report drew attention to the fact that many of the actions proposed could only be taken after specific statutory or other legal process had been followed and/or consultation had taken place. It specifically drew attention to the Council's legal duties including its obligations to have 'due regard' under the Equality Act 2010.

30. At [83], [85] and [89] of that report, Members were told:

> "83 Apart from statutory duties relating to specific proposals the council must consider its obligations under the Equality Act. In broad terms this means that the council has a duty to have regard to the need to eliminate discrimination and advance

> equality of opportunity between all irrespective of whether they fall into a protected category such as race, gender, religion etc.
>
> ….
>
> 85 In determining the final set of proposals for consideration officers have had regard to how the equality duty can be fulfilled in relation to the proposals overall. However detailed equality impact assessments will be required for specific proposals as identified by each directorate prior to final decisions being made.
>
> ….
>
> 89 The council needs to be satisfied that it can continue to meet its statutory duties and meet the needs of vulnerable young people and adults. Proposals have been drawn up on the basis that Strategic Directors are satisfied that this will enable them to continue to meet their statutory duties and the needs of the most vulnerable."

31. The proposals were considered by the appropriate overview and scrutiny committees of the Council on 21 and 28 February 2011 (which considered representations by members of the public and Members in response to the consultation) and by the full Council on 9 March 2011 where the budget was approved subject to the amendment to which I have previously referred which arose out of those representations.

32. It is submitted by the defendant that it was recognised that the outcome of further consultations which were necessary might require further resources to be used than those budgeted for. This was one reason among others why the City Treasurer recommended that the Council should hold a General Reserve Fund of £21m in 2011/12 as a minimum which could be used to make good savings which did not proceed and the uncertainties associated with a budget strategy. In addition, the Council also had available to it £59m in 'earmarked' reserves for the same purposes, albeit that future savings would be needed to replace any of this sum drawn down in 2011/12. The Council had before it a report on the council tax resolution for 2011/12 which drew attention to the risks in setting a balanced budget in the circumstance that consultation, legal processes and EIAs were required before final decisions could be taken on many of the proposals for savings. The report also drew attention to the City Treasurer's opinion that the risks could be managed in light of the reserves envisaged.

33. For the reasons I set out in due course I accept that this was a proper and lawful budget strategy which took into account a pre-budget consultation whose legality is not challenged and which overtly identified principles and a framework which was informed by the needs of disabled and elderly service users. Neither the framework nor the principles are challenged and they were 'stress tested' in over 60 meetings between officers and Members including those outside the Executive. To the extent that the budget decision relied upon contingency planning and the identification of reserves to meet statutory obligations it was a strategy based on good budgeting practice and local authority governance.

34. On 14 September 2011 the Council's Executive was asked to approve the 'redefined social care offer' which arises out of the budget approved by full Council on 9 March 2011 as identified in the report to the Executive on 16 February 2011. The proposals and savings which are effective from 1 November 2011 on a pro-rata basis can be summarised as follows:

	Proposals – Redefined Social Care Offer	Savings Target
A	Increased use of Reablement	£3,218,000
B	Prevention and innovation through Reviews	£2,627,000
C	Changes to Resource Allocation System (RAS)	£2,918,000
Sub-total	Redefined Social Care Offer	£8,763,000

35. By the time the Executive made its decision on 16 September 2011 a post budget public consultation had been completed. The Executive had the benefit of an EIA published on 7 September 2011.

36. The claimants submit that if any of their challenges succeed then the subsequent decision of the Executive of the Council on 14 September 2011 must also be set aside. With respect, that begs the question which decision it is that they seek to impugn: no grounds have been pleaded or established to interfere with the September decision. The import and substance of the challenge this court has heard is as to the budget decision.

37. The post budget consultation took place from 9 May to 8 August 2011 during the course of which it was extended and its terms revised. It was originally intended to run until 9 July 2011 but it is conceded that a number of respondents did not fully understand the proposals and a revised questionnaire was issued on 29 June 2011. A number of meetings took place, a powerpoint presentation with printed slides was provided and there was a questionnaire with an accompanying explanatory document 'guidance and information to help you complete the questionnaire'. Whereas the original questionnaire had a question in these terms: "we will continue to support vulnerable customers but we will make some changes to the way we allocate money to meet certain needs and allow more flexibility in managing risks. Do you think this is fair?" which quite aside from any legal duties upon the Council in respect of the same was a question almost impossible for a respondent to answer in any meaningful way, the revised questions were more specific, for example in the circumstance that the Council proposed to change the way that money is allocated, whether respondents would consider using alternative means of shopping and collection of pensions.

38. The powerpoint slides set out three ways in which the Council proposed to change its social care offer:

> "1. Increasing our Reablement Service. This is support for about 6 weeks for people who need help to get back up to speed and live as independently as possible after a crisis, for example, being in hospital, an accident or a fall.
>
> 2. When we carry out a review of customer's needs, we will look at other ways to better meet support needs…
>
> 3. Continue to support the most vulnerable customers in the City. We will change the way we allocate money to meet certain needs and introduce greater levels of flexibility to manage risk."

39. The guidance says that the Council's recent experience has shown that half of people who use reablement do not need support afterwards and that it is estimated that savings of £3.2m will be made over two years by providing this service to 85% of social care customers. It should be noted that preventative services of this kind are in line with the central Government guidance to local authorities. With regards to proposed changes to the RAS the Council confirmed that it would continue to meet substantial and critical needs and then explained that "needs will be met in different ways and there would be some changes to the services (customers) currently receive".

40. The EIA is said to have relied upon the information gleaned from the consultation to the extent that what are described as 'modified' proposals were put to the Health and Wellbeing Overview and Scrutiny Committee, which were approved by the Executive on 14 September 2011. The proposals put to the Executive followed through the full Council's decision relating to eligibility by confirming that substantial needs would still be met but that those 'universal needs not directly related to personal care' would be met by commissioning changes e.g. by the Council assisting the families of service users, the community, charities and voluntary or commercial organisations to provide the same. The impact was described in the EIA as follows:

> "Impact on Type of Provision to Customers
>
> These proposals including the adjustment of the RAS will redefine the offer and reduce the types and choices of provision in certain areas whilst maintaining the commitment to meeting all 'substantial' needs; it is proposed that those universal needs which are not directly related to personal care such as cleaning, shopping, pension collection and laundry will no longer be directly provided and funded by the Council. Instead, the council will assist individuals to have those needs met from within the family or wider community, from voluntary organizations or charities, or from commercial organisations. These commissioning changes will be in place before any changes are made to individual care packages. This will reduce risks associated with the proposed changes."

41. Critically in correspondence between solicitors in October 2011, the EIA commitment was explained by the Council's officers as follows:

> "As stated in the report, the proposal is that consideration will be given to providing these services in other ways when needs are assessed (see eg paras 7.5 and 8.7). However, as the report makes clear no changes will be made unless an individual's needs will continue to be met and pending any appeal."

42. The references are to the report to the Executive which at the cited paragraphs confirms that the Council will meet assessed eligible needs, that there will be a new appeals process and that although some people will receive less money, no person's individual budget allocation will be changed until an alternative method of meeting the needs in question has been identified or the appeals process has been determined. In so far as existing services will not be funded in the future there is a further commitment in the mitigation section of the EIA in respect of the resources that may be needed to provide for an individual's eligible needs until an alternative is identified or developed as follows:

> "…Assessment staff must ensure alternative sources are available to provide the services no longer regarded as eligible. If they cannot, and the need still exists then Assessment staff may apply to Funding Panels for additional resources to meet needs until some other forms of support are developed."

43. Although it can be submitted that the integrity of the service depends on the detail and propriety of the assessment of the individual's eligible needs and a rigorous and transparent allocation of funds and services to meet those needs so that a person with an identified characteristic is not overlooked or unfairly discriminated against, that is the overt purpose of the law and guidance in this field. If in making an individual decision the Council avoids the safeguards it has set itself in order to ensure that the process is lawful, for example by failing to meet an assessed and eligible need by alternative means than a direct payment, then it would no doubt be the subject of an appropriate claim. That is not the factual circumstance upon which the claimants rely.

44. In summary, therefore, an adverse impact of the budget proposal was identified which was confirmed as to its particulars in the subsequent EIA. Safeguards were identified to meet needs both on a strategic and individual client basis. These included a specific budget contingency to provide flexibility both to abide the event of the consultation process and EIA and to ensure that assessed eligible needs were met, a commitment to continue to meet assessed eligible needs, new appeals and funding panels processes and an interim commitment to continue to fund assessed eligible needs that it is decided are to be met by alternative means until the alternative is identified and developed and the appeals process complete. The claimants complain in submissions that this is a wholly novel mechanism which is by implication untried and untested. That does not make it unlawful in principle and understandably having regard to the inception of this claim, there is as yet no claim as to its operation in practice.

The claim in respect of the Council's budget

45. The claim in respect of the City Council's budget is based solely on an alleged failure to comply with the 'disability equality duty' contained in section 49A of the DDA

1995 which was still in force at the time the Council took its budget decision on 9 March 2011. Section 49A(1) DDA 1995 provided that:

> "Every public authority shall in carrying out its functions have due regard to –
>
> (a) the need to eliminate unlawful discrimination and victimisation;
>
> (b) the need to eliminate harassment of disabled persons that is related to their disabilities;
>
> (c) the need to promote equality of opportunity between disabled persons and other persons;
>
> (d) the need to take steps to take account of disabled persons' disabilities, even where that involves treating disabled persons more favourably than other persons;
>
> (e) the need to promote positive attitudes towards disabled persons; and
>
> (f) the need to encourage participation by disabled persons in public life."

46. The disability equality duty was repealed on 5 April 2011 but its effect was then subsumed in the general public sector equality duty imposed by section 149 EA 2010 which consolidated a number of such duties with amendments. The Council was invited to consider the budget for 2011/12 by reference to this duty as it was the duty that would be applicable in the year for which calculations were made and in which Executive decisions would be required to give effect to them. Section 149 EA 2010 provides, *inter alia*, that:

> "(1) A public authority must, in the exercise of its functions, have due regard to the need to –
>
> (a) Eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
>
> (b) Advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it:
>
> (c) Foster good relations between persons who share a relevant protected characteristic and persons who do not share it.
>
> ….
>
> (3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to-

(a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;

(b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;

(c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.

(4) The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.

(5) Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to-

(a) tackle prejudice; and

(b) promote understanding.

(6) Compliance with the duties in this section may involve treating some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act.

(7) The relevant protected characteristics are-

age;

disability;

gender reassignment;

pregnancy and maternity;

race;

religion or belief;

sex;

sexual orientation."

47. The relevant protected characteristics which relate to the claimants in this case are age and disability.

48. No issue is taken with the proposition that the setting of a budget and the provision of adult social care are functions of the Council to which the duties apply. A function is an activity carried out by a local authority: this may be the discharge of a statutory duty, the exercise of a discretion vested in it or the carrying out of a common law obligation. In *Pieretti v Enfield* [2010] EWCA Civ 1104; [2011] HLR 3 at [25] – [26] Wilson LJ rejected the argument that the section 49A DDA 1995 duty applied only to the culmination of a housing authority's duties under the part VII of the Housing Act 1996. He found that the duty applied to the "discharge of its prior duties" such as the duty to make enquiries and review any decision. This analysis is consistent with the DRC Code of Practice at 1.13. Consultation would on this basis also be an activity in which the defendant was engaged and accordingly a function for the purpose of the duties.

49. Both section 49A(1) DDA 1995 and section 149(1) EA 2010 require a public authority to *"have due regard to ... the need"* to achieve certain goals. Due regard was said by Dyson LJ in *Baker v Local Government Secretary* [2009] PTSR 809 at 821 to be "the regard that is appropriate in all the circumstances". In *R (Domb) v Hammersmith and Fulham LBC* [2009] EWCA Civ 941 at [52] it was said per Rix LJ:

> "Our attention has been drawn to a number of authorities on the need to have due regard... I find the greatest help in the judgments of Dyson LJ in *Baker* (dealing with the RRA) at paragraphs 30ff and of Scott Baker LJ in *Brown* (dealing with the DDA) at paragraphs 89/96, where each of them summarises what is involved in the duty to have "due regard". For present purposes I take from those summaries in particular the observations that there is no statutory duty to carry out a formal impact assessment; that the duty is to have due regard, not to achieve results or to refer in terms to the duty; that due regard does not exclude paying regard to countervailing factors, but is "the regard that is appropriate in all the circumstances"; that the test of whether a decision maker has had due regard is a test of the substance of the matter, not of mere form or box-ticking,.."

50. To which one can add what Pill LJ said in *R (Harris) v Haringey LBC* [2010] EWCA Civ 703, [2011] PTSR 931 at [40]:

> "Due regard" need not require the promotion of equality of opportunity, but on the material available to the council in this case it did require an analysis of that material with the specific statutory considerations in mind … "

51. The substantive obligation is thus to have such regard to the relevant needs as "is appropriate in all the circumstances". This was recently confirmed by Lord Brown, giving the leading judgment in the Supreme Court, in *R (McDonald) v Kensington and Chelsea LBC* [2011] UKSC 33, [2011] PTSR 1266, at [23]. There are two, inter-related aspects to that obligation: (a) how far to investigate what impact (if any) the decision to be made may have on the needs to which regard must be had and (b) what weight to give to any anticipated impact on those needs relative to other material considerations. What may be "appropriate" in each respect is a matter of judgment for the authority.

52. What is the task of the court? It is to review whether in these respects what an authority did was something no reasonable authority could have thought appropriate in all the circumstances. It is not the court's function to decide for itself what was appropriate in all the circumstances in these respects. When statute requires consideration to be given by an authority to a material consideration, it is for the authority to determine what investigation into it may be required to obtain the necessary information to have regard to it and what relative weight to give to it. The Court will review what the authority did to ascertain whether what it did or did not do was something no reasonable authority could have done in the circumstances: see eg *R v Westminster City Council ex p Monahan* [1990] 1 QB 77 per Nicholls LJ at p117-8; *R (Khatun) v Newham LBC* [2004] EWCA Civ 55, [2005] QB 37, per Laws LJ at [23], [33]-[36] (with whom Wilson and Auld LJJ agreed at [94] and [95] respectively); *R (National Association of Health Stores) v the Department of Health* [2005] EWCA Civ 154 per Sedley LJ at [1]-[2], [51]-[65], per Keene LJ at [75]; *Greenpeace Ltd v the Secretary of State* [2005] EWCA Civ 1656 per Laws LJ at [25] and [26] (with whom Wall and Mummery LJJ agreed at [41] and [42] and *Tesco Stores Ltd v the Secretary of State* [1995] 1 WLR 759 per Lord Hoffmann at p784.

53. The claimants contend in their Amended Grounds and submitted during the course of oral argument that "the court must review whether 'due regard' has been paid, not merely consider whether the absence of due regard was *Wednesbury* unreasonable". This is a false contrast which could lead to a mistaken conclusion. That the court must review whether due regard to the relevant needs has been had says nothing about the basis on which such a review may be carried out. If no due regard has been had to such needs, then the duty has not been complied with regardless of whether a reasonable authority would have failed to have regard to it but that does not mean that in determining whether the regard which was had to such needs was appropriate in all the circumstances the court does not consider whether or not a reasonable authority could have thought it appropriate: it does.

54. In so far as the claimants pursue their interpretation of the test, I have come to the conclusion that I agree with the defendants that the claimants' submissions are based on a misreading of paragraph [72] of the judgment of Davis J in *R (Meany & Ors) v Harlow DC* [2009] EWHC 559 (Admin) where all that the learned judge was doing was to reject a false choice being presented to him by counsel in that case. Regrettably, in my respectful opinion, the misreading also appears to have been adopted by the court in *R (Boyejo) v Barnet LBC* [2009] EWHC 3261 (Admin) at [56] – [57] without citation of the relevant authorities. Even if the 5 authorities cited by the defendants in support of their interpretation (see above at paragraph 48) are limited by their facts or the different statutory schemes with which they were concerned, they are relied upon simply for the description of a principle which is well known and which needs no further elaboration by this court.

55. In *R (W, M & Ors) v Birmingham CC* [2011] EWHC 1147 Walker J accepted 22 propositions about the content of the disability equality duty agreed between counsel for the parties to that claim. That they were agreed rather than determined by the court is apparent from the report at [151]. It was initially suggested by Mr Wise QC for the claimants that this court should adopt these propositions. In oral argument before this court it was agreed that there was no necessity for this court to do so and that as they are not an agreed basis for the interpretation or application of the duty,

this court should happily leave their approval or otherwise to others who might have a purpose in undertaking that task.

56. It is clear that what is appropriate in all the circumstances includes on the one hand the importance of the context to the elderly and disabled (i.e. the impact of the proposals) and on the other hand any countervailing factors relevant to the performance of the public function by the Council. Ultimately, how much weight is to be given to each of the factors in play is a matter for the Council not the court although it can be submitted with some force that the disability equality duty is at its most important when questions arise which affect disabled people (see, for example: DRC Code of Practice, paragraph 2.36).

57. So far as the requirements of a fair consultation are concerned, the law was not in issue between the parties. In *R v North and East Devon HA ex p Coughlan* [2001] QB 213 the Court of Appeal set out the principles as follows:

> "108. It is common ground that, whether or not consultation of interested parties and the public is a legal requirement, if it is to be embarked upon it must be carried our properly. To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response, adequate time must be given for this purpose, and the product of consultation must be conscientiously taken into account when the ultimate decision is taken: *R v Brent London Borough Council, Ex p Gunning* (1985) 84 LGR 168"

> "112. It has to be remembered that consultation is not litigation: the consulting authority is not required to publicise every submission it receives or (absent some statutory regulation) to disclose all its advice. Its obligation is to let those who have a potential interest in the subject matter know in clear terms what the proposal is and exactly why it is under positive consideration, telling them enough (which may be a good deal) to enable them to make an intelligent response. The obligation, although it may be quite onerous, goes no further than this".

The claim

58. The claimants contend as follows:

i) That there is no evidence that the defendant paid any regard to the disability equality duty;

ii) That the absence of any equality impact needs assessment (EINA) provides evidence of a lack of due regard;

iii) That no regard was had to the impact of any proposed cuts on disabled people and whether the detriment to disabled persons could be avoided or mitigated by (for example) finding savings elsewhere in the budget; and

iv) That it was insufficient for the Council to comply with the disability equality duty when considering the subsequent consultation on adult social care as there is no suggestion "that the outcome of this consultation could be any increase in the funding allocated to adult social care".

59. General: I have already commented that the budget strategy was as a matter of principle lawful and in accordance with good practice. Save as respects whether due regard was had to the public sector equality duty or rather the DDA 1995 duty, the claimants do not suggest otherwise. Good governance demands that a budget is not only an estimate of planned spending, it is also a projection based upon foreseeable risks which includes a contingency for uncertainties. Where risk assessments are incomplete or inchoate and/or financial circumstances are such that predictions are necessarily less certain, the contingency becomes all the more important. Here it was crucial. Were this not to be the case, budgets of many public bodies would be impugned by the erroneous elision of uncertainty with unfairness and/or illegality. That is not in any way to suggest that the public sector equality duty or its predecessor do not apply to budgetary decisions: they categorically do, but where flexibility is built into the budget so that subsequent corporate decisions and decisions relating to individuals can still lawfully be made by reference to the potential impact of the proposals on the persons affected then it is possible for the duty to be complied with i.e. there is nothing wrong in principle with such an approach and nothing inconsistent with the duties under the DDA 1995 or the EA 2010.

60. In this regard I find myself in agreement with Kenneth Parker J in *JG and MB v Lancashire CC* [2011] EWHC 2295 (Admin) at [48] to [51] in particular at [50] albeit in the different factual circumstances of that case:

> "The economic reality was that to meet imperative needs of reducing expenditure it would be extraordinarily difficult to avoid an adverse effect on adult social care. But there remained flexibility as to how any such effect on disabled persons could be minimised and mitigated… "

61. I respectfully agree that this view of principle is reinforced by the application of the perspective provided by Ouseley J in *R (Fawcett Society) v Chancellor of the Exchequer* [2010] EWHC 3522 (Admin) at [15] to local government budgets. This was helpfully summarised by Kenneth Parker J in the *Lancashire* case at [52]:

> "in my view it was sensible, and lawful, for the Defendant first to formulate budget proposals and then, at the time of developing the policies that are now under challenge, to consider the specific impact of proposed policies that might be implemented within the budgetary framework. "

62. In coming to this conclusion and although the point was not referred to by either party, I am cognisant that an *ex post facto* rationalisation which seeks to excuse an adverse effect subsequently identified is not the same as and will not pass as a

substitute for due regard being had at the time when the budget was approved. It is not said that this is what happened in this case. With these general observations in mind, I now turn to each of the specific grounds in turn:

63. There is no evidence that the defendant paid any regard to the disability equality duty: The claimants' case is that the Council paid no regard at all to the duty in setting the budget, that they did not have the specific statutory considerations in mind and that any general awareness they may have had was insufficient. What is needed and was absent, they submit, is evidence of an assessment of practical impact and steps to be taken so as to promote equal opportunity.

64. There is no requirement to refer in terms to the duty: *R (Domb) v Hammersmith and Fulham LBC* supra at [52] and the question is whether the decision maker has in substance had due regard to the relevant statutory need: *R (Baker) v SoS* supra at [37] and [40]. The duty to have due regard does not involve the taking of any prescribed step nor the achievement of a result. The regard is what is appropriate in the circumstances, namely at a point where the budget was set and a commitment to engage in an impact assessment was acknowledged.

65. Members attention was drawn to the Council's duties under the EA 2010 into which the section 49A DDA 1995 duty was subsumed. This was done in the Report on the Revenue Budget 2011/12 and 2012/13 published on 8 February 2011 and considered by the Executive on 16 February 2011 which was before the Council on 9 March 2011. Although a submission was made by the claimants that the duties are different that was not developed and does not stand scrutiny when the statutory duties are compared. It is clear, therefore, that the Council had the statutory duties in mind.

66. The budget was constructed following a pre-budget consultation that led to a framework and principles whose overt aim was to safeguard those in greatest need and to provide sufficient resources to effectively safeguard and protect the most vulnerable residents of the City while increasing independence and reducing dependency where appropriate. This is at least evidence that the Council had the substance of the statutory duties in mind. The budget was drawn on the basis that the Council would be able to continue to meet its statutory obligations and the needs of the disabled and elderly as vulnerable people and monies were identified for that purpose. It was recognised that further consultation and equality impact assessments were required and that decisions by the Executive in consequence upon the same would be needed involving the use of additional resources from reserves if necessary. The defendant subsequently consulted and assessed the impact of the proposals before a decision to implement the same in modified form was made by the Executive in September.

67. There is a theme to the submissions made by the claimants which is that the evidence they seek and which they submit is absent is that of decisions made to promote equality of opportunity and steps taken in that regard i.e. practical measures. That is not the same as having due regard. The duty is to have due regard not to achieve results. The Council recognised the need for an analysis of the impact which it acknowledged would have to be taken into account. It put in place a strategic response i.e. a contingency fund and guarantees as to how an individual's needs would still be met and consequent upon its consultation and EIA, interim i.e. procedural and substantive protections for those affected. In my judgment, that

amounted to a consideration of impact which was consistent with the need to have due regard and was a consideration of substance not mere form: it involved a commitment, if necessary, of real money.

68. Having regard to the needs of the elderly and the disabled does not exclude other considerations and the weight which is to be attached to each consideration. The Council was faced with the difficult task of making large savings and in setting a budget in a very short timescale from the time the Government's financial settlement was provisionally announced on 13 December 2010 and finally settled on 31 January 2011. The Council had to set its budget by no later than 11 March 2011. A great deal of work was done to inform elected Members and to explain and challenge proposals in the month and a half that was available to the Council.

69. The absence of any EINA provides evidence of a lack of due regard: There is no statutory duty to carry out a formal EIA or EINA: *R (Domb) v Hammersmith and Fulham LBC* supra. Accordingly, the absence of the same at what is alleged to be a material time is not evidence of what the Council failed to do.

70. That no regard was had to the impact of any proposed cuts on disabled people and whether the detriment to disabled persons could be avoided or mitigated by (for example) finding savings elsewhere in the budget: This ground was not pursued in oral argument and related to an earlier formulation of the claim within which it was proposed to adduce expert evidence concerning among other things whether the Council's budget could have been alternatively constructed. That evidence was not adduced. In any event, the Council plainly had due regard to the needs of the disabled and other vulnerable groups when setting its budget.

71. The Consultation: The claimants have permission to impugn the consultation after the budget on the basis that the Council failed to provide sufficient information and opportunity to respondents to make an intelligent response. In addition, they seek permission to pursue a claim that the consultation was unlawful because it was launched without due regard to the needs set out in sections 149(1)b) and 149(3)b) EA 2010, namely the need to advance equality of opportunity and the need to take steps to meet the needs of (here) disabled and elderly people.

72. The only examples of a failure to provide sufficient information relate to a) the failure to identify which individuals are expected to be "within the 85% who are diverted to reablement services" and b) the failure to explain "how precisely RAS allocations are to be reduced". In addition it is alleged that the consultation was unfair because of the way the questions were framed.

73. That the consultation was extensive does not appear to be in doubt. Its thoroughness was not impugned in the claimants' Grounds. Aside from the published documentation it included 40 events, open meetings and a support service to help complete the questionnaire and provide clarification 24 hours a day and 7 days a week. The terminology of the questions complained of was appropriately amended and extended time was provided for the revised consultation exercise. There was nothing unintelligible or unfair about the consultation process. In addition, the claimants seek to impugn the lack of intelligible information in respect of two aspects of the consultation.

74. The complaint about the reablement proposal is misguided. That is a forecast of an enhanced service which aims to support 85% of those referred to it with a provision which will arguably improve the service delivered to vulnerable adults while recognising that hitherto that service has been limited in not being able to respond to all those suitable. No-one argues that the extension of reablement is anything other than desirable in principle. The estimate of savings which might result was no more than an estimate which has been explained by the Council but is not a necessary component to an understanding of how an enhanced reablement service might benefit the claimants and others.

75. The second complaint relates to the amount of money to be given to people with care needs in lieu of the direct provision of services to them. Theoretical savings in these RAS allocations were identified by reference to alternative ways in which needs might be met. As this is a matter for individual assessment in each individual's case underpinned by the commitment that needs would continue to be met by funding unless and until an alternative service provision is identified to meet the need, it would not be possible to explain whether or how an individual's direct payments would be reduced. Furthermore, the claimants labour under a misapprehension caused in part by the defendants. They submit that the Council will no longer provide for non-personal care needs. That proposition is derived from an unfortunate and inelegant use of words by the Council in its EIA whereas the Council has made clear and continues to stress that the RAS will continue to ensure that all identified eligible needs are met.

76. In respect of neither specific complaint, therefore, can it be said that insufficient information was provided nor that the information actually provided was unintelligible.

77. Consultation on the revised social care offer is a function to which the public sector equality duty attached and although the claimants do not formally concede it, they acknowledge that in adopting the adult social care policy and implementing the budget relating to it by the decision taken on 14 September 2011 the defendant says that it paid due regard. The claimants submit that if the defendant did, then it did so in relation to a separate though related function i.e. the ultimate decision rather than the decision to consult.

78. In order to understand this element of the proposed claim one has to refer to what the claimants say the defendant needed to do. In oral submission this was summarised as follows:

> "a. identif(y) any detriment to disabled and/or elderly people from the proposals on which it intended to consult;
>
> b. consider whether to proceed with the consultation was consistent with due regard to the specified needs;
>
> c. provide its assessment to consultees to enable them to comment on any detrimental impact in the course of the consultation"

79. This is no more than a re-working of that which is required by the well known authorities on a fair consultation process cited above. In other words, and without prejudice to the full narrative of the authorities: was the proposal set out with clarity, were sufficient reasons given to enable an intelligent response to be made and was adequate time allowed? For the reasons given above, the answer to each of these questions is, yes.

80. In any event, the Council submits that the claimants are factually incorrect. The budget decision was taken on the basis that if it was subsequently decided not to implement any particular proposal having regard to the needs of the elderly and disabled (among others) then reserves might have to be used to support expenditure i.e. that expenditure incurred in adult social care might be more than that allocated to it. Accordingly, in making a decision to embark upon the consultation with the overt purpose of further considering the budget proposal in light of the impact on the disabled and elderly by providing respondents to the consultation with all the information available to the Council, the defendants undoubtedly had due regard to the public sector equality duty.

81. For all of these reasons, I have come to the conclusion that the claim should be dismissed.

82. Whether relief should in any event be granted? If I am wrong about the merits of the claims being advanced, the defendants say that the claim was made with undue delay. As I have already set out, if any relief is to be granted in respect of the Council's budget calculation, as a matter of law, it must be quashed. This would invalidate the council tax that has been set and incur additional cost in the re-calculation and re-setting of the tax and the re-issue of tax demands. In excess of 220,000 demand notices were issued on 15 March 2011. The claimants acknowledge that the issues raised by this claim are important and urgent but, despite this, the claim was not filed until 3 June 2011 and the papers were not served on the Council until 8 June 2011, almost exactly 3 months after the date of the budget decision.

83. It is clear from the sequence of events after D contacted his solicitors on 31 March 2011 that at least once if not more than once his solicitors "held off issuing proceedings" while asking the Council to re-consider its position. There was no good reason for the delay, which in giving permission Kenneth Parker J described as unacceptable. With respect, I agree. The cost of re-setting the amount of council tax would have to be met from the resources which the Council has available in a sum in excess of £650,000 excluding the cost of staff time. There would also be the associated cost of the effect of the delayed receipt of revenues.

84. In order for the claimants and adult social care customers to benefit from the grant of any relief, the resources available to the adult directorate have to increase. The Council has demonstrated that if it departed from its policy of freezing council tax (in order to effect an increase in revenue from the tax) it would then lose its grant of £3.489m not just in this financial year but in each subsequent year until 2014/15. It should be noted that this loss is more than the estimated savings proposed in the redefined social care offer. In any event, any increase within the Government's capping criteria is so marginal as not to justify taking that step. There is accordingly clear evidence that there is no realistic prospect that the Council would set a higher

council tax with the obvious implication that any relief which quashed the same would only have the effect of reducing resources available.

85. Accordingly, even if the claim were to have merit, I have come to the clear conclusion that invalidating the council tax for the year would be disproportionate, contrary to the public interest and serve no intelligible purpose. There also remains a quite separate argument that the claimants have not addressed: if the subsequent decision of the Executive of the Council made after full consultation and in the light of an EINA on 14 September 2011 is valid then any complaint in respect of the budget calculation is academic.

Judgment ends.

The Queen on the application of Judy Brown v Secretary of State for Work and Pensions, Secretary of State for Business, Enterprise and Regulatory Reform v Royal Mail Group Limited, Post Office Limited, Equality and Human Rights Commission

Positive/Neutral Judicial Consideration

Court
Divisional Court

Judgment Date
18 December 2008

Case No: CO/1537/2008

High Court of Justice Queen's Bench Division Divisional Court

[2008] EWHC 3158 (Admin), 2008 WL 5485766

Before: Lord Justice Scott Baker and Lord Justice Aikens

Thursday, 18th December 2008

Hearing dates: 8th, 9th and 10th October 2008

Representation

James Goudie QC and Stephen Knafler (instructed by Pierce Glynn , Solicitors, London) for the Claimant.
Jonathan Swift and Karen Steyn (instructed by Office of the Solicitor to the Department for Work and Pensions, London for the 1st Defendant and Treasury Solicitor , London for the 2nd Defendant) for the First and Second Defendants.
Michael Fordham QC and Shaheed Fatima (instructed by Olswang , Solicitors, London) for the First and Second Interested Parties.
Helen Mountfield (instructed by Equality and Human Rights Commission, Manchester) for the Intervener.

Judgment

Lord Justice Aikens:

This is the judgment of the court to which both judges have contributed.

A. The Background to the Claim.

1. The local Post Office has long had a place in the affection of the British public. In rural areas in particular it is often regarded as being at the centre of the community. Announcements of Post Office closures are unpopular and most peoples' lives have been touched in one way or another by Post Office closures. However, the advent of modern technology, the changing habits of the public and the fact that the Post Office network has made vast losses for years has made closures inevitable. This case is concerned with the duties owed to disabled people in respect of the closures proposed by the government in 2007.

2. Between the 1970s and 2006 some 10,500 Post Offices were closed. Since 2000 the decline in the use of Post Offices has accelerated. Some particular reasons for the downturn in use are: the government's decision to make payments of benefits and pensions directly to banks; the ability to make car tax and TV licence payments online; the availability of stamp purchases online and from many retailers, and the shift of shopping from town centres to retail parks. The result of all this has been that the volume of transactions handled by the Post Office network declined by one third between 2000/1 and 2003/4. Between 2004 and 2006, the weekly use of Post Offices fell by 4 million. Despite government funding of £2 billion since 1999, the Post Office network was losing about £3 million a week by 2006. At that point indications were that the customer base would continue to shrink, the losses would continue to rise and that the Post Office network would become insolvent without either further massive government support, or radical changes or both.

3. The Office for Disability Issues, which is a part of the Department of Work and Pensions ("DWP") estimates that there are some 10 million disabled people in the UK, including those with limiting long – standing illnesses. Of that total about 4.6 million are over state pension age and about 700,000 are children. It is estimated that one in four households has one member that is disabled. About 8 million out of a total of 10 million disabled people have difficulty in walking or climbing stairs. It goes without saying that disability comes in many different forms.

4. In February 2005 a National Audit Office report had noted that "vulnerable people (for example the elderly and those lacking mobility) tend to rely more heavily on Post Offices and are least able to adapt if their local Post Office closes". The government recognised at the time that a high proportion of Post Office customers comprised elderly people, disabled people, those on low incomes and those without ready access to private transport.

5. Here lie the opposing tensions which have given rise to this case.

6. **The Claimant:** Mrs Judy Brown, the Claimant, lives with her husband in Old Town, Hastings, Sussex. They are both retired and live on pensions. They do not have a car and are dependent on public transport. Mrs Brown is disabled. The effect of her disability is that she cannot stand or walk for long periods without acute discomfort and pain. Nor can she carry heavy loads for long. Mrs Brown's mother, who is 86, also lives in Hastings. She is frail and cannot get about much.

7. The Old Town, Hastings, is in a valley between two steep hills. It is separated from the town centre of Hastings by a hill. Old Town has a permanent population of about 6000. Many are elderly. There are several care homes in the town. With all its historic associations, tourism also thrives in the area.

8. Hastings used to have a number of Post Offices. There have been closures over the last 5 years. The Old Town itself has had a Post Office for centuries. Mrs Brown has used it for several services twice a week for the last eight years. In particular, Mrs Brown used the Post Office for its banking facilities, which are the only ones readily available to her in Old Town. She did so for her own banking needs and those of her immobile mother. Mrs Brown also used the Post Office for shopping by mail order and the more traditional Post Office services, such as buying stamps and sending parcels.

9. **The Letter before claim:** On 16 November 2007 an article appeared in *The Hastings Observer.* It said that several post offices in Sussex were to be closed, including the Post Office in Old Town Hastings. Mrs Brown and her husband made enquiries and found out that there was a consultation period about possible closures. They wrote to Mr Adam Crozier, the chief executive of Royal Mail, asking him about the procedures used to decide which Post Offices should be closed and about what criteria had been used to make the decision. They took legal advice from solicitors.

10. On 23 January 2008, Pierce Glynn, the solicitors acting for Mrs Brown and her husband, wrote a Letter before Claim to the Department of Work and Pensions ("DWP"), the Department of Business, Enterprise and Regulatory Reform ("DBERR", which had replaced the DTI) and the Royal Mail Group plc, which became Royal Mail Group Ltd in 2007. (We will refer to both these companies as "RMGL"). The letter pointed out that between 2002 and 2005 there had been a significant programme of Post Office closures in urban areas, including Hastings. It stated, correctly, that on 14 December 2006 the DTI published a consultation paper proposing a further round of closures of up to 2,500 Post Offices in both urban and rural areas. The consultation period had expired on 8 March 2007. In May 2007 the DTI had published its response to this consultation process in a paper entitled *"The Post Office Network"* .

11. The letter from Pierce Glynn noted that there had been further consultation periods for particular local areas. The consultation for Sussex had been undertaken between 13 November and 24 December 2007. The Sussex consultation paper proposed the closure of 49 Post Offices in Sussex and 4 in Hastings.

12. The Letter before Claim continued by stating that Mrs Brown intended to make three broad areas of challenge in judicial review proceedings. All three concerned actions or alleged failures of ministers or of RMGL relating to the proposed Post Office closures in the light of the Disability Discrimination Act 1995 ("the DDA"), which had been considerably amended in 2005. We shall explain the nature of the Claimant's complaints in more detail later on, but we should indicate briefly now the points made in the Letter before Claim, so far as they are still relevant.

13. Under the amended DDA, section 49A(1) imposed a general duty on all public authorities to have "due regard" to various needs concerning disabled people, with the overall aim of enhancing their position in society. Section 49D of the DDA gave the Secretary of State for Work and Pensions the power to make regulations to impose upon public authorities further specific duties to ensure the better performance by those authorities of their general duties under section 49A(1) . In 2005 the Secretary of State for the Department of Work and Pensions ("SSWP"), issued regulations [1] which identified a large number of public authorities and imposed on them specific duties in relation to disability. The most important of these duties, for present purposes, is the duty to publish a "Disability Equality Scheme", (which we shall call a "DES"), in which the public authority concerned would show how it intended to fulfil its duties under section 49A(1) of the DDA and the duties imposed on it under the 2005 regulations. Schedule 1, Part 1 of the 2005 regulations listed both "a minister of the Crown or government department" and also "Royal Mail Group" as entities to which the specific duties under the 2005 regulations applied. All entities listed in Part 1 of Schedule 1 of the 2005 regulations were obliged to publish their DES by 4 December 2006.

14. In 2007, the SSWP made a further regulation under section 49D of the DDA . [2] Regulation 3(b) of the 2007 regulations purported to remove "Royal Mail Group" from the list of public authorities on which the specific duties were imposed by the 2005 regulations. The first point raised by the claimant in the Letter before Claim and made against the SSWP, was to challenge the legality of Regulation 3(b) of the 2007 regulations.

15. The second challenge, which was against the Secretary of State for the Department of Business, Enterprise and Regulatory Reform, ("the SSBERR"), fell into two parts. The first attacked the DES of the department's predecessor, the DTI, [3] and the present department's DES . [4] The letter alleged that neither statement contained any account, (to be developed with input from disabled people) about the department's method of assessing the impact of its policies and practices or the likely impact of proposed policies and practices on equality for disabled people, contrary to the duty imposed by Regulation 2(3)(b) of the 2005 regulations. Furthermore, the "action plan" sections of both schemes, which identify a number of projects which would be subject to Disability Impact Assessments, did not list the Post Office closures policy as one of the policy areas in need

of such an assessment. Therefore, it was asserted, the SSBERR was in breach of his duty under the 2005 regulations. Those allegations have not been in the forefront of the argument before us.

16. The second part of this challenge related to the fact that the DBERR had not carried out a "disability impact assessment" in relation to the current Post Office closure programme. Under section 53A(1C) of the DDA , [5] the Disability Rights Commission ("DRC"), [6] had the power to issue Codes of Practice. The Codes are intended to give practical advice to persons subject to duties by virtue of section 49A(1) and section 49D of the DDA on the performance of those duties. In 2005 the DRC produced a Code, called *"The* Duty to Promote Disability Equality: Statutory Code of Practice" ("the Code"). This Code was approved by the SSWP and then laid before Parliament in October 2005. It came into effect on 5 December 2005. Paragraph 2.45 and the succeeding parts of the Code set out ways of fulfilling the general duty under s.49A(1) of the DDA . It does so by reference to the specific duties imposed on public authorities that are subject to the specific duties set out in the 2005 regulations, saying that " … the key mechanisms required by the [specific duty] provide a useful framework for all authorities seeking to comply with the general duty". Paragraph 2.48 refers to "the specific duty requirement to conduct disability equality impact assessments ("DEIA") "for ensuring that due regard is given to disability equality in decision making and activities".

17. The Letter before Claim asserted that the SSBERR had not carried out any DEIA in relation to the proposed Post Office closures. In particular it had failed to direct inquiries specifically at disabled people and had failed to take any subsequent steps required as part of a DEIA, as set out in Chapter 3 of the Code. The Letter before Claim summarises the allegation as follows (pages 8 – 9):

> "Given the obvious significance of the department's post office closure policy to a very large number of disabled people, the on – going failure to conduct a disability impact assessment is a clear breach of the department's duties under both s.49A and the 2005 regulations."

18. The third broad area covered by the letter before action concerned allegations against RMGL, which was called "the Mail" in the letter. It was said, first, that RMGL had failed to produce a DES . Secondly it had failed to carry out disability impact assessments, conduct lawful consultations in respect of the current proposals, in particular the Sussex Local Area Plan Proposal, or implement its own "Disabled Customer Policy".

19. However, after RMGL had served its evidence following the permission hearing before Davis J, Pierce Glynn wrote on 30 July 2008 to Olswang, who are the solicitors for RMGL and its subsidiary, Post Office Limited, ("POL"). The 30 July letter said that the claimant no longer pursued any claim against either company. The letter stated that there were two reasons for this: first, because of the announcement by POL that there would be a new "post office outlet" in Old Town, Hastings from 1 September 2008, i.e. before the existing Post Office closed on 1 October 2008. Secondly, because the claimant accepted that any challenges concerning failures to exercise duties under section 49A(1) of the DDA (as well as any failures under the 2005 regulations and the Code) were more correctly directed at the SSBERR, rather than RMGL or POL. Therefore, all allegations against both RMGL and POL were withdrawn and removed from the Amended Claim Form which was filed on 30 July 2008.

20. Despite the withdrawal of the claimant's case against both RMGL and POL, both were represented, as Interested Parties, at the hearing before us. Counsel made written and oral submissions on their behalf. The Equality and Human Rights Commission ("EHRC"), which was established by the Equality Act 2006 and which took over responsibilities from the DRC (amongst other bodies), was given leave to intervene. We had full written submissions from Miss Helen Mountfield and these

were supplemented by oral submissions for which she had earlier been given permission. In our view the decision on whether to entertain oral submissions from an intervener is ordinarily best left to the court hearing the substantive application, then it can decide on what, if any, topics it wishes to hear oral submissions.

B. The Statutory and Regulatory provisions.

(1) The Post Office

21. The Post Office Act 1969 established the Post Office Corporation as a statutory corporation. In 1986, after the telephone business of the Post Office had been hived off and privatised, the Post Office's operations were organised into three separate businesses: letters, parcels and counters. The Postal Services Act 2000 ("the PSA 2000") set up the current corporate structure for these three services. A holding company, Royal Mail Holdings plc, was created in March 2001. That company is wholly owned by the Crown. This holding company owns all the shares in what was Royal Mail Group plc, but which since March 2007 has been RMGL. RMGL's principal activity is the provision of mail services across the UK. RMGL operates these services under a Licence from the Postal Services Commission, to which we refer below.

22. RMGL owns three significant subsidiaries, one of which is Royal Mail Investments Limited ("RMIL"). That is, itself, a holding company. RMIL owns (amongst other companies) General Logistics Systems BV (which is a European logistics company incorporated and registered in the Netherlands) and RMGL, which owns Post Office Limited. [7] The principal activity of Post Office Limited (ie. "POL") is the operation of the network of Post Offices within the UK.

23. Section 1 of the PSA 2000 set up the Postal Services Commission, called "the Commission" for short in the Act, but known also as "Postcomm". Section 5(1) of the PSA 2000 stipulates that Postcomm must exercise its functions in the manner which it considers is best calculated to further the interests of users of postal services and, wherever appropriate, by promoting effective competition between postal operators. In doing so, Postcomm "shall have regard to the interests of … (a) individuals who are disabled or chronically sick": see section 5(2)(a) of the PSA 2000 .

24. Under sections 11 and 12 of the PSA 2000 , Postcomm is given power to grant licences to entities to permit them to provide services. In March 2001 Postcomm granted a licence to RMGL to collect and deliver mail. Under the terms of its licence from Postcomm, RMGL is under a "universal service obligation" as to the collection and delivery of mail. RMGL's licence therefore imposes certain obligations on it to ensure reasonable access to postal services for all, in line with the UK's obligations under the EU Postal Services(Directive 97/67/EC), as amended by 2002/39/EC and, in February 2008, by Directive 2008/6/EC . That Directive stipulates, (broadly), that there must be a universal postal service available to users of postal services throughout the UK.

25. Since 2002 the market in postal services has been gradually liberalised. There is now no statutory monopoly in favour of RMGL for the collection and distribution of mail. Competitors are entitled to provide a delivery service to customers. However, to date all have chosen not to incur the costs of setting up a "final mile" delivery service. Instead, competitors use the existing infrastructure of RMGL to deliver mail which they have previously collected and sorted.

26. POL provides and manages the Post Office network. Because of EU competition regulations and other competition requirements, POL is subject to competition over the provision of services habitually associated with Post Offices, such as TV licence payment services for the BBC (since 2006 through "Paypoint") and the Government Card Account. Awarding these services to POL is now part of a complex relationship with the government; parties have to comply with the EC Procurement Regulations. Further, competitors of RMGL are entitled to set up their own collection and delivery networks, using "access points" other than POL Post Offices. Overall, therefore, POL is subject to competitive pressures.

27. Section 2 of the PSA 2000 (since replaced by provisions in the Consumers, Estate Agents and Redress Act 2007), created the Consumer Council for Postal Services, known as "Postwatch". It was created to represent consumer interests in relation to postal services. Section 54 of the PSA 2000 requires that Postwatch, in exercising its functions, will have regard to various interests, including the interests of individuals who are disabled or chronically sick. Postwatch established a committee called the Counter Advisory Group, or "CAG", whose aim is to promote the views, concerns and interests of all consumers, but in particular those with disabilities, the elderly, those on low incomes and people who reside in rural areas, in relation to the issues affecting the Post Office network. Its membership includes organisations such as Age Concern, Help the Aged, Public Utilities Access Forum, the RNIB and the National Consumer Council.

(2) Disability Equality

28. **Background:** The present statutory framework concerning disability equality must be seen against the background of other equality legislation. This started with the amendment to the Race Relations Act 1976 by the Race Relations (Amendment) Act 2000 (together the "RRA"). The 2000 Act substituted a new section 71 in the RRA . That imposed on public authorities a general statutory duty to "have due regard to the need" to eliminate unlawful racial discrimination and to promote equality of opportunity and good relations between persons of different racial groups.

29. There is a similar type of provision in the Sex Discrimination Act 1975 , i.e. section 76A . That was added by section 84(1) of the Equality Act 2006 . That imposed on public authorities (with identified exceptions) a duty "to have due regard to the need" to eliminate unlawful discrimination and harassment and to promote equality of opportunity between men and women.

30. Historically, disability in its many forms has played regrettably little part in the thinking and decision making of public authorities. The provisions of the DDA with which this case is concerned were added by the Disability Discrimination Act 2005 . [8] They are aimed at public authorities' duties towards disabled people. The purpose of the amendments and of section 49A(1) in particular, is to achieve a change of climate. The underlying objective of the general duty under section 49A(1) of the DDA 1995 is to create a greater awareness on the part of public authorities of the need to take account of disability in *all* its forms and to ensure that it is brought into "the mix" as a relevant factor when decisions are taken that may affect disabled people.

31. However, there is, it seems to us, a notable distinction between disability and other targets of equality legislation such as race or sex, because, as we have noted, disability can be in numerous different forms. Different steps are needed to have regard to the needs of the mentally disabled from those of the physically disabled. The needs of a blind man are different from one who is deaf. Furthermore, disability comes in varying degrees

32. The Disability Discrimination Act 1995 : The DDA 1995 defines "disability" and "disabled person" for the purposes of the DDA . Section 1(1) states: "a person has a disability for the purposes of this Act if he has a physical or mental impairment which has a substantial and long – term adverse effect on his ability to carry out normal day – to – day activities". Section 1(2) states that a "disabled person" is one who has a disability.

33. The relevant sections of the DDA are set out in full in the Appendix to this judgment. In summary the position is as follows: first, section 21B of the DDA makes it unlawful for public authorities (with certain exceptions) to discriminate against a disabled person in carrying out its public authority functions. Section 21D defines what is meant by "discrimination". In the first place, a public authority discriminates against a disabled person if, for reasons relating to that person's disability, it treats him less favourably than it treats or would treat others without such a disability and the public authority cannot show that the treatment is justified within terms set out in the DDA : see section 21D(1) . But the definition of discrimination is also enlarged by the provisions of section 21D(2) and 21E .

34. Secondly, section 49A(1) of the DDA imposes on public authorities a general duty with regard to disability and disabled persons. Because this section is central to the argument in this case, we repeat it here as well as setting it out in the Appendix :

> **"49A General Duty**
>
> (1) Every public authority shall in carrying out its functions have due regard to—
>
> (a) the need to eliminate discrimination that is unlawful under this Act;
>
> (b) the need to eliminate harassment of disabled persons that is related to their disabilities;
>
> (c) the need to promote equality of opportunity between disabled persons and other persons;
>
> (d) The need to take steps to take account of disabled persons' disabilities, even where that involves treating disabled persons more favourably that other persons;

(e) the need to promote positive attitudes towards disabled persons; and

(f) the need to encourage participation by disabled persons in public life.

(2) Subsection (1) is without prejudice to any obligation of a public authority to comply with any other provision of this Act.

…"

35. We will, later in this judgment, have to analyse in more detail the scope of the duty imposed on public authorities by virtue of section 49A(1) . However, we note here, first, that the general duty is expressed in broad and wide ranging terms of the needs or targets to bring about a change of climate, but the section is silent as to how it should be done. Sometimes it will be possible for a public authority to meet one or more of the needs by taking particular steps; on other occasions it will not.

36. Secondly, we note that the duty is not to achieve the objectives or take the steps set out in paragraphs (a) to (f) of section 49A(1) as would have been the case if the words "have due regard to the need to" had been omitted. Rather, the duty on public authorities is to bring these important objectives relating to discrimination into consideration when carrying out its public functions.

37. Thirdly, we note that a most important component of the general duty of public authorities is that set out in section 49A(1)(d) . This requires public authorities to have "due regard" to the need to take steps to take account of disabled persons' disabilities, even where that involves treating disabled persons more favourably than other persons.

38. **Regulations under the** DDA : As we have already noted, section 49B defines a "public authority" and section 49D gives the Secretary of State the power to make regulations that impose on public authorities "such duties as the Secretary of State considers appropriate for the purpose of ensuring the better performance by that authority of its duty under section 49A ". We have already referred to the 2005 regulations. The relevant parts of those are also set out in the Appendix . The key provisions are in paragraphs 2 and 3.

39. Under paragraph 2 of the 2005 regulations, the public authorities listed in Schedule 1 of the regulations have to publish a Disability Equality Scheme ("DES"), showing how they intend to fulfil their duties under section 49A of the DDA and the duties set out in the 2005 regulations. The contents of the DES are prescribed by paragraph 2(3) of the 2005 regulations. The DWP and the DBERR, which are listed in Schedule 1 to the 2005 regulations, were therefore obliged to publish their departmental DES by 4 December 2006. [9] That was done by both departments.

40. At paragraph 7 of the DES prepared by the DBERR, [10] under the heading "Impact Assessment", it states that the DBERR is "required to follow a rigorous impact assessment procedure as part of its policy making procedures". Paragraph 7 goes on to state that the department has designed a "Toolkit for Equality Duties". This "toolkit" would "give policy makers across the Department the tools and advice they need to decide best how to make an assessment of equality in their work. Whilst it is designed for use by all staff, it is particularly aimed at project managers". A Toolkit for Equalities had been published by the DTI prior to December 2006, but covered race equality only. The Toolkit for Equalities was amended to deal with disability equality and was published on the DTI intranet on or shortly before 4 December 2006. This Toolkit for Equalities ("the Toolkit") has been adapted since then. We were provided with the DBERR's current version. [11] The claimant has relied on parts of it, particularly the paragraphs dealing with the "focus and purpose of Equality Impact Assessment" (para 4), and "The stages of an Equality Impact Assessment" (para 6). We have reproduced the relevant parts of paragraphs 4 and 6 in the Appendix to this judgment.

41. **The Disability Rights Commission and Equality and Human Rights Commission:** We have already referred to the DRC, which was established originally as the National Disabilities Council in 1995. The DRC is now subsumed in the Equality and Human Rights Commission ("the EHRC"), which was established by section 1 of the Equality Act 2006 . The EHRC became operational on 1 October 2007. It now has responsibilities for promoting the Sex Discrimination Act 1975 , the Race Relations Act 1976 and the DDA . Its general function (in relation to disabled people) is to encourage and support the development of a society which promotes the potential of disabled people and mutual respect. Section 8 of the Equality

Act sets out specific duties of the EHRC in relation to equality and diversity. Under section 30 of the 2006 Act, the EHRC has the power to intervene in important cases.

42. We have also already referred to the Statutory Code of Practice, called " *The Duty to Promote Disability Equality",* which was produced by the DRC under the terms of section 53A(1C) of the DDA and published in December 2005. The relevant provisions of that Statutory Code are also set out in the Appendix to this judgment. The paragraphs referred to or relied upon are 1.42, 1.44, 2.1, 2.8, 2.33, 2.38 – 2.41, 2.43 – 2.45; 248 to 2.52, 2.66, 3.13, and 3.36 – 3.39.

C. The background to the SSBERR's decision paper of May 2007: "The Post Office Network: government response to public consultation" and the aftermath to the decisions set out in that paper.

43. **The Lead in to the Consultation Paper of December 2006:** From the establishment of the corporate restructuring of the Post Office under the Postal Services Act 2000 , POL lost money. In February 2005 the National Audit Office ("NAO") reported on the Post Offices. It noted the tension between what it regarded as the vital social role of the Post Office network on the one hand and POL's inability to sustain a commercially viable network without continued financial support by the DTI for Post Offices on the other. As already noted, the report said, in its introduction, that "vulnerable people (for example the elderly and those lacking mobility) tend to rely more heavily on post offices and are least able to adapt if their local post office closes".

44. Following the report, the DBERR decided on two courses of action. First, it commissioned a detailed analysis of the Post Office network, office by office. The object was to establish levels of usage, customer and transaction profiles, costs and remuneration levels. Secondly, the DBERR established an interdepartmental working group to review and consider the current and future role and usage of the network for the provision of government services and those of associated agencies.

45. The detailed analysis of the network examined the purely commercial aspects of the network's activities. It demonstrated that the network was uneconomic and could not continue without further government support. The interdepartmental working group considered the network's importance as a means of providing services and information to the public and also the importance of the wider social role undertaken by Post Offices, particularly for disadvantaged members of society.

46. By December 2006 the Post Office Network in the UK, was losing £3 million a week and many million fewer people were using post offices each week, even compared with 2004. Of the total of 14,500 Post Offices in the network, only about 3,500 – 4,000 were commercially viable. It was clear that, without much further support from the Exchequer, POL, the company that owned and ran the Post Office network, would become insolvent.

47. **The Consultation Process:** On 14 December 2006 the Secretary of State for Trade and Industry announced a public consultation into the future of the Post Office network. The DTI published its consultation document *"The Post Office: a Consultation Document",* in which it stated that there would have to be changes in the size of the Post Office network. At the same time it recognised the important social and economic role played by Post Offices " … particularly among the more vulnerable customer groups who rely on them as a lifeline". [12]

48. The paper set out the government's principal proposals for the future of the Post Office network. The witness statement of Mr MJ Whitehead, an Assistant Director of the Shareholder Executive within the DBERR, describes this (at paragraph 92) as "a managed restructuring of the network", with the object of creating one that was sustainable. To achieve what was called "the Network Change Programme", Mr Whitehead says that "it was further concluded that around 2,500 closures (offset by the introduction of 500 new outreach services) was the smallest possible reduction that would realistically create a sustainable network within the funds available". That would provide a "core commercial network" of about 3,500 – 4,000 Post Offices and a "non – commercial network" of around 7,500 branches.

49. At paragraph 96 of his witness statement, Mr Whitehead explains how the government proposed that POL would make decisions on which particular Post Offices would close. The government proposed that there should be a "comprehensive set of criteria applying at national level to ensure that access to postal services continued to be available across the country with particular protection for vulnerable consumers". The Consultation Paper proposed that the new access criteria for the national Post Office network would be based on access within a set distance of a Post Office for a certain minimum percentage of the population. In the Consultation Document access criteria are set out first on a national basis, then for deprived urban areas, then for urban areas, then for rural areas. It was also proposed that within remote areas 95% of the population of any postcode must be within 6 miles of their nearest "post office outlet". [13]

50. The government proposed that these access criteria would have to be applied by POL when considering what individual Post Offices were to be closed. The Consultation Document also stated that the government would require POL to ensure that no one part of the network and no particular group of people be significantly more adversely affected than any other. [14] The government also proposed that the Network Change programme be implemented through a series of local consultations by POL. [15] Although decisions on specific closures would be for POL to take, it would be limited to a maximum of 2,500 "compensated closures" nationally. [16] The government intended that, in those cases, POL would have to take account of geographical impediments such as rivers, mountains, valleys, motorways and sea crossings to islands, so as to avoid undue hardship and to ensure that the principles behind the access criteria were adhered to by POL. [17] POL would also have to take account of the availability of public transport and alternative access to key Post Office services, the local demographic position and local economies. POL would be required to show "how these factors [had] been considered in arriving at their plans in each local consultation document". [18]

51. Mr Whitehead also states, at paragraph 107 of his first witness statement:

> "The [DBERR] proposed detailed requirements for this [i.e. the local consultation] process. These were designed to ensure that, among other things, the needs of vulnerable people, including disabled people, were at the forefront of local implementation decisions. This was to be achieved by taking account of local geography and demographics, including such factors as the suitability and accessibility of the particular post office for use by disabled persons. This reflected the overarching policy principle that a national post office network needed to be protected to ensure continuing access to services for vulnerable individuals and communities."

52. The Consultation Document was circulated to many organisations which the government believed would be able to offer representative views on the impact of the proposals on disabled, elderly and vulnerable people. The DBERR therefore urged comments from (amongst others): Age Concern, Help the Aged, Mencap, the RNIB and the DRC. The DRC did not respond. We were informed by Miss Mountfield that it was, at the time, the policy of the DRC not to respond to generic consultation exercises. Responses were, however, sent by Age Concern, Citizens Advice, National Consumer Council, National Pensioners' Convention, Postwatch and the Scottish Disability Equality Forum.

53. In retrospect, the failure of the DRC to respond was astonishing. It would have been an ideal opportunity to draw attention to the ambit of the duty imposed on public authorities by section 49A(1) in relation to the closure of Post Offices. It is unfortunate that the DRC chose not to make any response at that stage, yet incurred considerable expense in the current proceedings when it is too late to achieve any practical benefits.

54. During the consultation period of 12 weeks between 14 December 2006 and 8 March 2007, the Department received more than 2,500 responses to the consultation, over half of which were from individuals. As a result of the representations of Age Concern and others, the DBERR decided that when POL was considering the closure of individual Post Offices, it must fulfil further requirements in the local consultations, in addition to those already proposed in the December 2006 Consultation Document.

55. First, POL must specifically take account of "socio – economic factors" as well as the access criteria and geographical factors. [19] Secondly, Postwatch, which (as already noted) had a statutory duty to have regard to the interests of "individuals who are disabled or chronically sick" and those of "pensionable age", would ensure that those groups had a formal role in the local consultation process. This led to a Memorandum of Understanding between POL and Postwatch, ("the MoU"), to which we refer again below. Thirdly, POL must have regard to particular factors when proposing particular Post Office closures and when making the final decision. These factors would include "deprivation and mobility issues (for example, local terrain, availability of public transport and local demographics)". Fourthly, POL was required to ensure parity of treatment so that no particular group of people should be significantly more adversely affected by closures or other changes in service provision than any other. Further, no country within the UK and no group of inhabitants at the area plan level should be significantly more adversely affected than any other. [20]

56. **The May 2007 Decision:** Having considered the representations, the SSBERR set out his decision in the paper " *The Post Office Network: government response to public consultation"* which was published in May 2007 . This will be referred to as "the May 2007 decision".

57. The main points of the decision were: (i) to provide total funding of up to £1.7 billion (subject to EC state aid clearance) in the period to 2011 to support "necessary changes to the network and put it on a more stable footing and to provide continuing support for the social network". (ii) To introduce a new framework of "minimum access criteria to maintain a national network of Post Offices and, in particular, to protect vulnerable consumers in deprived urban, rural and remote areas". [21] (iii) Government funding would support up to 2,500 compensated closures within the "access criteria framework" set out in the document. The closure programme would be implemented within 18 months of the summer of 2007. (iv) POL would establish new "Outreach" locations to provide access to services and the government would support about 500 of those "to mitigate the impact of the compensated closures". (v) POL would draw up area plans for closures within this framework. POL would "in due course seek information and input from relevant parties including Postwatch, subpostmasters and local authorities as area plan proposals are developed for local public consultation". [22] (vi) Individual local area plans would be subject to a 6 week public consultation. The role of Postwatch and local authorities in the development of those proposals for closures, local consultation on them and "other changes in service provision" would be set out in the MoU signed by POL and Postwatch.

58. On page 18 of the paper, it states that:

> "We agree that no particular part of the network and no particular group of people should be significantly more adversely affected by closures or other changes in services provision than any other. We therefore expect that POL will be making roughly similar numbers of closures in rural and urban areas. We also expect that when developing detailed area plans POL will reflect the principle that no country within the UK and no group of inhabitants at the area plan level should be significantly more adversely affected than any other". [23]

59. **The Memorandum of Understanding:** The MoU, which was not legally binding on either party, provided in paragraph 6.2 for a "Further Review" process in cases where Postwatch showed that POL had taken a decision about a particular local closure but had "not given due consideration to material evidence received during the public consultation in coming to its decision, or where evidence emerges from the consultation that the proposal for that branch does not meet [the] government's policy requirements". [24] However, Postwatch did not have a veto on any POL final decision. Once a final decision was made and announced a poster would be displayed to notify customers at the branch to be closed. POL would also write to an identified list of consultees (set out in Appendix 1 to the MoU) to summarise and respond to key issues raised in representations to POL. [25] In general the changes would be implemented four weeks after the announcement of the decision.

60. The Funding Agreement: At the same time as the May 2007 decision was announced, a Funding Agreement was made between the government and POL. Under this the government was committed to provide POL with funds of up to £1.7 billion in return for it carrying out the Network Change Programme in accordance with the requirements that had been settled as a result of the consultation process. Mr Whitehead states, at paragraph 117 of his first witness statement, that:

> "Via this [Funding Agreement], as well as through the actions taken by the government in encouraging POL to enter into the MoU with Postwatch … the government imposed obligations upon POL that helped to ensure that sufficient measures were in place to protect the interests of vulnerable users of postal services, including those with disabilities". [26]

61. **POL Area Plan for Sussex:** POL announced in its Area Plan Proposal for Sussex that it proposed to close 49 Post Offices in the county. After the consultation period ended on 24 December 2007, it maintained its decision on 41 of those closures. The other eight, including the case of the Old Town Hastings Post Office, went to further reviews. At the third stage, in February 2008, Postwatch dealt with eight Post Offices in Sussex which had been identified for closure. Its main concern was the capacity of the five Post Offices in Sussex which had been identified as the "receiving branches" for the eight that were subject to the review. [27] Postwatch provided information on the number of disabled and elderly people in each of the areas surrounding the branches it was proposed to close and those remaining branches that would receive customers from closed Post Offices. POL produced a further report dealing with the capacity issues and considering demographic data relating to disabled people and matters that were of particular concern to disabled people. [28]

62. In March 2008 Postwatch stated that it was satisfied in relation to seven out of the eight proposed closures. The exception was the Old Town, Hastings branch. Ultimately POL took the decision to introduce a Post Office outlet in the Spar convenience store in Old Town. That has been open since 1 September 2008. [29]

D. The Issues for decision and a brief outline of the arguments.

63. Before the hearing, counsel for the parties produced an Agreed List of Issues. This list is very detailed. The court produced its own suggested list of issues in an attempt to simplify matters. What we set out below draws on both lists.

64. The issues for decision fall into four groups or topics, which we should first identify. Topic A concerns the validity of Regulation 3(b) of the 2007 regulations, which were made by the SSWP. In respect of that topic, the claimant seeks a declaration against the SSWP that Regulation 3(b) was made *ultra vires.* or is invalid because it was unlawfully made. Topic B concerns the alleged actions or inactions of the SSBERR and his department which culminated in the May 2007 decision. The claimant seeks a declaration against the SSBERR that the May 2007 decision was unlawful. Topic C concerns the SSBERR's conduct in relation to Post Office closures under the "Network Change Programme" since the May 2007 decision. The claimant seeks a declaration that the SSBERR continues to be in breach of duty under section 49A(1) of the DDA as regards Post Office closure strategy and its implementation, because the DBERR has not performed or published any disability impact assessment or equivalent exercise as regards past, current and likely future impacts of Post Office closure strategy.

65. In respect of each of these three topics there is a further issue concerning the relief that is sought by the claimant. This forms Topic D. It is argued on behalf of the SSWP and the SSBERR, supported by counsel for RMGL/POL, that insofar as the question of relief depends on the court's discretion, then it should be refused. We develop all these below.

66. **Topic A:** There are four issues that arise under this topic. Issue (1): Did section 49D(1) of the DDA (together with section 14 of the Interpretation Act 1978 [30] so far as applicable) give the SSWP the power to make Regulation 3(b) , which removed "Royal Mail Group" from Schedule 1 of the 2005 regulations, which were promulgated pursuant to section 49D(1) of the DDA ? Mr Goudie Q.C, for the claimant, submits that, upon the correct construction of section 49D and section 14 of the 1978 Act, it did not. Mr Swift and Mr Fordham QC, for the SSWP and RMGL/POL respectively, argue to the contrary.

67. Issue (2) arises on the assumption that there was *vires* to make Regulation 3(b) . The next question is: was it made by the SSWP for an impermissible or improper purpose? This must depend (a) what is meant by "Royal Mail Group" in the 2005 and 2007 regulations and (b) on factual findings as to the actual reason for making Regulation 3(b) . It must, we think, also take into account the duties imposed on the SSWP by section 49A(1) and the 2005 regulations. Mr Goudie submits that the purpose was impermissible and/or improper because the aim of making Regulation 3(b) was to ensure that RMGL and POL, as a subsidiary of RMGL, did not have to comply with the duties imposed by the 2005 regulations. Mr Swift and Mr Fordham argue that this was not the intention and that the purpose was proper.

68. Issue (3) also assumes that there was *vires* to make Regulation 3(b) . The next question is: was the decision to make the Regulation irrational. Mr Goudie argues it was. Mr Swift for the SSWP argues that there was no intention in 2005 to list the entire Royal Mail Group of companies, but only RMG plc (now RMGL). There were good reasons for removing RMG plc. Therefore removal of "Royal Mail Group" cannot be irrational.

69. Issue (4): Was the decision to make Regulation 3(b) in breach of the SSWP's own obligations under section 49A(1) of the DDA ? Mr Goudie says that it was. Mr Swift says that the decision was made before section 49A(1) came into force so that this issue does not arise. But whether or not the decision was made after 4 December 2006, Mr Swift argues that, when making the decision, the SSWP did properly consider (a) his own obligations under section 49A(1) of the DDA ; (b) the Code of Practice issued under section 53(1C) of the DDA ; and (c) the DWP's own obligations under the 2005 regulations.

70. **Topic B:** This concerns the May 2007 decision of the SSBERR. The topic covers the acts and alleged omissions of the SSBERR during the period before the May 2007 decision and the decision itself. Mr Goudie alleges four particular failures by the SSBERR. These are as follows: (1) prior to making the May 2007 decision, he acted contrary to section 49A(1) of the DDA (and/or irrationally) by failing to consider whether to carry out a disability equality impact assessment or equivalent exercise. (2) Prior to making the May 2007 decision, the SSBERR acted contrary to his duty under section 49A(1) of the DDA by failing to have regard to the DES adopted by the SSBERR to meet his own obligations under the 2005 regulations

and/or the "Toolkit for Equality Duties" adapted by the SSBERR, in particular in relation to a DEIA or similar exercise. (3) Prior to making the decision, he acted contrary to his section 49A(1) duties by failing to have regard to the provisions of the Code of Practice (promulgated by the DRC under section 53A (IC) of the DDA). (4) In making his decision, the SSBERR failed to have due regard to the matters referred to in section 49A(1) and so was in breach of his duties under that section.

71. Mr Swift, supported by Mr Fordham, submit that there were no relevant failures by the SSBERR at any stage during the decision making process. They also submit that, even if there were, then as a matter of discretion, no declaratory relief should be given: Topic D.

72. **Topic C:** This concerns the SSBERR's conduct in relation to the "Network Change Programme" since May 2007. It is important to recall that the claimant has withdrawn all allegations of breach of duty by POL in respect of the implementation of the Network Change Programme. In paragraph 8 of the Outline Argument for RMGL/POL their counsel, Mr Fordham Q.C. and Shaheed Fatima, record the important fact that "it is common ground that this hearing is proceeding on the basis, in particular, that POL has in substance acted compatibly with the "due regard" duty in section 49A(1) of the DDA , were such duty applicable to it".

73. Therefore the focus has to be on alleged failures of the SSBERR. There are two broad issues under this topic. Issue (1) is what is the extent of the SSBERR's responsibility for the Post Office closure programme since the May 2007 decision and how does that impinge on the duties of the SSBERR under section 49A(1) of the DDA , the 2005 regulations, the Code, the DES of the DBERR and the "Toolkit". Mr Goudie argues that the SSBERR's duty under section 49A(1) remains unchanged by the fact that it was POL that carried out the policy set out in the May 2007 decision. Mr Swift submits that the way in which the SSBERR fulfils the "due regard" duty will be different when it is POL that is implementing the policy in practice.

74. Issue (2) assumes that the SSBERR has direct responsibilities which can only be fulfilled through its own actions. Mr Goudie alleges three failures on the part of the SSBERR in relation to the way in which the Post Office closure programme has been implemented. These are: (i) he has been in breach of his duties under section 49A(1) in the manner in which the Post Office closure programme has been implemented. (ii) There was a failure to direct POL or ensure that it undertook a disability equality impact assessment or equivalent exercise in relation to the Network Change Programme, so that the SSBERR was in breach of his duty under section 49A(1) . (iii) There has been a failure by the SSBERR, in relation to the Network Change Programme, to have regard to advice in the Code, the DES and the "Toolkit", so that the SSBERR himself is in breach of his duties under section 49A(1) .

75. Mr Goudie, supported by Miss Mountfield, submits that there may be a further issue under Topic C. This is whether the SSBERR failed to reach a proportionate or rational decision not to carry out a disability equality impact assessment or equivalent exercise. We doubt whether this raises a separate point. The fact is that no such exercise was undertaken. Either the failure was a breach of duty or not. If it was not, then there cannot have been a failure to reach a proportionate or rational decision. If it was a breach of duty, then there is no point in asking the further question.

76. **Topic D:** We asked Mr Goudie to set out in writing precisely the relief sought against each Secretary of State. This is: first, a declaration against the SSWP that Regulation 3(b) of the 2007 regulations was invalidly made or unlawfully made. Secondly, a declaration against the SSBERR that the May 2007 decision is unlawful for failing to have due regard to the duty in section 49A(1) of the DDA . Thirdly, a declaration that the SSBERR continues to be in breach of that duty in three identified respects.

77. Mr Swift, counsel for the Secretaries of State, submits that all the declaratory relief should be refused, for two main reasons. First, the claim for judicial review was not brought promptly, so that section 31(6) of the Supreme Court Act 1981 [31] applies and the court ought to refuse the relief sought because it would be detrimental to good administration. Secondly, and even if the claim had been made promptly, relief should be refused because it would be detrimental to good administration and pointless. In this case events have progressed. The Network Change Programme has been implemented; Post Offices (including that at Old Town, Hastings) have been closed, premises sold and sub – postmasters have moved or retired. Therefore even if the claimant makes good her cases against the Secretaries of State, the court should exercise its discretion not to grant the relief sought.

78. Central to the whole case are the nature and scope of the duties imposed on public authorities when they are carrying out their functions as such, under section 49A(1) of the DDA , the 2005 regulations, the Disability Equality Schemes produced under the regulations and any relevant statutory or non – statutory codes. No party argued that the nature and scope of the duty would differ between different public authorities, although, obviously, the application of the duties by a particular public authority will depend on the nature and extent of its own functions. We think that it is sensible to analyse these duties before we consider in detail the particular issues that arise for decision in this case.

E. The nature and scope of the duty imposed on public authorities by section 49A(1) of the Dda, the 2005 regulations and the statutory and non – statutory codes.

(1) Duties under section 49A(1) of the Dda

79. There is no dispute that the aim of the 2005 amendments to the DDA is to make public authorities place disability equality for all at the centre of their organisation, policy making and functions, so as to further the important goal of the elimination of discrimination and harassment of disabled people and the promotion of equality of opportunity for them in society in general. [32] This new aim [33] focusing on public authorities, is to be achieved through two key sections in the new statutory provisions. First, the new section 21B of the DDA , which makes it unlawful for a public authority to discriminate against a disabled person in carrying out its functions. Secondly, by imposing on public authorities the duties set out in section 49A(1) .

80. The section 49A(1) duties are mandatory, as is clear from the opening words of the section; public authorities "shall", in carrying out their functions (as public authorities), "have due regard" to six "needs" which are identified in the paragraphs (a) to (f) of section 49A(1) . Each "need" identifies a particular goal, which, if achieved, would further the overall goal of the legislation dealing with disability discrimination.

81. However, it is important to appreciate, as Dyson LJ held in relation to analogous provisions in section 71(1) of the Race Relations Act 1975 , that the imposition of a duty to have "due regard" to the various identified "needs" does not impose a duty to achieve results. It is a duty to have "due regard" to the "need" to achieve the identified goals. This is a vital distinction: see R(Baker) v Sec of State for Communities and Local Government [2008] LGR 239 at paragraph 31.

82. What is meant by "due regard"? Dyson LJ stated, in the same paragraph in Baker , that "due regard" in the Race Relations Act provision meant the regard that is appropriate in all the particular circumstances in which the public authority concerned is carrying out its function as a public authority. The same principle applies here. There must, therefore, be a proper regard for all the goals that are set out in section 49A(1) paragraphs (a) to (f) , in the context of the function that is being exercised at the time by the public authority. At the same time, the public authority must also pay regard to any countervailing factors which, in the context of the function being exercised, it is proper and reasonable for the public authority to consider. What the relevant countervailing factors are will depend on the function being exercised and all the circumstances that impinge upon it. Clearly, economic and practical factors will often be important. Moreover, the weight to be given to the countervailing factors is a matter for the public authority concerned, rather than the court, unless the assessment by the public authority is unreasonable or irrational: see Dyson LJ's judgment in Baker at paragraph 34.

83. What about the six "needs" to which public authorities must have due regard when carrying out their functions? The "needs" identified in paragraphs (a) to (c), (e) and (f) are goals, such as the elimination of discrimination that is unlawful

under the DDA , or the encouragement of participation by disabled persons in public life. So public authorities have to have a proper regard for the need to achieve those goals.

84. Paragraph (d) is different, however. That paragraph places on public authorities a duty to have proper regard for the need "to take steps to take account of disabled persons' disabilities, even where that involves treating disabled persons more favourably than other persons". The phraseology is convoluted. It does not identify a goal which is an end in itself. However, in our view the paragraph imposes a duty on public authorities to pay "due regard" to the need *to take steps* to do two things which are means which will assist in achieving the goals identified in the other paragraphs in section 49A(1) . First, public authorities must have "due regard" to the need to take account of the fact of disabled persons' disabilities in the context of "carrying out their functions". Secondly, public authorities must have "due regard" to the need to recognise that this may involve treating disabled persons more favourably than others. But we emphasise that, in both cases, no duty is imposed to take steps themselves, or to achieve results. The duty is only to have "due regard to … the need to take … " the two steps we have identified. The court will only interfere if the public authority has acted outwith the scope of any reasonable public authority in the circumstances.

85. To do both of these things, the public authority concerned will, in our view, have to have due regard to the *need* to take steps to gather relevant information in order that it can properly take steps to take into account disabled persons' disabilities in the context of the particular function under consideration. We emphasise once again, however, that the duty is to have due, ie. proper, regard, to "the need to take steps."

86. Mr Goudie relied on comments by the *Court of Appeal in R(C) v Secretary of State for Justice [2008] EWCA Civ 882* . That case concerned, amongst other things, the failure of the Secretary of State for Justice to make a Race Equality Impact Assessment before bringing in changes to rules (which were laid before Parliament) for the use of physical restraint in Secure Training Centres, or "STCs". These centres accommodate young persons who have been sentenced to custody or are remanded in custody by a court. At paragraph 39 of his judgment, Buxton LJ stated that "it was accepted that the effect of section 71(1) of the Race Relations Act 1976 [34] was to require a race equality impact assessment (REIA) where it was proposed to change policy on a matter that might raise issues about racial equality". The duties imposed by section 71(1) of the 1976 Act are in identical terms to those imposed by section 49A(1)(a) and (c) of the 1995 Act, as amended. Unfortunately, Buxton LJ's judgment does not elaborate the basis for this "acceptance".

87. In the Divisional Court, at [2008] EWHC 171 (Admin), Maurice Kay LJ had pointed out, at paragraph 38, that the Home Office and the Department of Constitutional Affairs had both published Race Equality Schemes. The Home Office document stated that "each new policy is the subject of a race equality impact assessment, unless the policy has no relevance to equality". The DCA document had similar wording. Paragraph 39 of Maurice Kay LJ's judgment continues:

> "In the present case it is common ground that, when policy changes, or at least when it changes significantly, it is incumbent upon the Secretary of State to ensure that the potential discriminating impact has been assessed and considered. It is also common ground that there was no such assessment or consideration in advance of the Amendment Rules. The case for the Secretary of State is that none was required because there was no change, *a fortiori* no significant change of policy. We have rejected this submission when dealing with the first ground of challenge. [35] In our judgment there plainly was a significant change of policy (see para 35 above). For this reason, we are satisfied that the failure to carry out a race equality impact assessment in advance of such changes (Elias at 274) [36] involves a breach of duty on the part of the Secretary of State. This ground of challenge is substantiated … ".

88. We note several things about that paragraph. First, it appears to have been common ground in that case that the proper way to assess and consider the impact of the proposed change in the rules on race equality was by the use of a formal race equality impact assessment, as contemplated in the Race Equality Schemes of the two departments. Secondly, it was common ground that no such assessment, nor indeed any race equality assessment, had been undertaken before the new rules were introduced. Thirdly, the reference to paragraph 274 of Elias is to provide authority for the proposition that consideration of issues of race discrimination must be made before policy decisions are made. Arden LJ does not state in that paragraph that

section 71(1) of the 1976 Act imposes, directly or indirectly, a duty on a public authority to undertake a formal race equality impact assessment in a form set out in a Race Equality Scheme .

89. Accordingly, we do not accept that either section 49A(1) in general, or section 49A(1)(d) in particular, imposes a statutory duty on public authorities requiring them to carry out a formal Disability Equality Impact Assessment when carrying out their functions. At the most it imposes a duty on a public authority to consider undertaking a DEIA, along with other means of gathering information, and to consider whether it is appropriate to have one in relation to the function or policy at issue, when it will or might have an impact on disabled persons and disability. To paraphrase the words of WB Yeats in *An Irish Airman Foresees his Death,* the public authority must balance all, and bring all to mind before it makes its decision on what it is going to do in carrying out the particular function or policy in question.

90. Subject to these qualifications, how, in practice, does the public authority fulfil its duty to have "due regard" to the identified goals that are set out in section 49A(1) ? An examination of the cases to which we were referred suggests that the following general principles can be tentatively put forward. First, those in the public authority who have to take decisions that do or might affect disabled people must be made aware of their duty to have "due regard" to the identified goals: compare, in a race relations context R(Watkins – Singh) v Governing Body of Aberdare Girls' High School [2008] EWHC 1865 at paragraph 114 per Silber J. Thus, an incomplete or erroneous appreciation of the duties will mean that "due regard" has not been given to them: see, in a race relations case, the remarks of Moses LJ in R (Kaur and Shah) v London Borough of Ealing [2008] EWHC 2062 (Admin) at paragraph 45.

91. Secondly, the "due regard" duty must be fulfilled before and at the time that a particular policy that will or might affect disabled people is being considered by the public authority in question. It involves a conscious approach and state of mind. On this compare, in the context of race relations: *R(Elias) v Secretary of State for Defence [2006] 1 WLR 3213* at para 274 per Arden LJ. Attempts to justify a decision as being consistent with the exercise of the duty when it was not, in fact, considered before the decision, are not enough to discharge the duty: compare, in the race relations context, the remarks of Buxton LJ in *R(C) v Secretary of State for Justice [2008] EWCA Civ 882* at paragraph 49.

92. Thirdly, the duty must be exercised in substance, with rigour and with an open mind. The duty has to be integrated within the discharge of the public functions of the authority. It is not a question of "ticking boxes". Compare, in a race relations case the remarks of Moses LJ in R(Kaur and Shah) v London Borough of Ealing [2008] EWHC 2062 (Admin) at paragraphs 24 — 25.

93. However, the fact that the public authority has not mentioned specifically section 49A(1) in carrying out the particular function where it has to have "due regard" to the needs set out in the section is not determinative of whether the duty under the statute has been performed: see the judgment of Dyson LJ in Baker at paragraph 36. But it is good practice for the policy or decision maker to make reference to the provision and any code or other non – statutory guidance in all cases where section 49A(1) is in play. "In that way the [policy or] decision maker is more likely to ensure that the relevant factors are taken into account and the scope for argument as to whether the duty has been performed will be reduced": Baker at paragraph 38.

94. Fourthly, the duty imposed on public authorities that are subject to the section 49A(1) duty is a non – delegable duty. The duty will always remain on the public authority charged with it. In practice another body may actually carry out practical steps to fulfil a policy stated by a public authority that is charged with the section 49A(1) duty. In those circumstances the duty to have "due regard" to the needs identified will only be fulfilled by the relevant public authority if (1) it appoints a third party that is capable of fulfilling the "due regard" duty and is willing to do so; and (2) the public authority maintains a proper supervision over the third party to ensure it carries out its "due regard" duty. Compare the remarks of Dobbs J in R (Eisai Limited) v National Instituted for Health and Clinical Excellence [2007] EWHC 1941 (Admin) at paragraphs 92 and 95.

95. Fifthly, (and obviously), the duty is a continuing one.

96. Sixthly, it is good practice for those exercising public functions in public authorities to keep an adequate record showing that they had actually considered their disability equality duties and pondered relevant questions. Proper record — keeping encourages transparency and will discipline those carrying out the relevant function to undertake their disability equality duties conscientiously. If records are not kept it may make it more difficult, evidentially, for a public authority to persuade a court that it has fulfilled the duty imposed by section 49A(1) : see the remarks of Stanley Burnton J in R(Bapio Action Limited) v Secretary of State for the Home Department [2007] EWHC 199 (Admin) at paragraph 69, those of Dobbs J in R(Eisai Ltd) v NICE (supra) at 92 and 94, and those of Moses LJ in Kaur and Shah (supra) at paragraph 25.

(2) Duties under the 2005 regulations

97. Paragraph 2(1) of the 2005 regulations imposes a duty on all the public authorities listed in Schedule 1 to publish a Disability Equality Scheme ("DES") by "the relevant publication date". As we have already noted, in the case of the DWP and DBERR, that was 4 December 2006. Paragraph 2(1) also stipulates what the DES will contain. Thus, the duties imposed by section 49A(1) are not expanded by paragraph 2(1), save to the extent that it dictates *how* the public authority "intends to fulfil its section 49A(1) duty".

98. Paragraph 2(3) prescribes details of what will be contained in the DES . The requirements set out in paragraph 2(3)(b), (c),(d)(iii) and (e) are of particular importance in this case, but they are in general terms. None stipulates that the DES *must* contain provisions requiring that Disability Equality Impact Assessments must be used in identified circumstances. None of the paragraphs expand the section 49A(1) duty itself. Rather, paragraph 2(3) of the 2005 regulation is concerned with the mechanism for the implementation of the section 49A(1) duty.

99. Inevitably, for public authorities such as the DWP or the DBERR, which have such varied functions, the way the DES makes a statement about the "authority's methods of assessing the impact of its policies and practices or the likely impact of its proposed policies and practices on equality for disabled persons" will be broad and unspecific. So also will the statement of the steps that the authority proposes to take towards the fulfilment of the "due regard" duties imposed by section 49A(1) of the DDA .

100. Paragraph 3 of the 2005 regulations deals with the implementation of the DES that is to be produced by public authorities. Paragraph 3(1)(a) requires the public authority concerned to "take the steps which it has been required to set out in the [DES] by virtue of regulation 2(3)(c) " within three years of the publication of the DES . Paragraph 3(1)(b) requires the public authority, within the same period, to " … put into effect its arrangements, which it has been required to set out in the DES by virtue of regulation 2(3)(d) and (e) " for gathering information and making use of it. But this duty is tempered by paragraph 3(2), which is particularly important. It states that "nothing in this regulation imposes any duty on an authority where, in all the circumstances, it would be unreasonable or impractical for it to perform the duty."

101. We take particular note of the opening words of paragraph 3 of the 2005 regulations. In the case of both the DWP and the DBERR, they had three years from 4 December 2006 to complete the steps which they proposed to take *towards* [37] the fulfilment of their section 49A(1) duties, pursuant to paragraph 3(1)(a). They did not have to take those steps immediately from the start of that three year period. That would have been both unreasonable and impractical. Plainly, if departments showed no sign of taking any steps towards fulfilling their section 49A(1) duties as the three year period drew on, they would be in danger of being in breach of their paragraph 2(1)(c) duty. But we think it unlikely, on the face of it, that there could be any breach if the steps set out in the DES had not been fully taken within 18 months of 5 December 2006.

102. Equally, under paragraph 3(1)(b), public authorities have three years to put into effect the arrangements (as set out in their DES) for gathering information on the effect of its policies and practices on disabled persons (paragraph 2(1)(d)) and making use of it. We make the same point about timing of the fulfilment of this obligation as we have above in relation to the paragraph 2(1)(c) obligation.

103. These limitations on what obligations the DWP and DBERR had under the 2005 regulations and when they had to fulfil them are important in the context of this case. It is alleged that the departments were in breach of obligations under the 2005 regulations by virtue of what they did or did not do in the period from December 2006 until about June 2008, in other words in the first 18 months of the three year period for implementation of the DES by the departments. It seems to us, therefore, that it is, on the face of it, going to be very difficult for the claimant to succeed in demonstrating that the SSWP or the SSBERR were in breach of duties which they had three years to fulfil.

(3) Duties under the Disability Equality Schemes of the departments.

104. The relevant DES is that of the DTI, which became the DBERR. The DES that the DTI published in early December 2006 describes the disability discrimination legislation and the DTI's work in very general terms. It relates how the DTI gathers information on the effect of its policies and practices on disabled people, how it involves disabled people in its work and the issues it identifies as the most relevant and important for disabled people with whom it works. Section 7 describes how the DTI will take account of disability issues in policy making.

105. This last section refers to impact assessments. It states that the department has had to carry out Regulatory Impact Assessments for new policy proposals since 1998. It continues:

> "[The] DTI recognises the importance of making an assessment of the impact on equality alongside this economic assessment and many policy areas now carry out this assessment as a matter of course. The better regulation team of the DTI … works with teams across the Department to ensure impact assessments are robust and meet the standards required.
>
> [The] DTI has also designed a Toolkit for Equality Duties, which gives policymakers across the Department the tools and advice they need to decide best how to make an assessment of equality in their work. It is … particularly aimed at project managers. The toolkit takes staff through the different stages of making an assessment of impact on equality, including monitoring, consultation and publication /access to information requirements … "

106. Thus, in our view, the DES does not in terms require that an equality impact assessment has to be made in respect of all projects – nor could it. Whether or not to undertake one must be a decision for the project manager or other person in charge of a particular policy or function in the light of the section 49A(1) duties and all relevant other factors. If a decision was taken not to conduct an impact assessment or one was not undertaken, that could only be challenged in the courts if it was unreasonable or irrational or disproportionate, such that it must be contrary to the statutory duty of the public authority concerned under section 49A(1) of the DDA .

107. The first witness statement of Mr Gareth Mitchell makes some criticisms of the DES of the DBERR. [38] We note three things about this. First, the witness statement does not suggest that the DES is in breach of any of the specific requirements set out in paragraph 2 of the 2005 regulations. Instead, it asserts that the DES is in breach of provisions of the Code issued by the DRC. Secondly, those criticisms are misplaced, because the paragraphs of the Code relied on are not prescriptive, as suggested in paragraph 36 of Mr Mitchell's witness statement. Moreover, given the breadth of the functions of the DBERR, it is not surprising that there is no specific reference to Post Office closures. Thirdly, there is no claim for relief in relation to the DES of the DBERR, either in the amended Claim Form or in the summary of relief sought against the DBERR produced by Mr Goudie (at our request) in the course of the hearing. Therefore, these points go nowhere in any case.

(4) The "toolkit for equality duties" of the departments.

108. We were shown three versions of a "toolkit for equality duties"; the current one for the DBERR, and two for the DWP. Each is on broadly similar lines. First, they explain the department's equality duties. Secondly, they describe the nature and purpose of an Equality Impact Assessment.

109. In the DBERR "toolkit" it states [39] that the DBERR " … is therefore required by law to assess the impact of all of its policies and practices, or the likely impact of its proposed polices and practices on equality of opportunity. An Equality Impact Assessment is one way of ensuring that this happens". That is not a strictly accurate summary of the law. The duties of public authorities under section 49A(1) of the DDA do not *require* such an assessment to be undertaken. As already explained above, the section 49A(1)(d) duty only requires the public authorities to have *due regard* to the *need* to *take steps* to take account of disabled persons' disabilities. We appreciate that paragraph 2 of the 2005 regulations does require that public authorities state, in a DES , the *methods* for assessing the impact of policies and practices or the likely impact of proposed policies and practices. The public authority could therefore state, in its DES , that its method of assessing the impact of its policies and practices on disabled people will be an Equality Impact Assessment. But paragraph 2 of the 2005 regulation does not expressly impose an immediate duty on public authorities to assess the impact of existing or proposed policies and practices by any specific, particular means. Such an additional duty cannot be imposed indirectly by statements in the "toolkit", which has no statutory force at all.

110. The DBERR "toolkit" then gives guidance on when and how an Equality Impact Assessment should be carried out, who should be involved and what it should contain. If such an assessment is undertaken, it makes sense to follow the guidance. If the guidance is not followed, there is a risk that someone may challenge the result. But we are quite clear that the guidance

itself does not, indeed cannot, impose any legal obligations on the departments on when, how or by whom an Equality Impact Assessment should be carried out.

(5) Duties under the Drc Code of Practice.

111. As already noted, the Code of Practice was published under the power given to the DRC by section 53A(1C) of the DDA . We note that section 53A(4) of the DDA provides that the DRC may not issue a code of practice unless a draft has been approved by the Secretary of State and laid before Parliament and until a 40 day period has elapsed thereafter, in which either House can resolve not to approve it. Section 53A(8) provides that the failure to observe any provision of a Code of Practice does not of itself make a person liable in any proceedings. But section 53A(8A) also states:

> "But if a provision of a code of practice appears to a court, tribunal or other body hearing any proceedings under Part 2,3,4 or 5A, or any proceedings relating to a relevant improvement to be relevant, it must take that provision into account".

We are not convinced that the present proceedings for judicial review do fall within the ambit of section 53A(8A) , but we will assume for the present that they do so.

112. The DRC's Code of Practice is entitled: "The Duty to Promote Disability Equality". The Code first describes the "general duty" under section 49A(1) , then the specific duties under the 2005 regulations, who is subject to them and the enforcement of them. Paragraph 1.44 emphasises that the Code does not impose legal obligations and that this is not an authoritative statement of the law. In the light of our comments below, this is an important qualification.

113. Chapter 2 discusses in detail what public authorities "need to do to meet the general duty to promote disability equality" to fulfil the "general duty" in section 49A(1) of the DDA . Paragraphs 2.48 and 2.49 provide:

> "2.48 The general duty requires public authorities to adopt a proactive approach, mainstreaming disability equality into all decisions and activities.
>
> 2.49. The specific duty requirement to conduct impact assessments is designed to provide a mechanism for ensuring that due regard is given to disability equality in decision – making and activities. The technique of impact assessment is described in paragraphs 3.28 to 3.42".

114. If paragraph 2.49 is intended to state a proposition of law, then in our view it is inaccurate. Neither section 49A(1) nor the 2005 regulations impose a specific or particular duty on public authorities to conduct impact assessments, for the reasons we have already stated. Moreover, the Code itself is not a source of law: *R (Khatun) v Newham LBC [2005] QB 37* at paragraph 47 per Laws LJ. [40]

115. Chapter 3 of the Code deals with the specific duties under the 2005 regulations. Paragraph 3.35 is more accurate when it states that the specific duties created by the 2005 regulations do not prescribe a particular method of impact assessment. But it still misses the point that there is no specific legal obligation to conduct an equality impact assessment at all.

116. The legislation with regard to public authorities is littered with examples of Codes of Practice offering guidance as to how their activities should be conducted. In assessing the consequences of failing to comply with a provision in a Code it is critical to ascertain whether the Code is statutory or non – statutory, whether it is intended to create binding obligations, and whether Parliament has given any indication of the result of failing to comply with the Code. On the status of this Code we were referred by Miss Mountfield to the decision of the *House of Lords in R(Munjaz) v Mersey Care NHS Trust [2006] 2 AC 148* . That case was concerned (amongst other things) with the status of a statutory code of guidance published by the Secretary of State under section 118 of the Mental Health Act 1983 . The code contained guidance for hospitals and medical

staff on the use of seclusion for detained psychiatric patients. The code required hospitals to have clear written guidelines on the use of seclusion and itself set out guidance on when seclusion should and should not be used.

117. Lord Bingham of Cornhill said, at paragraph 21, that the statutory code was more than mere advice. He said: "It is guidance which any hospital should consider with great care and from which it should depart only if it has cogent reasons for doing so". Lord Hope of Craighead said, at paragraph 69, that those to whom the Code was addressed: " … must give cogent reasons if in any respect they decide not to follow it. Those reasons must be spelled out clearly, logically and convincingly. I would emphatically reject any suggestion that they have a discretion to depart from the Code as they see fit."

118. In our view the status of the Code in this case is not identical to that in the Munjaz case. First, section 53A(8) of the DDA stipulates that a failure to observe any provision of the Code does not itself make any person liable in any proceedings. In short, a failure cannot, by itself, constitute a breach of duty. Secondly, although section 53A(8A) stipulates that a court hearing particular (defined) proceedings must take a provision of the Code into account if it thinks it relevant, the obligation on the court is no greater than that. The section does not lay down any particular consequences of a failure to follow a provision. Those would be a matter for the court to assess in the overall context of the failure. Thirdly, the Code itself emphasises that it is setting out "steps that will assist a public authority to comply with its general duty" (paragraph 2.45) and that those steps are "designed to assist authorities, not to prescribe a particular approach which they are obliged to take".

119. We were referred to a number of other authorities on the effect of the Code. [41] In the light of those cases and the Munjaz case, we accept the following propositions on the status of the Code. First, a public authority must take the Code into account when considering disability equality issues. If it decides to depart from it, cogent reasons must be given and they must be convincing: see: Khatun at para 47 per Laws LJ. However, we also agree with the statement of Laws LJ in that case that there are no higher positive duties to comply with the Code, *pace* remarks of Dyson J in *R v North Derbyshire Health Authority ex Fisher (1997) 10 Admin LR 27* .

120. Secondly, if a breach of the general duty in section 49A(1) is alleged and it appears to a court that relevant guidance given by the Code has been ignored, departed from, misconstrued or misapplied without cogent reason, then that may be a powerful factor that leads the court to conclude that there was a breach of statutory duty by the public authority. Thirdly, it would be for the public authority to explain clearly and convincingly the reason for the lapse.

121. However, other than to the extent indicated above, we are quite satisfied that, as a matter of law, the Code does not itself impose further duties on public authorities in addition to those set out in section 49A(1) and the 2005 regulations.

F. Topic A: the validity of Regulation 3(b) of the 2007 Regulations.

(1) Issue One: Did section 49D of the Dda (together with section 14 of the Interpretation Act 1978) give the Sswp the power to make Regulation 3(b)?

122. Section 49D(1) gives the SSWP the power to make regulations that impose on a public authority "such duties as the Secretary of State considers appropriate for the purposes of ensuring the better performance by that authority of its duty under section 49A(1) ". Section 49D(5) stipulates that before a regulation is made under section 49A(1) "the person making the regulations shall consult" what in 2005 was the DRC, but since the relevant sections of the Equality Act 2006 came into force in 2006, has become the EHRC.

123. Section 49D(1) clearly gives the Secretary of State the power to make regulations. Therefore, by virtue of section 14 of the Interpretation Act 1978 , there will be an implicit power to revoke an instrument made under the power. The revocation power will be "exercisable in the same manner and subject to the same conditions" as the original power itself, unless "the contrary intention appears". Therefore the only question that arises on this issue is whether, as a matter of construction of section 49A(1) , there is a contrary intention which shows that the Secretary of State does not have power to revoke a regulation made under section 49D(1) .

124. We are clear that there is nothing in section 49D(1) , either expressly or by implication, which indicates that the Secretary of State does not have a power to revoke a regulation made pursuant to the powers given by that section. We accept that when the power in section 49D(1) has been exercised to make a regulation which imposes specific duties on a public authority, then any revocation of that regulation must be made "for the purpose of ensuring the better performance by that authority of its duty under section 49A(1) ". But this is because that purpose is a "condition or limitation" of the power to make a regulation in the first place and section 14 of the Interpretation Act 1978 requires that the power to revoke must be exercised on the same basis as the power to make the regulation in the first place. The question of whether the Secretary of State has

exercised the power to revoke "in the same manner and subject to the same conditions and limitations" as the exercise of his power to make the regulation must go to the validity of the exercise of the power, rather than the very existence of the power itself to revoke. The Secretary of State can only make regulations that he considers "appropriate for the purpose of ensuring the better performance by [authorities concerned] of [their] duty under section 49A(1) ". Whether the SSWP fulfilled that requirement is considered below under Issue (4) of Topic A.

125. Therefore we conclude that section 49D(1) , together with section 14 of the Interpretation Act 1978 , do give the SSWP the power to revoke the wording of the Schedule to the 2005 regulations which identified "Royal Mail Group" as being subject to those regulations. Thus the SSWP had the power to make Regulation 3(b) of the 2007 regulations.

126. This appears to us to accord with common sense. The Secretary of State, in exercising his own duties under section 49A(1) ought to be able to review the status and circumstances of the public authorities that have been identified in a previous regulation that had made them subject to specific duties. The Secretary of State has to ensure that the continued subjection of an identified public authority to specific duties under existing regulations will ensure better performance by that public authority of its duties under section 49A(1) . To do so he must have the power to revoke, amend or re-enact existing regulations. That must include the power to make a new regulation that declares that a public authority that was previously subject to specific duties beyond the section 49A(1) duties is no longer subject to those additional specific duties, because that would ensure the better performance by that public authority of its duties under section 49A(1) .

(2) Issue Two: Did the Sswp make Regulation 3(b) of the 2007 regulations for an impermissible or improper purpose?

127. In order to answer this question, it is necessary to consider two topics which involve factual matters. The first topic is: what is meant by "Royal Mail Group" in both the 2005 and 2007 regulations. That exercise of construction must be placed in the factual context in which the two regulations were made. The second topic is: what were the reasons for making Regulation 3(b) which removed the "Royal Mail Group" from the schedule to the 2005 regulation?

128. **Meaning of "Royal Mail Group":** In 2004, when the Disability Discrimination Bill was published, the DWP also published a consultation paper called " *Delivering equality for disabled people"* . [42] Paragraphs 3.19 and 3.20 of the paper state that the government intended to place certain "public bodies" under specific duties to assist them in complying with their general duty to promote disability equality. In deciding which bodies should be subject to the specific duties, the government would consider four particular factors. These were identified as being: (a) whether the body had significant direct dealings with disabled service users; (b) whether it had a significant impact on the lives of disabled people; (c) whether it was a significant employer of disabled people and (d) whether it was of sufficient size to support the proposed duties.

129. In the same consultation paper, the DWP stated that the government would consult a public body before placing it under specific duties by secondary legislation: see paragraph 1.12. At the time of the 2004 consultation the companies within the Royal Mail Group were not proposed to be in the list of public authorities subject to specific duties. [43] However, when the DDA was passed, Royal Mail Group was one of the public authorities submitted to ministers on 16 June 2005 for a decision about inclusion in the proposed list of authorities that would be made subject to specific duties. After ministerial approval of the proposed list, the Royal Mail Group plc was contacted by the DWP in a letter of 4 July 2005. The letter itself has been lost. Mr EM Clift, a civil servant in the Office for Disability Issues in the DWP, has said in his first witness statement [44] that it would have been on "standard terms".

130. On 13 July 2005 Mr Jonathan Evans, the company secretary of Royal Mail Group plc, replied. The letter [45] is clearly directed to the activities and status of that company alone, not any others within the "Royal Mail Group". Mr Evans denied that Royal Mail Group plc was a "public authority". He set out various factual reasons why the company should not be made subject to further proposed specific duties relating to disability equality. The company's concluded view was that it would be "wholly inappropriate" for specific obligations to be extended to its business.

131. Unfortunately, no action was taken by the DWP in response to this letter. Mr Clift states [46] that his predecessor has told him that he was not made aware of the letter from RMGL until after the 2005 regulations were made. Therefore, by default, "Royal Mail Group" was included in the list of public authorities set out in Part 1 of Schedule 1 of the 2005 regulations that was laid before Parliament on 25 October 2005.

132. With or without this factual background, we are quite satisfied that the words "Royal Mail Group" in the 2005 regulations do not mean Royal Mail Group plc *plus* all or even some of the direct or indirect subsidiary companies of that corporate entity. The phrase "public authority" in the 2005 regulations must have the same definition as that in section 49B(1) of the DDA .

The statutory description in section 49B(1) is that it "includes any person certain of whose functions are functions of a public nature". The phrase "person certain" appears in section 6 of the Human Rights Act 1998 when describing "public authorities". This is in contrast to the definition of "person" in the Interpretation Act 1978 , where the word is said to include "a body of persons corporate or unincorporated". In our view, the draftsman used the expression "person certain" to emphasise the fact that the public authority must be an identifiable natural or legal person. Therefore the "public authorities listed in schedule 1 " of the 2005 regulations must refer to such a legal entity that exists, that can contract and that can sue and be sued. This must be so for the simple reason that otherwise there will be no clearly identifiable person on whom to enforce the fulfilment of the general or specific duties that are imposed by section 49A(1) or the 2005 regulations.

133. "Royal Mail Group" is not a legal entity. It is a collective noun for a group of legal entities. In contrast, Royal Mail Group plc is a legal entity.

134. Mr Goudie submitted that the reference to "Royal Mail Group" in the 2005 regulations should be read in the same way as "group" in Part 15 of the Companies Act 2006 , so as to embrace all companies within the "group". Section 474 of Companies Act 2006 defines "group", for the purposes of Part 15 , as "a parent undertaking and its subsidiary undertakings". But Part 15 is dealing with company accounts and reports only. It is not analogous to the present matter, where the DDA itself and the 2005 regulations clearly intended to identify particular legal entities and make them subject to the specific duties that were to be imposed.

135. Mr Goudie accepted that the meaning of "Royal Mail Group" must be the same in both the 2005 and the 2007 regulations. Therefore if, upon the true construction of Part 1 of Schedule 1 of the 2005 regulation, that phrase means "Royal Mail Group plc", then that must be the same corporate entity that the 2007 regulation purports to remove.

136. **Background to removal of RMG plc from the 2005 regulations:** What were the reasons for de – listing RMG plc? Mr Goudie submits that the only reasons that can be considered are those set out in the Explanatory Memorandum to the 2007 regulations and a statement of a minister of the DWP to Mr Jack Straw, then Leader of the House of Commons, which explained the review of bodies subject to the specific disability equality duties.

137. The Explanatory Memorandum states, under the heading "Consultation":

> "7.8 Ministers also decided that, due to the changes since 2005 that have introduced full competition into the postal market, Royal Mail Group should not be subject to the specific duties. This is consistent with the approach taken for the gender equality duty through the Sex Discrimination Act 1975 (Public Authorities)(Statutory Duties) Order 2006 (S.I. 2006/2930) which comes into force on 6 April 2007".

138. The ministerial statement (of Anne McGuire) reads:

> "In addition, I propose removing Royal Mail, which is currently listed, form this requirement due to the changes that have been taking place in the postal market".

139. Therefore, Mr Goudie submits, it is clear that the SSWP decided to remove "Royal Mail Group" from Part 1 of Schedule 1 to the 2005 regulations because the group should not be subject to the specific duties as it was now subject to "full competition in the postal market". That, he says, is an impermissible or improper reason.

140. We think that it is unrealistic to look only at those two public statements. The court has to consider all the reasons put forward and then decide what were the actual reasons for the decision. The background to the decision is that Mr Evans of RMG plc had written to the DWP on 10 February 2006. That letter has also been lost, but the content can be gleaned from Mr Clift's reply dated 1 March 2006. [47] This notes Mr Evans' argument that "Royal Mail is now in a broadly analogous

position to other postal operators, and would not meet the definition of "public authority"". Mr Clift's response said that the arguments for de-listing "Royal Mail" would be put to ministers.

141. The points made in Mr Evans' letter were considered by the DWP during the spring and summer of 2006, as Mr Clift explains in his first witness statement. [48] The DWP concluded that "Royal Mail Group", which we take to mean RMG plc, was probably a "hybrid" public authority, which carried out both public and private functions. The understanding of the DWP was that, as a "hybrid" authority", RMG plc was only subject to general or specific equality duties to the extent that acts performed by it were of a public nature.

142. The provision of mail services, which was the business of RMG plc/RMGL, faced competition from other postal operators from January 2006. Because those rival operators were not public authorities, they would not be subject to any general or specific equality duties under the DDA or the 2005 regulations. The DWP concluded that "while we did not think that the production of a disability equality scheme was particularly burdensome on its own, it would have ongoing effects that could be regarded as a burden and we needed to have regard to wider government policy of minimising burdens on business and the cumulative effect of regulation". [49] Moreover, it was noted that RMG plc had not been placed under specific gender equality duties nor general or specific race equality duties. This seems to us to be of some importance.

143. Mr Clift says in his witness statement that the question of de- listing "Royal Mail Group" was discussed between him and Marie Pye of the DRC on more than one occasion, including a meeting on 30 October 2006. His evidence, [50] which is not contradicted, is that Ms Pye commented that:

> "…the DRC had always been aware that there would be cases at the margins where the extent of a public authority's public functions was unclear, and that they (ie. DRC) had thought that Royal Mail Group was in that category when they had initially proposed it for inclusion in 2005."

144. Mr Clift's evidence is that when the DWP was contemplating whether or not the "Royal Mail Group" should be de – listed, the key consideration of the department was the potential impact of its removal on disabled people. Paragraph 33 of his witness statement continues:

> "….
>
> We considered carefully the potential effect on disability equality before approaching Ministers for a decision. We bore in mind the fact that Royal Mail Group was subject to a licence condition in relation to its disabled customers, and the fact that the regulator, Postcomm, was (as a non-ministerial government department) subject to both general and specific disability equality duties and was in a good position to promote disability equality in the postal services sector and, in particular, in relation to Royal Mail's activities under its universal service provision licence. We considered that the requirement of the licence condition to publish a statement of arrangements for disabled customers largely replicated the requirements of a disability equality scheme when applied to Royal Mail Group's limited public functions. We concluded therefore that the combined effect of the licence condition, the general duty and the Regulator would protect disabled people's interests and that continuing to require Royal Mail Group to maintain a disability equality scheme, given the limited nature of its public functions, would add little value over and above these other requirements and was therefore not an appropriate way of ensuring the better performance of Royal Mail Group's duties under s 49A of the Act.
>
> …."

145. Mr Clift has stated [51] that the approval of the relevant Minister in the DWP, Anne McGuire, to remove "Royal Mail Group" from the list of public authorities subject to the 2005 regulation was obtained in 22 November 2006 and "formal collective agreement" was obtained on 11 December 2006.

146. **Impermissible or improper purpose?** In these circumstances, was the decision to de – list the "Royal Mail Group", which on our construction means RMG plc, (now RMGL), made for an impermissible or improper purpose? On the evidence before us we have concluded that it was not. The SSWP was entitled to consider two things in particular: first, the extent to which, if at all, RMG plc was a "public authority" within section 49B of the DDA . That is a question of fact and degree. No party to this hearing wishes us to make a definitive finding on the precise nature of the "public authority" status of RMGL, or of POL, although Mr Swift did accept that RMG plc/RMGL is to be regarded as a "public authority" in respect of some of its functions, for the purposes of sections 49B and 49D(1) . [52] The view taken by the DWP, that RMG plc was a "hybrid" public authority, was reasonable.

147. Secondly, the SSWP was entitled, indeed obliged, to consider the extent to which listing RMG plc/RMGL was "appropriate for the purpose of ensuring the better performance by that authority of its duty under section 49A(1) of the DDA ", to use the wording of section 49D(1) . The SSWP was entitled to perform that task having decided the extent to which RMG plc was a public authority for the purposes of section 49A(1) and also the company's business background and future. However, it is also clear from Mr Clift's evidence that the key consideration of the SSWP in reaching its conclusion to de-list was the potential impact on disabled people of removal of RMG plc.

148. Therefore our answer to this issue is: "no."

(3) Issue Three: Was the decision to make Regulation 3(b) irrational?

149. In the light of our conclusions on Issues (1) and (2) above and the reasons for them, the answer to this question must be "no".

(4) Issue Four: Was the decision to make Regulation 3(b) in breach of the Sswp's own obligations under section 49A(1) of the Dda, or the Code of Practice or the Dwp's obligations under the 2005 regulations?

150. Mr Clift has stated in evidence that the key consideration in giving advice to the SSWP to recommend that the "Royal Mail Group" be taken off the list in Part 1 of Schedule 1 to the 2005 regulations was that the DWP was "the part of government with policy responsibility for disability and the disability equality duty [and] the potential impact on disabled people of removal of Royal Mail Group … ". [53] Also in evidence is the memorandum prepared by Mr Clift for ministers dated 15 November 2006. [54] That made the recommendation to remove "Royal Mail Group", as well as adding other public authorities to the existing lists in the Schedule to the 2005 regulations.

151. There is no specific statement in the 15 November 2006 memorandum that Mr Clift had borne in mind the duty imposed on the DWP by section 49A(1) of the DDA whilst considering which public authorities should be added to the existing list or whether "Royal Mail Group" should be removed from it. We are quite satisfied, however, given the statements in Mr Clift's witness statements, [55] the tenor of the whole of the memorandum of 15 November 2006, its reference to the DDA and to the 2004 consultation paper " *Delivering Equality for disabled people",* that the SSWP did have due, i.e. proper, appropriate, regard to the "needs" set out in paragraphs (a) to (f) of section 49A(1) of the DDA when formulating his recommendation to the Secretary of State.

152. As we have noted, the approval of the relevant minister was obtained on 22 November 2006. We accept Mr Swift's submission that, in practical terms, the policy of removing "Royal Mail Group" from the list was established on that date. At the time of the memorandum to ministers, [56] section 49A(1) had not yet come into force. The general duties under section 49A(1) and the specific duties under the 2005 regulations only came into force on 4 December 2006. It would have been both impractical and unreasonable for Mr Clift to have written further memoranda to remind ministers that these provisions had come into force and of their duties under them. There was, in our view, no need to do so, given the tenor of the memorandum and what we know of the discussions that had taken place in the department before it was produced.

153. We are therefore satisfied that the Secretary of State accepted this recommendation having due regard to the matters in section 49A(1)(a) to (f) of the DDA .

(5) Was the decision to make Regulation 3(b) in breach of the Sswp's obligations under section 49A(1) because of a failure to consider the Code of Practice issued by the Drc under section 53A(Ic) of the Dda?

154. As we have already noted, the Code was produced by the DRC in 2005 pursuant to section 53A(1C) of the DDA and became effective from 5 December 2005. This was about one year in advance of the general duties under section 49A(1) and the specific duties under the 2005 regulations coming into force. The SSWP was, of course, subject to all three. The evidence of Mr Clift is [57] that when the advice to ministers on the 2007 regulations was being prepared, the Office for Disability Issues took account of the Code, in particular, its paragraph 3.35, which states:

> "….
>
> 3.35 The specific duties do not prescribe a particular method of impact assessment – approaches are likely to vary depending upon the nature of the public authority and the degree of relevance of the function for disabled people. Where the relevance of a function is high, this indicates the need for the authority to take particular care to be able to demonstrate that it has given due regard to the general duty in exercising that function. In these circumstances, a full impact assessment would assist in this. Where it is clear that the relevance is low, authorities may wish to have a system for identifying and recording the reasons for the decision not to move to a full impact assessment. Consideration should still be given to any small improvements which do not require a full impact assessment.
>
> …."

155. Mr Clift's evidence [58] is that his office "considered that the 2007 Regulations were of high relevance to disability equality, and therefore [they] carefully considered the potential impact on disability equality of each of the aspects of the Regulations and set out these considerations in our advice to the Minister". He accepts that, given the conclusion that the relevance of the 2007 regulations for disabled people was high, the department had to consider the recommendation at paragraph 3.35 of the Code that a full disability impact assessment would assist. That is because such an assessment would usually assist a public authority to show that it had "given due regard to the general duty" in exercising the particular function at issue.

156. However, he points out – and we acknowledge – that the Code does not make a full impact assessment mandatory in those circumstances. Mr Clift's evidence [59] is that his Office did, in fact, consider whether a disability equality impact assessment (amongst other impact assessments) should be undertaken in relation to the proposed 2007 regulations, albeit in the context of the DWP's own internal guidance on impact assessments rather than the Code itself. The internal guidance had been circulated on 20 November 2006. The conclusion reached was that a disability impact assessment was not necessary, because the information regarding the potential impact on disability equality of de – listing the "Royal Mail Group" had already been fully assessed. He says: "We therefore considered that producing a separate document labelled "equality impact assessment" which repeated those considerations was not [an] appropriate or necessary use of resources". [60] We agree.

157. We therefore conclude that there was no failure properly to consider the Code by the SSWP.

(6) Was the decision to make Regulation 3(b) in breach of the Sswp's obligations under section 49A(1) because of a failure to undertake a disability equality impact assessment as required by the Disability Equality Scheme ("Des") made by the Sswp in fulfilment of its own obligations under the 2005 regulations?

158. The DWP, as a government department, was subject to the specific duties imposed by the 2005 regulations. So also was the SSWP as a Minister of the Crown: see Part 1 of Schedule 1 to the 2005 regulations. Therefore both were under an obligation, by virtue of paragraph 2(1) and (4) of the 2005 regulations, to publish a DES by 4 December 2006. The DES had to show how the Secretary of State and the Department intended to fulfil its section 49A(1) duty and their duties under the 2005 regulations.

159. The DWP's Disability Equality Scheme was produced on about 4 December 2006, that is after the minister had taken a decision to de – list "Royal Mail Group" on 22 November 2006. A separate DES for the DWP is not in our otherwise voluminous bundles. But we have been shown two of the Department's "Disability and Gender Equality Schemes and Race Equality Scheme " Progress Reports. [61] We are told these effectively contain the DWP's DES . The Progress Report for 2006 acknowledge that the Department has processes in place for equality impact assessments. It states that staff must complete an impact assessment to consider the impactof the proposed policy or change on race, disability and gender equality. [62]

160. It is accepted on behalf of the SSWP that neither he nor his officials considered the Department's DES in connection with the decision to de – list the "Royal Mail Group" from Part 1 of Schedule 1 to the 2005 regulations. Although we do not have the wording of the DWP's Disability Equality Scheme , we assume that it is of a similar effect to that of the DTI which was published in early December 2006. That DES does not make disability equality impact assessments mandatory for all proposed policy changes, although it recognises the importance of making equality impact assessments.

161. Given that there was no mandatory requirement to perform an equality assessment, the decision on whether one should have been undertaken in relation to de – listing after a decision had been taken in principle by the Minister on 22 November must have involved a judgment by the department's officials. Bearing in mind the circumstances set out above, we accept that there was no point in going over the same ground so as to be able to produce a document entitled "disability equality impact assessment". In substance the work had been done.

162. Accordingly, we conclude that the decision not to perform a disability equality impact assessment did not amount to a breach by the SSWP of his obligations under section 49A(1) of the DDA .

Conclusion on Topic A

163. Our conclusions are: (i) the SSWP had the power to make Regulation 3(b) of the 2007 Regulations: (ii) the exercise of that power was not invalid for any of the reasons advanced on behalf of the claimant. It follows that we do not need to consider the further arguments addressed to us on behalf of the SSWP (supported by RMGL and POL) that relief should not be granted in any event.

G. Topic B: The May 2007 decision of the SSBERR contained in the document "The Post Office Network: Government Response to Consultation":

(1) What has to be considered?

164. We have already identified the ways in which the claimant attacks the manner in which the SSBERR made the May 2007 decision. To summarise: the overall submission of Mr Goudie is that, in the work leading up to the decision, the SSBERR did not recognise that it had a duty under section 49A(1) of the DDA to have "due regard" to the needs of disabled people as set out in paragraphs (a) to (f) of that sub – section whilst preparing the policy statement set out in the May 2007 decision. As a result of this failure, the SSBERR did not carry out a disability equality impact assessment; failed to have regard to the DES , the "Toolkit" and the Code. Mr Goudie also submits that the SSBERR, in making the decision itself, failed to have due regard to the matters referred to in section 49A(1) and so was in breach of his duty under that section.

165. As we understand it, neither the Amended Claim Form nor the written or oral submissions of Mr Goudie attack directly the December 2006 Consultation Paper " *The Post Office Network – A Consultation Document"* . [63] It is not specifically suggested that the SSBERR failed, with regard to that document, to have regard to his duties under section 49A(1) of the DDA , the duties imposed by the 2005 regulations, the DRC's Statutory Code, the DBERR's Disability Equality Scheme , or other guidance material relating to disability equality, such as DBERR's "Toolkit". Section 49A(1) and the 2005 regulations only came into force on 4 December 2006. The Department's DES was only produced in early December 2006 and the "Toolkit" at the same time. The DRC's Code of Practice, although published in 2005, was intended to prepare public authorities for compliance with the new provisions of the DDA and the 2005 regulations that came into force in December 2006.

166. There was, therefore, no statutory duty on the SSBERR under section 49A(1) or the 2005 regulations until 4 December 2006. As we have already noted, neither the Code, the DES nor the "Toolkit" can create additional duties. Therefore Mr Goudie was correct not to direct his attack on the Consultation Paper itself.

167. The December 2006 Consultation Paper set out proposals on national policy regarding the criteria to be used in deciding which Post Offices must remain and which should be closed. The consultation paper stated that the actual decisions relating

to individual Post Offices would take place after area consultations, which would follow the publication of the government's decisions in the light of the public consultation.

168. During the period from December 2006 to May 2007, the SSBERR was subject to the duties set out in section 49A(1) of the DDA and those set out in the 2005 regulations. Those duties were, of course, continuing ones. The SSBERR was also to be guided by the DRC's Code of Conduct and the DBERR's own DES . He would be further guided by the DBERR's "Toolkit".

169. The questions that have to be asked, therefore, are: (1) in relation to the consultation exercise and the formulation of the May 2007 decision, what did the SSBERR consider in relation to disability equality? (2) Prior to the May 2007 decision, did he breach his duties under section 49A(1) of the DDA and the 2005 regulations or act irrationally by not carrying out a disability equality impact assessment or equivalent exercise before making the May 2007 decision? (3) Prior to the decision, was there any failure in relation to (a) the DBERR's own DES or "Toolkit"; or (b) the DRC's Code, such that the SSBERR was in breach of his section 49A(1) duties? (4) In making the decision itself, did the SSBERR fail to have due regard to the matters referred to in section 49(1)A so as to be in breach of his duty under that section?

(2) What did the SSBERR consider in relation to disability equality in the exercise that led to the May 2007 decision?

170. Mr M J Whitehead, an Assistant Director of the "Shareholder Executive" in the DBERR, states [64] that the impact of the changes to the Post Office network on vulnerable (including disabled) users was one of the core considerations in the development of the Post Office network programme. He says that one of the key purposes of developing the access criteria that were proposed in the Consultation document and then adopted (with modifications) in the May 2007 decision "was to reduce the impact of what were inevitable closures on vulnerable groups". [65] He also states, at paragraph 130 of his first statement, that the department did consider whether or not to carry out a formal written disability equality impact assessment of the affect that the proposals for a significant number of closures would have on disabled people.

171. Paragraph 130 of Mr Whitehead's first statement continues:

> "[The department] fully recognised that proposals to restructure the post office network involving a significant number of closures, only partly mitigated by the introduction of outreach services, would impact on disabled customers together with other categories of vulnerable customers in terms both of having to use a different post office and of potentially having to travel further to access post office services". [66]

Nevertheless, the department concluded that "it was not possible to do a meaningful assessment of the effect of the proposals at a national level". [67]

172. Mr Whitehead also states that the "high level decision being taken by the Secretary of State would not in itself have an immediate impact on any disabled person", whereas "the aim of a formal disability impact assessment was seen as being to ensure that policy proposals and their proposed implementation did not have the potential for discrimination against people with disabilities and to avoid any disproportionately adverse affects". [68] In the Consultation Paper the DBERR had proposed that the Network Change programme be implemented through a series of local consultations by POL. Mr Whitehead's evidence is that the detailed requirements for that process were designed "to ensure that, among other things, the needs of vulnerable people, including disabled people, were at the forefront of local implementation decisions". [69] Individual closures, which might have a direct effect on disabled people, would be carried out after POL's local investigations. Thus, the department reached the conclusion that:

> "…the most appropriate means of ensuring proper and full consideration of the potential impact of the programme on disabled people, elderly people and other vulnerable groups was to put in place a policy and process framework (specified in the Funding Agreement put in place between

the Government and POL) for local implementation which would have regard to a range of factors relevant to the impact of changes on these groups." [70]

173. Mr Whitehead further states that the department also considered whether to undertake a "regulatory impact assessment" or "RIA", which assesses the impact of proposed government policy in terms of costs, benefits and risks of any proposed regulation. [71] A preliminary and partial draft assessment was started. The draft partial RIA referred to the social role of Post Offices in relation to "vulnerable residents". It also mentioned that closures, particularly in rural areas, would have a greater impact on some groups, particularly the elderly, disabled and parents of young children. But the work on an RIA was not completed because there was to be no further legislation.

174. In his second witness statement, Mr Whitehead identifies the sources of the information which formed the basis for the DBERR's work which led to the May 2007 Decision, in particular in relation to the effect of Post Office closures on disabled people. He cites: (i) POL's analysis and data on customer and transaction profiles; (ii) the evidence and research base undertaken or commissioned since 2003 by Postwatch, Postcomm and the Commission for Rural Communities ("CRC"); (iii) the analysis and evidence in the 1999 White Paper on Post Office reform; (iv) the 2000 PIU Report "Counter – Revolution"; and (v) fieldwork by MORI for Postwatch and the CRC in 2005. [72] This last study analysed post office usage in rural and urban deprived areas by age, gender, disability, carer role, social class, frequency of visits and impact of closure. The impact of closure was found to be greatest on those over 65, those with disabilities, those on lower incomes and in rural areas in particular, female customers and carers.

(3) Did the SSBERR fail to fulfil his duties under section 49A(1), or act irrationally, by failing, prior to the May 2007 decision, to carry out a disability equality impact assessment or equivalent exercise?

175. Mr Goudie emphasises the fact that the SSBERR accepts that he did not, in terms, consider section 49A(1) when formulating the May 2007 decision. However, it does not follow that the SSBERR was therefore in breach of his "due regard" duties under section 49A(1) of the DDA . Compliance with the duty is a question of substance, not form. We have to look at the evidence overall.

176. We have concluded that the SSBERR was not in breach of his section 49A(1) duty in not carrying out a DEIA or equivalent exercise. This is for the following reasons: first, as we have already stated, the duty under section 49A(1) is to have "due regard" to the six needs identified in paragraphs (a) to (f). None of those paragraphs specifically imposes a duty of carrying out a disability equality impact assessment in relation to a proposed particular policy of the public authority concerned. The amended Claim Form expressly recognises that section 49A(1) of the DDA does not require that a formal disability equality impact assessment be performed. We have also already noted that the 2005 regulations do not widen the scope of the duties imposed by section 49A(1) of the DDA . The regulation is concerned with *how* those duties are to be implemented.

177. Secondly, we accept that in order for the SSBERR to be able to have proper regard to the need to take steps to take account of disabled persons' disabilities, even where that involves treating disabled persons more favourably than other persons, (paragraph (d)), he has to consider what information he has and what further information that he may need in order to be able to have such "due regard". We accept also that a disability equality impact assessment is recommended in the Code and the DES as the method for obtaining this information, in appropriate circumstances.

178. However, on the evidence which we have summarised above, it is clear to us that the SSBERR did, in substance, have proper regard to the needs set out in paragraphs (a) to (f) of section 49A(1) of the DDA . In particular, we are satisfied that he did, in substance, have regard to the need identified in paragraph (d). The evidence (which we accept) is that the DBERR did indeed consider whether or not to carry out a formal DEIA. The SSBERR had all the other information which we have identified above when considering the overall policy to close 2500 Post Offices. The conclusion that a formal DEIA would not have assisted in the formulation of national, as opposed to local, policies on closures was, in the circumstances, a reasonable and rational one.

179. Thirdly, the evidence shows, in our view, that the SSBERR considered a great deal of information in relation to disability equality in the course of the exercise that led to the May 2007 decision, as is clear from the preceding paragraphs and from the paragraphs below. Accordingly, we conclude that the SSBERR fulfilled his duties under section 49(1)A of the DDA , despite

the lack of a disability equality impact assessment or equivalent exercise before the May 2007 decision. We also conclude that he did not act irrationally by not conducting a DEIA.

(4) Did the SSBERR fail to fulfil his duties under section 49A(1) of the Dda by failing, prior to the May 2007 decision, (a) to have regard to the Des, adopted by the SSBERR to meet his own obligations under the 2005 regulations, and/or (b) the "Toolkit for Equality Duties"?

180. The theme of Mr Goudie's submissions is that the DTI's own DES emphasised the requirement of government departments to follow a rigorous impact assessment procedure as part of its policy making process, [73] yet this was not followed. But, as we have already pointed out, the DES does not require that a formal equality impact assessment has to be made in respect of all projects or decisions – nor could it. The same applies to the "toolkit".

181. In the light of our conclusions on the scope of the duties imposed by the 2005 regulations (under which the DES was promulgated) and our conclusions under (3) above, we must conclude that this point adds nothing to Mr Goudie's case. Either there was a breach of the duty under section 49A(1), paragraph (d) in particular, or there was not. The DES and the "toolkit" do not add additional statutory duties.

(5) Did the SSBERR fail to fulfil his duties under section 49A(1) of the DDA by failing, prior to the May 2007 decision, to have regard to the provisions of the Code of Practice promulgated by the DRC?

182. As we have already noted, if it appears that relevant guidance given in the Code has been ignored, departed from or misapplied without cogent reason, that may be a powerful factor that would lead a court to conclude that there was a breach of duty under section 49A(1) of the DDA . We have also noted that the Code is not accurate in suggesting (at paragraph 2.49) that there is a "specific duty requirement" to conduct impact assessments.

183. Mr Goudie submits that, without cogent reasons, the SSBERR ignored, misapplied or misconstrued paragraph 2.45 of the Code, [74] in that it failed to make any kind of impact assessment; failed to gather and analyse evidence, did not involve disabled people and did not "prioritise remedial actions" prior to the May 2007 decision. He submits that these failures demonstrate a breach of the primary duty under section 49A(1) .

184. We do not accept this submission. First, it is clear from the material that we have referred to above that a wealth of evidence on the possible impact of Post Office closures, particularly on "vulnerable" or disabled people, was in the hands of the DBERR by the time the decision was taken in May 2007. The SSBERR specifically consulted the DRC, MENCAP, the Royal National Institute for the Blind, Age Concern, Help the Aged and equivalent Scottish and Northern Irish organisations. In addition to the material that we have already referred to under section (2) above, the department had the advice and reports of Postwatch and the Postcomm Annual Report for 2007, which expressly referred to the Postwatch reports on issues concerning Post Office closures and disabled people. [75]

185. Secondly, by consulting the organisations it did, the SSBERR did involve disabled people. As we have already emphasised, it is both remarkable and most unfortunate that the DRC did not respond on their behalf, particularly given the importance of changing the attitude of public bodies and the public towards disabled people. However, disabled people were involved via Postwatch, with its specific brief to have regard to the interests of disabled people, particularly through the committee called "CAG".

186. Thirdly, the department did consider the extent to which it could make an assessment of the immediate practical effect on disabled people of the general policy proposals on closures in the May 2007 decision. [76] It concluded that this was not possible, except in the most general way. [77] It is not simply a matter of whether the DES , the Code and "toolkit" boxes have been ticked in order to decide whether the SSBERR fulfilled his duties. It is necessary to look more broadly at what was, or was not, done.

187. Fourthly, the May 2007 decision did "prioritise remedial actions" in the sense that it set out national "minimum access" criteria and dictated that there must be local consultations on closures which would have had to have disabled people particularly in mind. When undertaking the local consultations, the department instructed POL that it must take account of local conditions including public transport, terrain and the local demographic situation, which would inevitably include disabled people.

(6) Did the SSBERR fail to fulfil his duties under section 49A(1) of the DDA in making his May 2007 decision?

188. The essence of Mr Goudie's submission on this part of his case is that the May 2007 decision itself failed to have "due regard" to the "needs" set out in section 49A(1) . He does not attack the decision to close 2,500 Post Offices as such. But he does submit that the decision to introduce a new "framework of minimum access criteria" based essentially on distance from Post Offices, did not have "due regard" to all the section 49A(1) "needs", in particular the "need to take steps to take account of disabled persons' disabilities, even where that involves treating disabled persons more favourably than other persons" under paragraph (d). Mr Goudie emphasises, once again, the facts that there is no reference in the Decision Document to the section 49A(1) duties, nor to the DBERR's DES , nor the Code nor the "toolkit".

189. The fact that there are no such references means that the SSBERR starts at a disadvantage in his attempt to demonstrate to the court that the section 49A(1) duties have been discharged. But it is not a fatal flaw. We accept the submission of Mr Swift that the position of disabled people, whilst by definition important, could not so dominate as to produce an unacceptable disadvantage to other groups. There had to be proper regard for the needs of disabled people and their position, but not to the exclusion of other relevant factors, of which economic reality and practicality are the most important.

190. Having said that, we note the following: first, that the use of the word "vulnerable" in the Decision document was intended and, we conclude, did refer to disabled people, as well as the elderly and socially excluded, as it had done in the Consultation Document. [78] Secondly, we accept that in framing the national minimum access criteria that were imposed by the Decision document, a particular aim of the SSBERR was to "protect vulnerable consumers in deprived urban, rural and remote areas". [79] The Indices of Multiple Deprivation, which are used to determine whether an area is to be characterised as "urban deprived", give specific weight to disability factors and there is a close correlation between disability and deprivation. [80] We recognise that the IMD are not perfect as a tool and in some areas in SE England there may be a higher proportion of disabled people in districts which are not deprived. That does not alter its general utility.

191. Thirdly, we accept that the requirement in the Decision that POL must consider local conditions when deciding on individual Post Office closures was designed to ensure that vulnerable people, including disabled people were at the forefront of local implementation decisions. [81] Fourthly, we accept that the stipulation that no one group should be significantly more adversely affected by closures or changes in service provision or another was intended to ensure that the needs of vulnerable, including disabled people would be properly taken into account and would not be overwhelmed by the issues raised by other groups. [82] Fifthly, the requirement that POL must involve "Postwatch", (with its particular statutory duty to have regard to the interests of those who are disabled and chronically sick), in the local consultations for closures would ensure that the needs of those groups would be borne in mind.

192. Lastly, we note that the SSBERR pledged a £150 million Network Subsidy Payment to fund a non – commercial network of about 7,500 Post Offices, in addition to the 3,500 – 4,000 branches that were commercially viable. This support was for both rural and urban branches, thereby helping to meet the needs of disabled persons in their communities.

193. Taking into account all these factors, we have concluded that in substance the SSBERR did have proper regard for the "needs" set out in section 49A(1) , in particular in paragraph (d), when taking the May 2007 decision. Nothing of substance would have been added if, in the Decision Document, there had been a specific statement that the Secretary of State had had proper regard to those factors, or the Code or the 2005 regulations. However, if something like that had been said, it would at least have expressly stated that which we have found to be the case. It might even have made this litigation less likely. We reiterate the remark of Dyson LJ in the Baker case that it is good practice for the policy or decision maker to make reference to the statutory provisions and any Code or non – statutory guidance in all cases where section 49A(1) is in play. "In that way", as Dyson LJ said "the decision maker is more likely to ensure that the relevant factors are taken into account and the scope for argument as to whether the duty has been performed will be reduced". [83]

H. Topic C: The SSBERR's conduct in relation to the Network Change Programme since May 2007.

194. **Issue One:** We have already identified the two issues that have to be considered under this topic. The first one falls into two parts. The first aspect is a question of fact: what was the extent of the SSBERR's responsibility for the Post Office closure programme after the May 2007 Decision? The second aspect is: how does the extent of that responsibility impinge (if at all) on the SSBERR's duties under section 49A(1) , the Code, the DES and the DBERR's "toolkit".

(1) What has been the involvement of the SSBERR in implementing the Network Change Programme since the May 2007 Decision?

195. The May 2007 Decision of the SSBERR stipulated that the Network Change Programme of Post Office closures would be implemented by POL, which operated the Post Offices. The Decision required POL to "seek information and input from relevant parties, including Postwatch". [84] That requirement led to the MOU between POL and Postwatch, which set out the manner in which POL and Postwatch would carry out the local area consultations and decisions.

196. The evidence of Mr Whitehead is that the SSBERR deliberately adopted this structure because it was "considered to be the most appropriate way of ensuring that the government's intentions were properly implemented at a local level and that the particular needs and concerns of local populations were taken into account in determining which Post Offices to close". [85] He also states that the impact of the Network Change programme has been monitored by the DBERR. During the operation of the Network Change Programme there have been monthly working group meetings between DBERR officials and POL and a quarterly Project Board meeting of senior representatives from the DBERR and POL. These arrangements will carry on until the programme is complete. The monthly "scorecard" produced by POL contains a number of "indicators", which include POL's progress in improving accessibility for disabled customers and the increase in capacity of remaining Post Offices which are taking the business of those that are intended to be closed. [86]

197. Mr Whitehead also states that the reports from POL have indicated that it has taken extensive measures to assess the impact of specific closures on disabled and vulnerable users in developing each area plan and each individual closure proposal. His evidence is that:

> "The impact on vulnerable customers, in particular the elderly and disabled, is usually the key factor in making these changes and in our view this demonstrates POL's openness to reconsider proposals against new or further information put forward during the local public consultation process". [87]

(2) Does the fact that it is POL that has carried out the Network Change Programme have any effect on the duties of the SSBERR under section 49(1)A, the 2005 regulations, the Code and the "toolkit"?

198. We appreciate that the claimant criticises heavily the May 2007 decision itself, which is the subject of Topic B above. However, if it was intended to make any criticism of the decision of the SSBERR that POL, as opposed to any other body, should undertake the detailed working out of the Network Change Programme, it was misplaced. POL operates the Post Office network. It is clearly in the best position to assess the impact of individual closures and to implement the programme.

199. We have already stated that where a public authority which is subject to the duty under section 49A(1) delegates the performance of a policy or a programme that it has promulgated, the public authority itself cannot delegate its section 49A(1) duty. But the nature of what the public authority has to do to fulfil its "due regard" duty may well change. In this case, we have concluded that the SSBERR's duty in this situation had two aspects. First, it was duty bound to ensure that POL was capable of carrying out the "due regard" duty in implementing the Network Change Programme and that it was willing to do so. Secondly, the SSBERR had to supervise POL in this respect to ensure that the duty was being carried out in practice.

200. If and to the extent that any further duties are placed on the SSBERR by the 2005 regulations, the Code and the "toolkit", which we will not go into again, the same principles must apply if the SSBERR delegates the performance or implementation of policy or a programme to a third party such as POL in the case of the Network Changes Programme.

201. **Issue Two:** To recall: there are three suggested failures by the SSBERR: (1) a breach of duty under section 49A(1) in the manner in which the Post Office closure programme has been implemented. (2) A failure to direct POL or ensure that it undertook a disability equality impact assessment or equivalent in relation to the Network Change Programme, in breach of the section 49A(1) duty. (3) A failure to have regard to the advice in the Code, the DES and the "toolkit", in relation to the implementation of the Network Change Programme.

202. Given our view on the nature of the duties imposed on the SSBERR in relation to the implementation of the Network Change Programme, it is necessary first to consider the evidence about POL's attitude and actions concerning its section 49A(1) duty concerning the Network Change Programme. There is clear evidence that POL is and was in 2007 very well aware of disability issues and its need to respond to them. [88] Mr Gittens, the Head of Corporate Responsibility and Diversity at POL, states in his evidence that early in the implementation of the Network Change Programme, (ie. August and September 2007), the issue of whether disability equality impact assessments for the programme was raised by Kay Allen, the Head of Social Inclusion at the Royal Mail Group of Companies. There were discussions thereafter. [89]

203. Whether or not POL is a "public authority" for the purposes of the DDA and the 2005 regulations, the evidence served by POL demonstrates that it was fully aware of the "needs" identified in the paragraphs of section 49A(1) of the DDA and that it did have "due regard" to them in the course of carrying out the Network Changes Programme. Therefore, we agree with counsel for POL that it is unsurprising that the claims in relation to POL were all abandoned once this evidence was served.

204. Having considered the work on disability that the programme would undertake and the information that would be obtained as a result, Mr Gittens took the decision that there should not be a formal disability impact assessment. In his witness statement he says:

> "I considered that it would have been wholly artificial and served no real purpose to have these matters considered separately (and at prohibitively substantial expense and at the risk of an unacceptable delay) in a discrete impact assessment. They were being sensibly assessed as part of the broader decision making within the Programme". [90]

205. We must proceed on the basis that it is now common ground that POL has, in substance, acted in a manner that is compatible with the "due regard" duty in section 49A(1) of the DDA , always assuming that such a duty is owed by it. On that basis, in our view there is no room for any claim that the SSBERR was in breach of any duty under section 49A(1) in connection with the implementation of the Network Changes Programme in any of the three ways suggested by Mr Goudie. The job of the SSBERR was to oversee the implementation of the Network Changes Programme by POL and to ensure that POL took due regard of the needs as set out in section 49A(1) . The claimant accepts that POL was not failing in its duty (whether under section 49A(1) , or the Code, (or, if relevant, the 2005 regulations, DES and "toolkit") by not undertaking a disability equality impact assessment or equivalent in relation to the Network Change Programme. If so, there cannot have been any failure by the SSBERR in supervising POL.

Accordingly, we must conclude that there were no failures on the part of the SSBERR in relation to the implementation of the Network Changes Programme.

I. Conclusions on substantive claims

206. For the reasons we have set out, we conclude that:

(1) The SSWP had the power, under section 49D of the DDA and section 14 of the Interpretation Act 1978 , to make Regulation 3(b) of the 2007 regulations.
(2) Regulation 3(b) was lawfully made. The SSWP was not in breach of his duty under section 49A(1) of the DDA , nor the 2005 regulations, nor the DRC's Code nor the DWP's own Disability Equality Scheme in making it.
(3) The SSBERR was not in breach of his duty under section 49A(1) of the DDA , nor the 2005 regulations, nor the DRC's Code, nor the Disability Equality Scheme , nor the DBERR's "toolkit" in respect of the actions taken before the May 2007 Decision, nor in relation to the Decision itself.
(4) The SSBERR has not been in breach of his duty under section 49A(1) of the DDA , nor the 2005 regulations, nor the DRC's Code, nor the DBERR's Disability Equality Scheme , nor the DBERR's "toolkit" in respect of the implementation of the Network Change Programme since May 2007.

J. Topic D: Relief.

207. In the light of our conclusions no question of relief arises. We do, however, make the following observations. This was a very late claim for judicial review. CPR 54.5(1) provides that a claim form must be filed promptly and in any event not later than 3 months after the grounds to make the claim first arose. It was 6 months before this claim was launched i.e. not until another 3 months had passed from the long-stop date under the rules. It is true that the claim was allowed to proceed notwithstanding the delay. The court is inclined to grant such an indulgence where there is an allegation of continuing unlawfulness or where the interests of others apart from the claimant may be affected by the court's decision. However, the delay is relevant again when the court comes to consider exercising its discretion whether or not to grant relief.

208. Section 31(6)(g) of the Supreme Court Act 1981 provides that where the court considers there has been undue delay in making an application for judicial review it may refuse to grant 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.

209. When the hearing commenced we expressed concern about the practical benefit to the claimant or anyone else should the claim proceed.

210. Had we concluded that the SSWP had no power to make Regulation 3(b) of the 2007 regulations it is likely that we would have granted a declaration to that effect. If a court concludes that a minister has acted without having the power to do so it will ordinarily say so. Other considerations would, however, apply if the power to make regulation 3(b) was exercised in an unlawful manner. RMGL has been acting for 18 months on the assumption that it is not subject to the 2005 regulations. It is far too late to put the clock back. At this point the delay in making the claim against the SSWP becomes very relevant in the exercise of discretion. Had there been a viable claim, good administration dictates that it should have been launched promptly and followed by an expedited hearing; so that any unlawfulness could then have been rectified promptly.

211. Similar considerations apply to the claims against the SSBERR. The May 2007 decision was taken 18 months ago. The Network Change Programme is now nearly complete throughout the UK as a whole. [91] The programme is complete in Sussex.

212. The claimant has stated that she does not ask that the May 2007 decision be set aside. However, we accept the submission of Mr Swift that the effect of a declaration that the SSBERR's decision was unlawful would, effectively, be inviting him to reconsider in principle a decision taken 18 months ago which has now largely been implemented on the ground. In our view, such a declaration would be detrimental to good administration and is wildly impractical.

213. We also find it difficult to see what possible practical use could be served by a declaration that the SSBERR continues to be in breach of the section 49A(1) duty with regard to the implementation of the Network Change Programme now that it has been virtually completed. What has happened cannot be undone. Post Offices have closed pursuant to POL's decisions after consultations; sub – postmasters have moved or retired; alternative arrangements have been put in place; funds have been allocated and have been used. Any declaration would not have served any useful purpose.

Postscript.

214. This case required the court to look at a large amount of material, as we hope is obvious from the judgment. We make no complaint about that. But, unfortunately, the organisation of the files for the hearing made the preparation of this judgment much more difficult. It would have been more helpful to have had a chronological bundle (of one or more volumes) of contemporaneous correspondence, properly indexed, a bundle for the statutory Code, the "toolkits" and all the relevant Disability Equality Schemes, a bundle for the statements and a bundle of relevant legislation and authorities. Although a Core Bundle was produced, it did not have the key documents (and those only) in it. We would draw attention to the comments of Sir Igor Judge P (as he then was) in Mustafa (orse Abu Hamza) v Government of the United States of America and others [2008] 1 WR 2760 at 2761 (para 76). In the future, in large cases such as this one, it may be helpful for there to be a short directions hearing to discuss the organisation of bundles once it is known what material is intended to lay before the court.

215. We are, however, very grateful to counsel for their helpful submissions, both oral and in writing.

The Disability Discrimination Act 1995

The Disability Discrimination Act 1995 provides as follows at s 49A and (as far as is material) 49D :

49A General Duty

(1) Every public authority shall in carrying out its functions have due regard to—

(a) the need to eliminate discrimination that is unlawful under this Act;

(b) the need to eliminate harassment of disabled persons that is related to their disabilities;

(c) the need to promote equality of opportunity between disabled persons and other persons;

(d) The need to take steps to take account of disabled persons' disabilities, even where that involves treating disabled persons more favourably that other persons;

(e) the need to promote positive attitudes towards disabled persons; and

(f) the need to encourage participation by disabled persons in public life.

(2) Subsection (1) is without prejudice to any obligation of a public authority to comply with any other provision of this Act.

49D Power to impose specific duties

(1) The Secretary of State may by regulations impose on a public authority … such duties as the Secretary of State considers appropriate for the purpose of ensuring the better performance by that authority of its duty under section 49A(1) …

(5) Before making regulations under any of subsections (1) to (4), the person making the regulations shall consult the Commission for Equality and Human Rights.

The Disability Discrimination (Public Authorities) (Statutory Duties) Regulation 2005 ("the 2005 Regulations:

2. Preparation and publication of a Disability Equality Scheme

(1) A public authority listed in Schedule 1 shall, on or before the relevant publication date, publish a Disability Equality Scheme ("Scheme"), that is, a scheme showing how it intends to fulfil its section 49A(1) duty and its duties under these Regulations.

(2) Such an authority shall involve in the development of the Scheme disabled people who appear to that authority to have an interest in the way it carries out its functions.

(3) A Scheme shall include a statement of—

(a) The ways in which such disabled people have been involved in its development;

(b) That authority's methods for assessing the impact of its policies and practices, or the likely impact of its proposed policies and practices, on equality for disabled persons;

(c) The steps which that authority proposes to take towards the fulfilment of its section 49A(1) duty;

(d) That authority's arrangements for gathering information on the effect of its policies and practices on disabled persons and in particular its arrangements for gathering information on –

(i) their effect on the recruitment, development and retention of its disabled employees,

(ii) their effect, in the case of an authority specified in Part II, III or IV of Schedule 1, on the educational opportunities available to, and on the achievements of, disabled pupils and students, and

(iii) the extent to which, in the case of an authority specified in Part I or V of Schedule 1, the services it provides and those other functions it performs take account of the need of disabled persons; and

(e) that authority's arrangements for making use of such information to assist it in the performance of its section 49A(1) duty and, in particular, its arrangements for—

(i) reviewing on a regular basis the effectiveness of the steps referred to in sub-paragraph (c), and

(ii) preparing subsequent Schemes.

(4) Such an authority shall review its Scheme and publish a revised Scheme—

(a) not later than the end of the period of three years beginning with the date of publication of its first Scheme; and

(b) subsequently at intervals of not more than three years beginning with the date of publication of the last revision of the Scheme.

(5) Such an authority may comply with the duty to publish under paragraph (1) or (4) by setting out its Scheme as part of another published document or within a number of other published documents.

(6) In this regulation, "the relevant publication date" means—

(a) in the case of a public authority listed in Part I or II or Schedule 1, 4th December 2006;

(b) in the case of a public authority listed in Part III of Schedule 1, 3rd December 2007;

(c) in the case of a public authority listed in Part IV of Schedule 1, 1st April 2007.

3 Implementation of the Disability Equality Scheme

(1) A public authority listed in Schedule 1 shall within the period of three years beginning with the date when a Scheme prepared for the purposes of regulation 2 is published—

(a) take the steps which it has been required to set out in the Scheme by virtue of regulation 2(3)(c); and

(b) put into effect its arrangements, which it has been required to set out in the Scheme by virtue of regulation 2(3)(d) and (e), for—

(i) gathering information, and

(ii) making use of such information.

(2) Nothing in this regulation imposes any duty on an authority where, in all the circumstances, it would be unreasonable or impracticable for it to perform the duty.

Annual Reporting

4. —

(1) A public authority listed in Schedule 1 shall publish a report—

(a) not later than the end of the period of one year beginning with the date of publication of its first Scheme; and

(b) subsequently at intervals of not more than one year beginning with the date of publication of the last report.

(2) The report shall contain a summary of—

(a) the steps the authority has taken for the purposes of regulation 3(1)(a);

(b) the results of the information-gathering it has carried out for the purposes of regulation 3(1)(b)(i); and

(c) the use it has made of such information it has gathered for the purposes of regulation 3(1)(b)(ii).

(3) Such an authority may comply with the duty to publish under paragraph (1) by setting out its report within another published document.

Sections 14 and 15 of the Equality Act 2006

The DDA 1995 made provision for a Code of Practice at s 53A . The relevant provisions are now found at ss 14 and 15(4) of the Equality Act 2006 .

> (1) The Commission may issue a code of practice in connection with a mater addressed by any of the following—
>
> …
>
> (d) Parts 2 to 4 and 5A of the Disability Discrimination Act 1995
>
> …
>
> (4) A failure to comply with a provision of a code shall not of itself make a person liable to criminal or civil proceedings; but a code—
>
> (a) shall be admissible in evidence in a criminal or civil proceedings, and
>
> (b) shall be taken into account by a court or tribunal in any case in which it appears to the court or tribunal to be relevant."

The Duty to Promote Disability Equality: Statutory Code of Practice

The relevant parts of the Code provides as follows:

> **Purpose of the Code**
>
> 1.42 This Code of Practice (the Code) gives practical guidance to public authorities on how to meet the general duty to promote disability equality. It includes guidance on both the general duty and the specific duties imposed by way of regulations. The aim of the Code is to help public authorities to promote equality of opportunity and to eliminate disability discrimination. The Code also helps disabled people to understand the duties imposed on public authorities and the role that they can play in them.
>
> …
>
> **Status of the Code**
>
> 1.44 The Code does not impose legal obligations. Nor is it an authoritative statement of the law – that is a matter for the courts and tribunals. It is, however, a 'statutory' Code. This means that it has been approved by Parliament and it is admissible as evidence in legal proceedings under the Act. Courts and employment tribunals must take into account any part of the Code that appears to them to be relevant to any question arising in those proceedings. If public authorities follow the guidance in the Code, it may help to avoid an adverse decision by a court or tribunal in such proceedings.

….

Introduction

2.1 This chapter explains what public authorities need to do to meet the general duty to promote disability equality. The duty is set out in s.49A of the Act and applies to all public authorities, including those only certain of whose functions are functions of a public nature. There are some limited exemptions from the duty, which are detailed in paragraphs 5.9 to 5.11.

…

Disabled people

2.8 The definition of disabled persons in the Act is a broad term, and covers people with a wide variety of disabilities. The duty requires due regard to be given to all disabled persons when considering the impact of decisions and functions, and authorities must ensure that they pay attention to the full range of disabled people. The social causes of exclusion are often experienced in common by people with a wide variety of impairments (for example, an unnecessary job requirement for a driving licence will disadvantage people with a wide range of disabilities who are prohibited from driving). In some instances distinct barriers will arise for groups with a particular type of disability (for example, the employment barriers confronting people with Asperger's syndrome are distinct from those confronting Deaf people).

…

What does the general duty mean?

2.33 The general duty requires public authorities to adopt a proactive approach, mainstreaming disability equality into all decisions and activities. This is framed as a requirement on authorities to give due regard to disability equality in its various dimensions, as set out in paragraph 2.2.

…

2.38 The general duty requires authorities not only to have due regard to disability equality when making decisions about the future but also to take action to tackle the consequences of decisions in the past which failed to give due regard to disability equality. This will entail working towards closing the gaps in service or employment outcomes, so that, for example, disabled and non-disabled people express the same level of satisfaction with their social housing, or achieve a more equal pattern of educational attainment.

2.39 Authorities will not be able to fully review all aspects of their operations, and act to ameliorate all adverse impacts, in a single cycle of improvement. Rather this is a continuing duty on authorities, which should prioritise for review those aspects of their functions which have most relevance to disabled people. It will be of assistance to public authorities to involve disabled people in this process of prioritisation and review.

2.40 The technique of impact assessment, discussed below and in Chapter 3 is designed to assist authorities in ensuring that due regard is paid to disability equality in all their decisions and functions.

2.41 Having due regard to disability equality will generally require some adaptation to existing or proposed activities. In some instances it may require an authority to consider whether additional, targeted services are required in order to deliver an equal outcome for disabled and nondisabled

people (for more information on this, see the discussion about the meaning of equality for disabled people in Chapter 1 and above at paragraph 2.7).

…

2.43 The general duty may also require public authorities to review the ways in which they prioritise, resource and implement their functions that are specifically intended to benefit disabled people, such as care and support services. Public authorities should expect to be more carefully scrutinised and accountable for their performance of disability-focused functions.

2.44 Because the general duty requires authorities to give due regard to disability equality in every aspect of their activities it may, depending on the nature and remit of the particular authority, require a public authority to consider what action it can take to dismantle attitudinal and environmental barriers within its sphere of influence. For example, licensing authorities should review any licensing conditions to ensure that they are not unnecessarily restrictive of disabled people's access, and that staff draw attention to prospective licensees' responsibilities to make reasonable adjustments on an anticipatory basis, and provide appropriate advice.

How to meet the general duty

2.45 Set out below are steps that will assist a public authority to comply with its general duty. A number of these steps are discussed in more detail in Chapter 3, which explains what is required of those authorities who are subject to the specific duties. Whilst only those authorities listed in Appendix A are required to carry out the actions set out in the specific duties, the key mechanisms required by that duty provide a useful framework for all authorities seeking to comply with the general duty. These actions are:

- mainstreaming – impact assessment
- gathering and analysing evidence
- prioritising remedial actions
- involving disabled people; and
- public reporting – transparency.

…

Mainstreaming – impact assessment

2.48 The general duty requires public authorities to adopt a proactive approach, mainstreaming disability equality into all decisions and activities.

2.49 The specific duty requirement to conduct impact assessments is designed to provide a mechanism for ensuring that due regard is given to disability equality in decision-making and activities. The technique of impact assessment is described in paragraphs 3.28 to 3.42.

Gathering and analysing evidence

2.50 Authorities will require evidence in order to assess the impact of their activities on disabled people and to measure progress towards disability equality. The information provided in Chapter 3 at paragraphs 3.56 to 3.107 on the specific duty requirement in relation to information gathering will provide a useful framework for authorities in relation to evidence gathering.

Prioritising remedial actions

2.51 Action to review existing activities to ensure that they have due regard to disability equality, and actions to remedy any deficiencies, will need prioritising. The specific duty requirement to draw up action plans (discussed in paragraphs 3.43 to 3.55) provides a framework for this process.

Involvement

2.52 The specific duties expressly require the involvement of disabled people in the development of the Disability Equality Scheme . Even those authorities not subject to these duties are likely to find that the involvement of disabled people is key to compliance with the general duty. Public authorities will be unable to identify and prioritise equality initiatives effectively unless disabled people and, where appropriate, disabled children and their parents, have been involved in that identification and prioritisation.

….

Effectiveness

2.66 It is important that public authorities use the disability equality duty to achieve outcomes, otherwise they are likely to find it difficult to establish that they have had due regard to the disability equality duty. It is also important that authorities consider carefully how effective their actions will be in achieving outcomes, bearing in mind that the easiest way of doing something will not necessarily be the most effective.

…

What does involvement entail?

3.13 The specific duties require the ‘involvement’ of disabled people. ‘Involvement’ requires a more active engagement of disabled stakeholders than ‘consultation’.

…

3.36 In considering whether to conduct a full impact assessment, public authorities will need to develop criteria which enables them to determine whether:

- the policy is a major one in terms of scale or significance for the authority's activities; or
- there is a clear indication that, although the policy is minor, it is likely to have a major impact upon disabled people. This is not a question merely of the numbers of disabled people affected but of the degree of impact. A policy which has an extremely negative impact on a small number of disabled people will be of greater relevance than one which has only a minor impact on a large number of disabled people.

3.37 If the policy fits into either of these categories, authorities are likely to need to conduct a full impact assessment. In general a full impact assessment is likely to involve:

- consideration of available data and research
- assessment of impacts – what effect will this policy/decision etc have upon disabled people
- consideration of measures which might mitigate any adverse impact and alternative policies which might better achieve the promotion of equality of opportunity for disabled people
- a decision by the public authority
- publication of the results of the impact assessment
- arrangements for monitoring for future adverse impact.

3.38 Involvement of disabled people will be of great assistance in drawing up criteria for deciding whether or not to conduct a full impact assessment and in actually conducting a full impact assessment.

3.39 Such assessment will allow authorities to design arrangements that ensure the full and fair participation of disabled people from the start. It will avoid the need for expensive remedial work when experience proves that untested new initiatives have adverse consequences for disabled people.

…."

Footnotes

1 The Disability Discrimination (Public Authorities)(Statutory Duties) Regulations 2005 , hereafter "the 2005 regulations". The 2005 regulations came into force on 5 December 2006.

2 The Disability Discrimination (Public Authorities)(Statutory Duties)(Amendment) Regulations 2007 ("the 2007 regulations").

3 The DES of the DTI was published in December 2006.

4 This was published in November 2007.

5 As amended by the 2005 Act. See now sections 14, 15 and 42(3) of the Equality Act 2006 .

6 Under the original section 53 of the DDA 1995 , a National Disabilities Council was established. The DRC was established by the Disability Rights Commission Act 1999 . The DRC is now subsumed in the Equality and Human Rights Commission, established by the Equality Act 2006 .

7 RMIL also owns General Logistics Systems Germany GmbH & Co oHG, (incorporated in Germany, GLS Netherlands Services BV (incorporated in the Netherlands), General Logistics Systems Poland SP ZO O (incorporated in Poland), General Logistics Systems Italy Spa (incorporated in Italy) and GLS General Logistics Systems Slovakia sro (incorporated in Slovakia).

8 References to the DDA in this judgment mean, hereafter, the DDA as amended by the 2005 Act. The amendments all came into force on 4 December 2006.

9 Paragraph 2(6)(a). Part 1 of Schedule 1 of the regulations lists "A Minister of the Crown or government department" thus including both the DWP and the DBERR.

10 Court bundle C1/page 4.358

11 Bundle F/page 9.192.

12 Section 1 para 1.3: Bundle C1/page 4.241.

13 Consultation Document Section 5 para 5.2: Bundle C1/page 4.254.

14 Ibid: para 5.4: Bundle C1/page 4.255.

15 Ibid: para 5.9 and 5.10: Bundle C1/page 4.256.

16 Ibid para 5.6: Bundle C1/page 4.255.

17 Ibid para 5.2: Bundle C1/page 4.255.

18 Whitehead 1 para 105: Bundle B/page 3.278

19 Whitehead 1 para 112: Bundle B/page 3.280.

20 May 2007 Decision, page 18: Bundle C1/page 4.285.

21 The "access criteria" were: (a) Nationally, 99% of the UK population to be within 3 miles of the nearest "post office outlet" and 90% within 1 mile; (b) 99% of the population in deprived urban areas across the UK to be within 1 mile of the nearest post office outlet; (c) 95% of the urban population across the UK to be within 1 mile of the nearest post office outlet; (d) 95% of the total rural population across the UK to be within 3 miles of the nearest post office outlet. In addition, 95% of the population of each postal district to be within 6 miles of the nearest post office outlet. "In applying these criteria, POL will be required to take into account obstacles such as rivers, mountains and valleys, motorways and sea crossings to islands to avoid undue hardship. POL

will also consider the availability of public transport and alternative access to key services, local demographics and the impact on local economies when drawing up area plans".

22 Executive Summary at page 3: Bundle C1/page 4.270.

23 Bundle C1/page 4.285.

24 Bundle C1/page 4.319.

25 The list of consultees did not contain any organisation particularly concerned with disabled people.

26 Bundle B/page 3.282.

27 Witness statement of Paula Vennells, Network Director of POL para 32/Bundle B page 3.338.

28 Vennells para 33/Bundle B pages 3.338 — 9. These matters included waiting times, getting access to the branches and access within them, public transport, planned DDA improvement works in branches.

29 Vennells paras 38 — 9: Bundle B/page 3.340.

30 Section 14 of the Interpretation Act 1978 provides: "Where an Act confers power to make — (a) Rules, regulations or byelaws; or (b) Orders in Council, orders or other subordinate legislation to be made by statutory instrument, it implies, unless the contrary intention appears, a power exercisable in the same manner and subject to the same conditions or limitations, to revoke, amend or re- enact any instrument made under the power".

31 This provides: "Where the High Court considers that there has been undue delay in making an application for judicial review, the court may refuse to grant…(b) any relief sought on the application, if it considers that the grant 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".

32 See the Foreword of the Minister for Disabled People to the 2004 White Paper "Delivering equality for disabled people", (Cm 6255), which proposed the changes to the DDA .

33 The importance of the aims of anti — discrimination legislation was emphasised by Arden LJ in Elias v Secretary of State for Defence [2006] 1 WLR 3212 at para 276.

34 This provides: "(1) Every body or other person specified in Schedule 1A or of a description falling within that Schedule shall, in carrying out its functions, have due regard to the need — (a) to eliminate unlawful racial discrimination; and (b) to promote equality of opportunity and good relations between persons of different racial groups".

35 This was that there was a failure to fulfil a duty to consult prior to the changes being introduced.

36 A reference to the remarks of Arden LJ at para 274 of *R(Elias) v Secretary of State for Defence [2006] 1 WLR 3213* at page 3268.

37 Our emphasis.

38 Mr Mitchell is an associate at Pierce Glynn, solicitors for the claimant. See Mitchell 1 para36 and 37, Bundle B/page 3.20 — 3.21.

39 Bundle F/page 9.194: third (unnumbered) page of the document.

40 Wilson and Auld LJJ agreed with the judgment of Laws LJ.

41 In particular: *R(Khatun v Newham LBC [2005] QB 37* ; R (Kaur) v Ealing LBC [2008] EWHC 2062 .

42 Bundle C1/page 4.27

43 See Annex B to the consultation paper.

44 Clift 1 at para 15: Bundle B/3.230.

45 See bundle D1/page 5.1

46 Clift 1 at para 16: Bundle B/page 3.231

47 Bundle D1/page 5.3.

48 Paragraphs 21 — 34: Bundle B/page3.232 to 3.237.

49 Clift 1/para 30: Bundle B/page 3.236

50 Clift 1 at para 34: Bundle B/page 3.237 — 8.

51 Clift 2 at paras 9 — 11: Bundle B/page 3.247.

52 It should be noted that RMGL and POL maintained, for the reasons set out in their Outline Submissions, that neither body should be regarded as a public authority for the purposes of sections 49B and 49D(1) , or at all. The point was not dealt with in oral argument and is not being determined in this judgment.

53 Clift 1 para 33: B/page 3.236.

54 Bundle F/page 9.145.

55 See also Clift 2 para 16: B/page 3.249.

56 That is: 15 November 2006.

57 Clift 2 at para 18: Bundle B/page 3.249

58 Ibid.

59 Clift 2 at para 16: Bundle B/page 3.249
60 Ibid.
61 See, eg. the extracts from one at Bundle C3/page 4.1449 and following.
62 Bundle C3/page 4.1463
63 Bundle C1/page 4.234.
64 Whitehead 1 at para 123: Bundle B/page 286
65 Ibid.
66 Bundle B/page 3.288
67 Whitehead 1 at para 131: Bundle B/page 3.288
68 Whitehead 1 at para 131: Bundle B/page 3.288.
69 Whitehead 1 at para 107: Bundle B/page 3.278.
70 Whitehead 1 at para 133: Bundle B/page 3.289
71 Whitehead 1at para 124: Bundle B/page 3.287
72 Whitehead 2 at para 3: Bundle B/page 3.295
73 DTI's first DES, para 7 : Bundle C2/page 4.418
74 The full terms of para 2.45 are set out in the Appendix to this judgment.
75 Postcomm's 7th annual report on the network of the Post Offices 2006 — 7, para 1.4.20. Bundle C1/page 4.189.
76 Whitehead 1 at para 123: Bundle B/page 3.289.
77 Ibid para 131: Bundle B/page 3.288
78 See Consultation Document para 4.1: “Post Offices provide a valuable service to the vulnerable in our society (particularly the elderly, disabled and socially excluded) and it is important that the network continues to do so”: Bundle C1/page 4.248.
79 Decision document: Executive Summary: Bundle C1/page 4.269.
80 Whitehead 1 para 103; Whitehead 2 paras 32 and 33: Bundle B/pages 3.277 and 3.304 — 5.
81 Whitehead 1 para 107: Bundle B/page 3.278.
82 Whitehead 2 para 31: Bundle B/page 3.304.
83 R (Baker) v Sec of State for Communities and Local Government [2008] LGR 239 at para 38.
84 See May 2007 Decision Document: “The Post Office Network” at page 28: Bundle C1/page 4.295.
85 Whitehead 2 para 49: Bundle B/page 3.310.
86 Whitehead 1 para 146: Bundle B/page 3.291 — 2.
87 Whitehead 2 para 51: Bundle B/page 3.311.
88 See the witness statement of Nicholas Gittens, Head of Corporate Responsibility and Diversity at POL, paras 7 — 32: Bundle B/pages 3.313 — 3.323. Also witness statement of Paula Vennells, Network Director of POL: paras 23 — 28: Bundle B/pages 3.336 — 7.
89 Gittens para 38: Bundle B/pages 3.323 — 4. Kay Allen had been appointed on 5 March 2007. She was a former Commissioner of the DRC: Gittens para 31.
90 Gittens para 39: Bundle B/page 3.324.
91 See the Schedule of Network Changes Programme key dates produced on 19.6.08: Bundle E/page 7.387.

The Queen on the application of Shane Williams v Caerphilly County Borough Council

Positive/Neutral Judicial Consideration

Court
Queen's Bench Division (Administrative Court)

Judgment Date
24 June 2019

Case No: CO/599/2019

High Court of Justice Queen's Bench Division Administrative Court

[2019] EWHC 1618 (Admin), 2019 WL 02578030

Before: Mr Justice Swift

Date: 24 June 2019

Hearing date: 19 June 2019

Representation

Christian Howells (instructed by Watkins & Gunn) for the Claimant.
Matthew Paul (instructed by Caerphilly County Borough Council) for the Defendant.

Approved Judgment

Mr Justice Swift:

A. Introduction

1. In these proceedings the Claimant, Shane Williams, challenges two decisions taken by the Defendant Caerphilly County Borough Council ("the Council"); first, a decision taken by the Council's Cabinet on 14 November 2018 to adopt a Sport and Active Recreation Strategy for 2019 – 2029 ("the Sports Strategy" and "the Strategy Decision", respectively); and second, a further decision by the Council's Cabinet taken on 10 April 2019 to close the Pontllanfraith Leisure Centre with effect from 30 June 2019 ("the Closure Decision").

2. By an Order made by Spencer J on 17 May 2019 the matter comes before me as a rolled-up hearing. Having heard full argument on the Claimant's grounds of challenge I am satisfied that each of the grounds of challenge is properly arguable and I grant permission to apply for judicial review on all grounds. I will now set out my determination and reasons on the merits of the five grounds of challenge. The first three grounds are aimed at the Strategy Decision; grounds four and five are directed to the Closure Decision.

B. Decision

(1) Ground 1. The Strategy Decision was not within the authority of the Council's Cabinet to take.

3. This ground is to the effect that the Strategy Decision was unlawful because it was a decision taken by the Cabinet when, by reason of the provisions of the Local Authorities (Executive Arrangements) (Functions and Responsibilities) (Wales) Regulations 2007 ("the 2007 Regulations") it was a decision that should have been taken by the full Council.

4. By section 13 of the Local Government Act 2000 ("the 2000 Act"), where a local authority operates under executive arrangements (as the Council does), any function not specified in regulations made under regulation 13(3) is the responsibility of the Council's executive. Where Leader and Cabinet executive arrangements are in place, executive arrangements made by the local authority under section 15 of the 2000 Act make further provision for the specific allocation of decision-making responsibility. By section 13(3) of the 2000 Act, Welsh Ministers have power to make regulations including to the effect that a function that would by virtue of section 13(1) fall as the responsibility of an authority's executive, should instead be the responsibility of the authority itself.

5. Regulation 6(1) of the 2007 Regulations provides as follows.

> **"6.— Discharge of specified functions by authorities**
>
> (1) Subject to paragraph (2), a function of any of the descriptions specified in column (1) of Schedule 4 (which, but for this paragraph, might be the responsibility of an executive of the authority), is not the responsibility of an executive in the circumstances specified in column (2) in relation to that function."

None of the provisos contained in regulation 6(2) is material for present purposes. Paragraph 2 of Schedule 4 is the material provision. That provides,

> (by Column 1)
>
> "The determination of any matter in the discharge of a function which (a) is the responsibility of the executive; and (b) is concerned with the authority's budget, or their borrowing or capital expenditure"

is not to be the responsibility of the executive where the person with authority under the arrangements made under section 15 of the 2000 Act to make the determination,

> (by Column 2)
>
> "… (a) is minded to determine the matter contrary to, or not wholly in accordance with (i) the authority's budget, or (ii) the plan or strategy for the time being approved or adopted by the authority in relation to their borrowing or capital expenditure; and (b) is not authorised by the authority's executive arrangements, financial regulations, standing orders or other rules or proceedings to make a determination in those terms."

For the purposes of my decision in this case I will assume that the proviso at (b) above (relevant authorisation under the Council's executive arrangements) does not apply. The Council has not put the material part of its executive arrangements in evidence, and has not otherwise contended that the proviso does apply.

6. That being so, paragraph 2 of Schedule 4 to the 2007 Regulations gives rise to four questions: (1) what is the function that is being discharged when the Strategy Decision was being taken; (2) was the discharge of that function concerned with any of the Council's budget, its borrowing or its capital expenditure; (3) if the answer to (2) is yes, what part or parts of the budget are material; and (4) was the Strategy Decision contrary to or not wholly in accordance with the Council's budget or any approved plan or strategy for borrowing or capital expenditure.

7. For the Claimant, Mr Christian Howells contended that the first two of these questions ought to be formulated differently so that the focus of attention was not the function being exercised, but rather the matter being determined. This may not be a distinction that – at least on the facts of this case – results in any material difference. Nevertheless, I consider that the formulation in terms of functions is correct, both as a matter of ordinary language given the way in which paragraph 2, column 1 is phrased, and also as a matter of construction if the paragraph is read together with section 13 of the 2000 Act. That section is concerned with the allocation of responsibility for functions (i.e. responsibility for the exercise of relevant powers and duties of a local authority). This is clear both from section 13(1) and (2) of the 2000 Act. Paragraph 2 of Schedule 4 to the 2007 Regulations should be read in the same way since it is by way of derogation from the default position stated in section 13(2) .

8. The Officer's Report provided to the Cabinet for the purpose of its decision whether or not to adopt the Sports Strategy does not identify the statutory power/powers relevant to the proposed decision, nor was this a point addressed in the course of either the meeting of the Council's Regeneration and Environment Scrutiny Committee ("the Scrutiny Committee") on 8 November 2018, or the Cabinet meeting itself on 14 November 2018 – at least not so far as is apparent from the minutes of either meeting. Mr Matthew Paul who appeared for the Council submitted that the relevant function exercised by the Council was the power under section 19 of the Local Government (Miscellaneous Provisions) Act 1976 ("the 1976 Act") – the power for a local authority to provide *"... such recreational facilities as it thinks fit ..."* either inside or outside its area. In my view the section 19 power is not the one most naturally framed as a fit for the Strategy Decision. A better fit is the subsidiary power at section 111 of the Local Government Act 1972 *"... to do any thing ... which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions"* . I reach this conclusion having regard to the substance of the Sports Strategy. In my view, appreciation of the substance of the Strategy and hence appreciation of what the Strategy Decision did, and what it did not do, is central to the determination of all the grounds of challenge directed to the Strategy Decision.

9. The Council's description of the Sports Strategy is that it sets out the future purpose and direction for the provision of sport and active recreation in the County Borough, and establishes *"... the key principles and vision over the next 10 years"* . This description is accurate. On consideration of the document, it is clear that it is genuinely a strategy document. It identifies the Council's *"vision"* to *"encourage healthy lifestyles and support ... residents to be more active more often"* . It identifies the role of the Council's Community and Leisure Service as being to lead *"the promotion of sport and active recreation"* and to co-ordinate the delivery of the Strategy. In this way the Sports Strategy signals the Council's intention to move from an approach which assumed that the Council would be the main provider of leisure facilities, and towards one resting on a mix of Council-provided facilities and facilities provided by others. The Sports Strategy next sets out how the Council's approach will fit with the "7 Wellbeing Goals" listed in the Wellbeing of Future Generations (Wales) Act 2015 , and the Wellbeing Objectives in the Council's own corporate plan. While it would be wrong to describe these parts of the Sports Strategy as purely aspirational, it is certainly the case that the Strategy is not written in hard-edged or prescriptive language. Rather, the document describes a collection of ideas, principles and objectives. It is not a set of marching orders. In this same vein, the Sports Strategy states that the Council will, in respect of facilities, adopt the approach advocated by the Welsh Government and Sport Wales in their March 2016 document *"Facilities for Future Generations"* , including what is referred to as the *"Decision-Making Matrix"* contained in that document to determine which leisure facilities are to be considered *"strategic leisure facilities"* and are to be directly managed by the Council. Under the heading *"What Needs to be Done"* , the Sports Strategy sets out the Council's Corporate Policy; states that the facilities it will provide are to comprise four *"strategic, high quality, multi-service leisure centres"* in Risca, Caerphilly, Newbridge and either the Bargoed area or the Aberbargoed area; states that a plan will be developed to enhance outdoor recreational spaces; develop a plan for swimming facilities; and will seek to collaborate with schools, community groups and clubs through a recreation outreach and intervention programme.

10. Mr Howells relies in particular on the part of the Sports Strategy that refers to the four proposed strategic leisure centres, to support his submission that the Strategy Decision was a "gateway decision" which committed the Council to clear and prescribed courses of action. As such, he submitted, the Sports Strategy was a strategy for investment. Although he accepted that the Sports Strategy was not itself a mandate to close or redevelop any specific leisure facility, he contends that when the

Sports Strategy was adopted a die was cast. In my view this is a significant over-reading of the Sport Strategy. The Strategy sets a direction – but only in generic terms. Any specific decision, for example to redevelop or close a leisure centre could not be taken by the Council simply on the basis that it was, in general terms, in-keeping with the Sports Strategy; rather, the specifics of any such proposal would have to be worked through in detail. Even by reference to the four strategic leisure centres, the Sports Strategy goes no further than saying that over a 10 year period these facilities should be provided. That is a policy objective rather than a hard-edged plan. The cost or other implications of that objective could significantly change over the 10 year life of the Strategy. Those matters are only capable of being distilled in specifics at such time as the Council chooses to make an operational decision. Put shortly, the Sports Strategy is a demonstration of intent; the way in which or the extent to which that intent becomes manifest in the course of the next 10 years is not set in stone.

11. I now turn to the second question posed at paragraph 6 above – was the discharge of the section 111 power, the decision to adopt the Sports Strategy, *"concerned with"* the Council's budget, borrowing or capital expenditure? The words *"concerned with"* have a flexible meaning. At one end of a scale, any decision that could, even indirectly, result in expenditure or borrowing might be said to be *"concerned with"* those matters. Yet that would not be a realistic application of those words in the context in which they appear. How they are applied must be guided by the purpose of paragraph 2 of Schedule 4 to the 2007 Regulations, namely that decisions which are inconsistent with a relevant budget or borrowing or capital expenditure plan should only be taken by persons authorised under the Council's own executive arrangements to take decisions which have those consequences. Thus while the words *"concerned with"* are to be applied taking good account of the specifics of the decision in hand, the focus should be on the direct consequences of the decision. Applied to the facts of this case, I do not consider it is correct to say that the Strategy Decision was a decision concerned with the Council's budget, borrowing or capital expenditure. Most obviously, the Strategy Decision was concerned with the Council's policy for sports and leisure provision over the period to 2029. It was not in the nature of the Sports Strategy – as I have described it above – that it was concerned with the Council's budget, borrowing or capital expenditure. The Sports Strategy contained no decision that committed the Council, as a matter of law, to specific expenditure, capital expenditure or borrowing. The fact that the Sports Strategy might be described as a plan that if implemented would inevitably entail expenditure of Council funds, is not to the point. Such spending decisions are yet to be taken; when proposals for development are put forward they will have to be assessed by the Council, on their own terms. (The Officer's Report for the Cabinet meeting on 14 November 2018 said as much as paragraph 7.1 – see below at paragraph 15 of this judgment.)

12. The third and fourth questions at paragraph 6 above can be taken together. As submitted by Mr Paul the only budget that can be in issue is the budget for 2019 – 2020, and the only plan in issue is the Council's capital programme which covers the period from 2019 until the end of the 2021 – 2022 financial year. The Sports Strategy does not amount to expenditure outside the budget or the plan. Mr Paul underlined his submission by reference to the Cabinet's decision on 10 April 2019 to make improvements to the fitness suite at the Newbridge Leisure Centre. This entails an investment of £550,000, and decision expressly listed the sources of the funding necessary to meet that expenditure.

13. For all these reasons, my conclusion is that the Strategy Decision was not, by reason of paragraph 2 of Schedule 4 to the 2007 Regulations, a decision required to be taken by the Council in full session. It was a decision that the Cabinet had authority to make.

(2) Ground 2. The Strategy Decision was unlawful because it was taken without information as to the cost of implementing the Sports Strategy.

14. The Claimant's submission on this ground is that when the Cabinet took its decision it had no information about the likely capital cost of the Sports Strategy, in particular there was no sufficient information about the likely cost of establishing the four strategic leisure centres.

15. No such information is in the Sports Strategy itself. The only information of this sort in that document is brief and concerns only the on-going costs associated with the Council's existing leisure centres – i.e. the cost of the status quo. The Sports Strategy was the subject of public consultation between July and September 2018. But no further financial information was provided for that purpose since the only consultation document was the then draft, Sport Strategy document. By the time the Council's Cabinet came to take the Strategy Decision on 14 November 2018 it had the benefit of an Officer's Report prepared for the meeting of the Scrutiny Committee on 8 November 2018, which had considered the Sports Strategy in light of a report on the responses to the consultation exercise and other associated documents. However, none of this contained specific or detailed information about the likely cost of putting the Sports Strategy into practice. The Officer's Report said the following at paragraph 7.1 under the heading *"Financial Implications"*

> "There are no financial implications as this stage. Should the Strategy be formally adopted then the proposed actions will be the subject of separate reports over the 10 year course of the Strategy that will include detailed financial implications. Any decisions will be dependent on the availability of funding and the approval of a robust business case."

16. Mr Howells' submission is that that is not satisfactory. He submits that the Cabinet could have no idea whether, at the point of any future proposed decision in furtherance of the Strategy, the money required would be available. He referred to the judgment of Yip J in *WX v Northamptonshire County Council [2018] EWHC 2178 (Admin)* at paragraphs 29 – 32. In that case a local authority ran into difficulties when setting its budget when an auditor's report concluded that its budget calculation rested on an unjustified assumption that the authority would obtain a specific sum as a capital receipt from sale of property, to fund its planned expenditure. The circumstances of the present case and of the Strategy Decision are not remotely similar.

17. My conclusion is that the Strategy Decision was not unlawful by reason of a failure to take account of the likely costs of implementing the Sports Strategy. The Strategy Decision did not commit the Council to any specific expenditure. As is apparent from paragraph 7.1 of the Officer's Report, a decision to adopt the Sports Strategy ran the risk of political embarrassment if over the 10 year period the Council lacked the resources to realise the Strategy. Yet in my view, that is an approach that the Council was entitled to take. Given that the Sports Strategy was set to endure for 10 years, it is equally reasonable to assume that anything approaching detailed costings would be either impossible or artificial given the difficulty of estimating now the cost of works that might not commence for 5, 7 or even 10 years.

18. In the premises, the second ground of challenge fails. Once the nature and substance of the Sports Strategy, as I have described it, is taken into account, it was not *Wednesbury* unlawful for the Council to adopt the Sports Strategy without information about the likely cost that its implementation might entail. Given that the Strategy Decision did not commit the Council to any specific programme of work, it was open to the Council, to proceed on the basis that information about the cost of implementation was not a material consideration at that stage, and that such financial considerations would be addressed step by step as implementing plans came forward. This ran a political risk if implementation turned out not to be possible; but that is not a matter going to the legality of the decision.

(3) Ground 3. The Strategy Decision was unlawful by reason of failures to comply with obligations under the Local Government (Wales) Measure 2009.

19. The Claimant's contention on this ground is that the Council failed to comply with obligations under sections 2 and 5, within Part 1 of the Local Government (Wales) Measure 2009 ("the 2009 Measure"). Section 2 of the 2009 Measure is in the following terms

> **"2 General duty in relation to improvement**
>
> (1) A Welsh improvement authority must make arrangements to secure continuous improvement in the exercise of its functions.
>
> (2) In discharging its duty under subsection (1), an authority must have regard in particular to the need to improve the exercise of its functions in terms of—
>
> (a) strategic effectiveness;
>
> (b) service quality;
>
> (c) service availability;

(d) fairness;

(e) sustainability;

(f) efficiency; and

(g) innovation.

(3) For the meanings of paragraphs (a) to (g) of subsection (2), see section 4 ."

Mr Howells relies in particular on section 2(2)(f) – the Council's obligation to have regard to the need to improve the exercise of its functions in terms of efficiency. As to this, section 4(2)(f) of the 2009 Measure provides further explanation

"(2) A Welsh improvement authority improves the exercise of its functions in terms of—

…

(f) efficiency, if there is an improvement in the efficiency with which resources are used in the provision of services or in the way in which functions are otherwise exercised; …"

Finally, section 5 of the 2009 Measure states an obligation to consult,

"5 Consultation about the general duty and improvement objectives

(1) For the purpose of deciding how to fulfil the duties under section 2(1) and 3(1) a Welsh improvement authority must consult—

(a) representatives of persons resident in the authority's area;

(b) representatives of persons liable to pay non-domestic rates in respect of any area within which the authority carries out functions;

(c) representatives of persons who use or are likely to use services provided by the authority; and

(d) representatives of persons appearing to the authority to have an interest in any area within which the authority carries out functions.

(2) For the purposes of subsection (1) "representatives" in relation to a group of persons means persons who appear to the authority to be representative of that group."

Mr Howells submits that when taking the Strategy Decision, the Council cannot have complied with the section 2 improvement obligation as regards efficiency if it had no information about the likely cost of implementing the Sports Strategy. Similarly, he submits, the consultation that was undertaken in connection with the draft Sports Strategy was not good enough to meet the section 5 consultation obligation because the information provided for the purposes of permitting the public to respond to the consultation included no relevant financial information. Thus, those consulted were not put in a position to provide informed response to the consultation.

20. Were the duties under the 2009 Measure material to the decision to adopt the Sports Strategy, those arguments would clearly have force. However, I do not consider that the duties under the 2009 Measure were material to that decision. The first point is the way in which the section 2(1) duty is formulated. It is not – for example, in the manner of the public sector equality duty under section 149(1) of the Equality Act 2010 – expressed in terms of an obligation to have regard to prescribed considerations whenever a decision is taken. Rather, it is an obligation to *"make arrangements to secure continuous improvement in the exercise of functions"* . This suggests that the section requires relevant authorities to put in place free-standing measures to improve decision-making processes by reference to the criteria listed at section 2(2) of the 2009 Measure. These arrangements are distinct from what a relevant authority might do in the exercise of its ordinary substantive functions; the section 2 arrangements are intended to improve the way in which those other functions are used. This conclusion is reinforced by the obligation at section 3 of the 2009 Measure for relevant authorities, each year, to set improvement objectives in respect of the exercise of their functions; the obligation at section 13 to make arrangements to collect information to permit assessment of whether the improvement objectives have been met; the provisions at section 18 for the Auditor General for Wales to assess the compliance of each relevant authority with the requirements of Part 1 of the 2009 Measure (including section 2); and the power under section 21 for the Auditor General to carry out inspections of a relevant authority's compliance with the Part 1 obligations. Taken together these provisions are a pragmatic framework for assessing compliance with the section 2 improvement duty.

21. None of this is to say that the section 2 duty is not enforceable through judicial proceedings. However, it does indicate that section 2 is aimed at matters which are in their nature arrangements for the improvement of the exercise of functions; this is something discrete from a relevant authority's "ordinary" executive decision-making. My conclusion is that neither the section 2 duty, nor the section 5 obligation to consult is a criterion for the legality of the Strategy Decision, because that decision was not in the manner of a decision to make improvement arrangements, and for that reason was not a decision within the scope of section 2 of the 2009 Measure.

22. Second, this conclusion is not affected by the judgment of Underhill LJ in *R(Nash) v Barnet London Borough Council [2013] EWHC 1067 (Admin)* . In that case, the defendant council had decided to contract out performance of an overwhelming majority of its functions. In part, the challenge to that decision rested on alleged non-compliance with section 3 of the Local Government Act 1999 ("the 1999 Act"), which applies to English local authorities and which is materially similar to sections 2 and 5 of the 2009 Measure. Strictly speaking, Underhill LJ's conclusions on the application in that case of the obligations under the 1999 Act are *obiter* since he dismissed the claim on the basis that it had been commenced out of time (see his judgment at paragraphs 33 – 59). However, I will address Mr Howells' reliance on the judgment in *Nash* without reference to that.

23. Mr Howells relies on paragraph 69 of the judgment, where the judge considered both the substance of the obligation under section 3 of the 1999 Act, and its application to the contracting-out decision in that case.

> "69. I start with sub-section (1), which establishes the substantive best value duty. I would analyse it as follows:
>
> (1) The core subject-matter is "the way in which" the authority's functions are exercised. That is very general language. It could in a different context cover almost any choice about anything that the authority does. But in this context it seems to me clear that it connotes high-level choices about how, as a matter of principle and approach, an authority goes about performing its functions. I do not say that the choice of whether, or to what extent, to outsource is the only such choice; but in the light of the legislative background outlined above the "ways" in which functions can be performed must include whether they are performed directly by the authority itself or in partnership with others: indeed that would seem to be a paradigm of the kinds of choices with which section 3 (1) is concerned.

(2) The duty is aimed at securing "improvements" in the way in which the authority's functions are exercised. That inevitably means change, where the authority judges that change would be for the better having regard to the specified criteria.

(3) The actual duty is not formulated as a duty to secure improvements simpliciter but as a duty to "make arrangements" to do so. I am not sure why this formula was adopted. I do not think that the draftsman was concerned with administrative "arrangements". It may have been thought that to impose a duty simply "to secure improvements" would expose authorities to legal challenges from those who contended that particular decisions were for the worse, or that authorities were wrong in failing to take particular steps which it was asserted would make things better: the reference to "making arrangements" would make it clear that the duty was concerned with intentions rather than outcome. It may also be that the draftsman wanted to emphasise the need to build the fulfilment of the best value duty into authorities' plans and procedures. Or perhaps it is just circumlocution. But, whatever the explanation, the important point for present purposes is what the arrangements are aimed at, namely securing improvements in the way in which authorities perform their functions.

It follows that one of the effects of the best value duty is to require local authorities to outsource – or, if you prefer, to make arrangements to outsource – the performance of particular functions where it considers, having regard to the specified criteria, that that would constitute an improvement."

Mr Howells submits that the Strategy Decision is an example of the sort of "high-level choices" that Underhill LJ considered to be within the scope of section 3 of the 1999 Act, and for that reason is a decision to which sections 2 and 5 of the 2009 Measure applies.

24. The conclusion in *Nash* on the application of section 3 of the 1999 Act to the decision under challenge turned on the nature of that decision. Underhill LJ's reasoning cannot be understood as meaning that every "high level" decision necessarily falls within the scope of the section 3 duty (or, for the purposes of the present case, the duty at section 2 of the 2009 Measure). Rather, given the way in which the duty is formulated (both under the 1999 Act and under the 2009 Measure) the issue must be whether the decision taken was by its nature, a decision on the arrangements to be made by the authority to secure improvement in the exercise of its functions. The decision under challenge in *Nash* clearly was of this nature since it entailed wholesale contracting-out of functions. That contracting-out was an arrangement aimed at improving the delivery of services.

25. Not every strategic decision will be of this nature. In fact it is more than likely that the majority of such decisions will not. This stems from the fact that the improvement obligation is free-standing of the exercise of functions *per se* . This is underlined by the various provisions directed to securing compliance with the improvement obligation. So far as concerns the 2009 Measure I have referred to them above; so far as concerns the 1999 Act, sections 10 – 15 of that Act establish a system for inspection of compliance and give the Secretary of state powers of direction in instances where there is a failure to comply with obligations under Part 1 of the 1999 Act. This structure is material since it displaces any incentive to construe or apply the obligations under section 3 of the 1999 Act or section 2 of the 2009 Measure as if they attach to all, or any class of, instances of decision-making.

26. Turning to the Strategy Decision, the Sports Strategy was in the nature of a plan for the future exercise of functions under section 19 of the Local Government (Miscellaneous Provisions) Act 1976 . That decision is qualitatively different to the contracting-out decision in *Nash* . The Strategy Decision was not in the nature of an arrangement to secure continuous improvement in the exercise of functions. It was a strategy for the steps the Council wanted to take in respect of its provision of recreational facilities. It would be wrong to construe section 2 of the 2009 Measure as applying to any/every strategic decision. That would be an artificial application of section 2 of the 2009 Measure. It would also have the unwarranted consequence of creating – via section 5 of the 2009 Measure – a statutory obligation to consult in respect of any proposed strategic decision. While it may be a matter of good practice that strategic decisions should be the subject of consultation, applying the section 5 obligation to all such decisions would be a step too far, absent an express statutory provision to that effect.

27. For these reasons, the challenge to the Strategy Decision based on the 2009 Measure fails. The proposal to adopt the Sports Strategy was not an arrangement falling within the scope of section 2(1) of the 2009 Measure; in consequence the section 5(1) obligation to consult did not arise.

28. Before leaving this ground I must comment on a submission made by the Council to the effect that section 2 of the 2009 Measure, and in substance the whole of Part 1 of the 2009 Measure had *"fallen into desuetude"* following the enactment of the Well-Being of Future Generations (Wales) Act 2015 ("the 2015 Act"). That Act requires specified public bodies in Wales (including local authorities) to *"carry out sustainable development"* – see section 3 of the 2015 Act. Section 2 of the 2015 Act defines sustainable development as meaning

> **"2. Sustainable development**
>
> In this Act, "sustainable development" means the process of improving the economic, social, environmental and cultural well-being of Wales by taking action, in accordance with the sustainable development principle (see section 5), aimed at achieving the well-being goals (see section 4)."

Section 5(1) of the Act defines acting in accordance with the sustainable development principle as

> **"5.— The sustainable development principle**
>
> (1) In this Act, any reference to a public body doing something "in accordance with the sustainable development principle" means that the body must act in a manner which seeks to ensure that the needs of the present are met without compromising the ability of future generations to meet their own needs."

And section 5(2) provides that to act in that manner a local authority must take account of various matters including its own *"well-being objectives"* , which are set in accordance with section 7 of the 2015 Act.

29. The Council's submission was to the effect that following enactment of the 2015 Act, Part 1 of the 2009 Measure was redundant, and for that reason the obligations under Part 1 no longer fell to be complied with. The Council suggested that the approach now taken by the Auditor General for Wales was not to require local authorities to report information relevant to the 2009 Measure.

30. These contentions are wrong. The 2009 Measure remains in force. It has not been expressly repealed. The Council pointed to the statement of intent by the Welsh Government in a January 2017 consultation document, which proposed repeal of Part 1 of the 2009 Measure and invited response to that proposal. But an intention to appeal falls materially short of actual repeal. The suggestion that Part 1 of the 2009 Measure has lapsed by desuetude – disuse – is wrong. No such principle forms any part of the law of England and Wales. Moreover, the suggestion of disuse is at odds with the guidance issued by the Auditor General for Wales in January 2019 *"A Guide to Welsh Public Audit Legislation"* . This guidance rests on the premise that the obligations in Part 1 of the 2009 Measure remain relevant, and are to be complied with. The guidance does suggest that local authorities may use a single document to comply with the reporting obligations under the 2009 Measure and the 2015 Act, but that is not to say that the obligations under the 2009 Measure have ceased to apply. I further note that after the conclusion of this hearing, the Council provided further information in support of its submission, which included the certificate of compliance issued to the Council by the Auditor General in May 2018. That certificate confirms (if confirmation were necessary) that the Auditor General continues to monitor the compliance by local authorities with the obligations under Part 1 of the 2009 Measure. Finally, any contention that enactment of the 2015 Act has resulted in an implied repeal of the obligations in Part 1 of the 2009 Measure could not succeed because there is no inconsistency between the obligations under the respective statutes. The obligations are not in conflict. Considerations of sustainability are an aspect of the improvement

duty under section 2 of the 2009 Measure; moreover the improvement duty extends significantly beyond considerations of sustainability and well-being.

(4) Ground 4. The public sector equality duty

31. This ground of challenge is directed to the decision taken by the Council's Cabinet at its meeting on 10 April 2019 that the Pontllanfraith Leisure Centre should close with effect from 30 June 2019. The Claimant's contention is that when taking the Closure Decision the Council did not meet its obligations under section 149(1) of the Equality Act 2010 ("the 2010 Act") – the public sector equality duty. Section 149(1) of the 2010 Act requires public authorities in the exercise of their functions to have *"... due regard to the need to – (a) eliminate discrimination ... prohibited by or under [the 2010 Act]; (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; [and] (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it"* . Section 149(3) and (4) further explain the nature of due regard for the advancement of equality of opportunity.

> "(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—
>
> (a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
>
> (b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;
>
> (c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.
>
> (4) The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities."

32. The case law on the public sector equality duty is legion. In *R(Law Centres Federation Limited) v Lord Chancellor [2018] EWHC 1588 (Admin)* Andrews J summarised the matter as follows at paragraphs 96 – 97.

> 96. The relevant principles relating to the exercise of the PSED are adumbrated by McCombe LJ in *Bracking v Secretary of State for Work and Pensions [2013] EWCA Civ 1345* at [25]-[26] and were endorsed by Lord Neuberger in *Hotak v Southwark LBC [2016] UKSC 30 [2016] AC 811* at [73]. The duty is personal to the decision maker, who must consciously direct his or her mind to the obligations; the exercise is a matter of substance which must be undertaken with rigour, so that there is a proper and conscious focus on the statutory criteria and proper appreciation of the potential impact of the decision on equality objectives and the desirability of promoting them. Whilst there is no obligation to carry out an EIA, if such an assessment is not carried out it may be more difficult to demonstrate compliance with the duty. On the other hand, the mere fact that an EIA has been carried out will not necessarily suffice to demonstrate compliance.
>
> 97. As to the proper approach to be taken by the court, a useful and elegant summary is to be found in the earlier judgment of Elias LJ in *R(Hurley) v Secretary of State for Business Innovation and Skills [2012] EWHC 201 (Admin)* at [78], a passage that was expressly approved in Bracking. As he concluded:

> "the concept of "due regard" requires the court to ensure that there has been a proper and conscientious focus on the statutory criteria…the decision maker must be clear precisely what the equality implications are when he puts them in the balance, and he must recognize the desirability of achieving them, but ultimately it is for him to decide what weight they should be given in the light of all relevant factors."

I have also well in mind the observations of McCombe LJ at paragraph 44 of his judgment in *Powell v Dacorum Council [2019] EWCA Civ 23* to the effect that when deciding whether or not a public authority has complied with the section 149(1) obligation there is no one-size-fits-all answer. The context and substance of the decision in hand is important, and the issue for the court is always whether, in the context before it, there is evidence that the decision-making process was informed by the required due regard.

33. In this case the Council accepts that there is no evidence of compliance in the form of an equality impact assessment of the proposal to close Pontllanfraith Leisure Centre. The Officer's Report (of 26 March 2019) prepared in anticipation of the Cabinet meeting stated that an equalities impact assessment had been completed, and referred to an attached document. However the document referred to is the assessment undertaken for the purposes of the Strategy Decision that had been taken in November 2018.

34. The Council's case as put at the hearing relies on that document and one other, an equalities impact assessment undertaken in 2017 at the time of an earlier proposal to close Pontllanfraith Leisure Centre. That proposal had been the subject of public consultation in October and November 2017; the Cabinet took a closure decision at a meeting on 13 December 2017; but following reconsideration at the request of the Scrutiny Committee, the Cabinet further decided, on 28 March 2018 to defer closure of the leisure centre pending the decision on whether or not to adopt the Sports Strategy, and following that decision to look at the matter again. The Council contends that, notwithstanding the absence of any further formal assessment in 2019, by the time that decision was taken the members of the Cabinet had the benefit of sufficient information in the form of the two assessment documents, the results of the 2017 consultation on the previous proposal, and the commentary in the Officer's Report prepared for the 10 April 2019 Cabinet meeting, either that it can be inferred that the due regard required by section 149(1) was had, or that it is safe to conclude that any further consideration of the section 149(1) criteria would have made no difference to the Closure Decision.

35. After the hearing, and without permission, the Council filed a further witness statement from Councillor David Poole, the Leader of the Council. In that statement he says (a) that the decision not to undertake further formal assessment of the likely impact of the Closure Decision was a conscious decision following advice that the assessment undertaken for the purposes of the Strategy Decision was sufficient; (b) that at the meeting on 10 April 2019, the Cabinet considered how the information in the assessment prepared in relation to the Strategy Decision related to the proposal to close Pontllanfraith Leisure Centre; and (c) that when considering the information in the Officer's Report for the 10 April 2019 meeting the Cabinet considered the impact of closure on persons with protected characteristics. The Claimant objected to this statement being admitted. Having heard submissions from both parties, I decided to admit the witness statement.

36. My conclusion is that when taking the decision to close the Pontllanfraith Leisure Centre the Council did not comply with the requirements of section 149(1) of the 2010 Act. The issue is not whether a formal equality impact assessment was undertaken; the issue is the question of substance – was there proper and conscious consideration of the public sector equality duty criteria. This cannot be made out from the evidence of the assessment made in 2017. In his statement, Councillor Poole accepts that that assessment was *"wholly inadequate"* . Nor can evidence of compliance with the public sector equality duty be made out from the assessment undertaken for the purposes of the Strategy Decision. That decision was directed to materially different matters. The fact that the Closure Decision was a step consistent with the Strategy Decision does not come close to making good the Council's argument in this case. The Strategy Decision was a decision on generic matters. It did not, and did

not purport to engage with the possible consequences of the closure of Pontllanfraith Leisure Centre. Next, I do not consider that the information contained in the Officers' Report is sufficient evidence of the required due regard. I have paid particular attention to paragraphs 5.12 – 5.17 of the Report. Those paragraphs focus on the availability of alternative provision and the distance between that provision and the Pontllanfraith Leisure Centre. Clearly that information is relevant to the due regard required by section 149(1) of the 2010 Act. It is agreed between the parties that in the context of the Closure Decision the most pertinent protected characteristics would be age and disability, and the most likely disadvantage would arise from the greater difficulties that some older or disabled persons would be likely to face when trying to get to the alternative facilities. However, paragraphs 5.12 – 5.17 of the Officer's Report do not address the significance of the new travelling distances from that perspective. They are not evidence of the required conscious and careful consideration of the public sector equality duty criteria. The position does not alter if the material part of the Officer's Report is read together with the minutes of the Cabinet meeting. The minutes do not support the suggestion now made in Councillor Poole's statement that the Cabinet considered the information before it from the point of view of the likely impact on elderly or disabled persons, were the Leisure Centre to close. The minutes refer only to the impact of closure on "users" of the Leisure Centre. That was, of course, a relevant consideration. But it is not the same as the focussed consideration required by the section 149(1) criteria as to the likely effect of the proposed closure on the elderly and the disabled. Given the admitted inadequacy of the attempt to comply with the public sector equality duty at the time of the proposed closure in 2017, it is striking that in 2019, the position of elderly and disabled persons was not addressed in terms. Overall, I am not satisfied on the evidence, that the Council discharged its section 149(1) due regard obligation.

37. Nor do I accept the Council's no difference submission. The present case is not one where that no difference submission is supported by an after the event assessment: compare *R(Hottak) v Secretary of State for Foreign and Commonwealth Affairs [2016] 1 WLR 3791* per Sir Colin Rimer at paragraphs 87 – 108, in particular at paragraphs 92 and 107 – 108. I do not consider there is any secure basis on which I could reach a no difference conclusion. The public sector equality duty is directed to the decision-making process. The premise of the duty is that process is important because it is capable of affecting substantive outcomes. In the present case there is nothing that gives me sufficient confidence that compliance with the public sector equality duty would be without purpose.

38. For these reasons, Ground 4 of the challenge succeeds.

(5) Ground 5. The Closure Decision was unlawful because the Council failed to consider the option of a community asset transfer of the leisure centre.

39. The Claimant's submission rests on the principles that public authorities should (a) take decisions having regard to relevant considerations; and (b) before taking a decision should conscientiously consider the responses to any consultation process. The Claimant contends that the possibility of a community asset transfer of the Pontllanfraith Leisure Centre, as a going concern, to a community group, had been raised, and ought to have been further considered. The failure to do so was either a failure to take account of a relevant consideration or a failure to pay proper regard to consultation responses.

40. The relevant consultation was that relating to the 2017 proposal to close Pontllanfraith Leisure Centre. The relevant response was the one provided by Blackwood Town Council, which included the following at paragraph 7.9

> " … Blackwood Town Council is of the view that any decision on closure *should be seen* in the context of this overall County Borough Strategy *once* agreed by the *Council and the ability (and responsibility)* **to actively engage and empower the local community towards possible asset transfer and community ownership options** and not as a convenient opportunity to asset-strip through demolition and land-sale a successful Leisure Centre with the apparent primary objective of maximising capital receipts."
>
> [italics and bold type, as in the original]

I note that it was agreed by counsel before me that notwithstanding the reference to "responsibility", the Council was under no legal obligation to consider community asset transfer.

41. When, on 26 March 2019, the Strategy Committee considered the proposed closure, members of that committee discussed the possibility of transferring the site to some sort of community ownership. The Committee was told there had been no expressions of interest. One councillor suggested delaying closure until expressions of interest had been sought. The Scrutiny Committee's final decision was not to support the Officer's recommendation to Cabinet that the Leisure Centre should close. The minutes of the Scrutiny Committee meeting were provided to Cabinet members for the purpose of their meeting on 10 April 2019.

42. At the Cabinet meeting, Councillor Etheridge, one of the members for the Blackwood Ward, addressed the meeting and drew attention to what had happened at the Scrutiny Committee meeting. The minutes of the Cabinet meeting record officers informing Cabinet members that during the 2017 consultation process the option of community asset transfer was not raised in any of the consultation responses.

43. I have assessed all these matters but I do not consider that the Claimant's case on this ground of challenge is made out. The fact that the possibility of community asset transfer of the Pontllanfraith Leisure Centre was raised in the consultation response from Blackwood Town Council did not oblige the Council to take that possibility further. The fact that the Council did not take it further does not make good a contention that there was a failure properly to consider the responses to consultation. The statement recorded as being made by officers at the 10 April 2019 Cabinet meeting that the responses to consultation had not made mention of community asset transfer was wrong. That was unfortunate, but not in my view material. This part of the Blackwood Town Council response fell well short of anything that could reasonably be understood as an expression of interest in a community asset transfer. Regardless of the officers' comment, Cabinet members were on notice of the community asset transfer option from what had been said at the Scrutiny Committee meeting. The fact that the Council did not pursue the possibility of community asset transfer did not render the Closure Decision unlawful by reason of failure to have regard to a relevant consideration. For the purposes of the proposal before the Council, it was for the Council, subject to the bounds of *Wednesbury* reasonableness, to decide whether this was a relevant consideration. The statutory framework for the Cabinet decision on the proposed closure was that provided by section 19 of the Local Government (Miscellaneous Provisions) Act 1976 . There is nothing in section 19 that required consideration of community asset transfer. The failure to consider community asset transfer was not unreasonable. There was some dispute before me as to the realisable value of the leisure centre site, but put at its lowest its value was in the order of £250,000. Pursuing community asset transfer would have required the Council to forgo that benefit – and depending on the terms of the transfer might have required the Council to take on new obligations to the new operator of the site. The Closure Decision cannot be characterised as unlawful on the basis pursued in this ground of challenge.

C. Conclusion

44. For the reasons set out above (a) the Claimant's challenge to the Strategy Decision fails; but (b) the challenge to the Closure Decision succeeds on Ground 4 (public sector equality duty). To that extent, the application for judicial review is allowed.

A [HOUSE OF LORDS]

WESTMINSTER CITY COUNCIL . . . . APPELLANTS

AND

GREAT PORTLAND ESTATES PLC. . . . . RESPONDENTS

B 1984 July 16, 17; Oct. 31

Lord Fraser of Tullybelton, Lord Wilberforce, Lord Scarman, Lord Roskill and Lord Bridge of Harwich

Town Planning—Development—Local authority's development plan—Protection of specific industrial activities—Office development subject to non-statutory guidelines—Whether interests of individual occupiers irrelevant to formulation of industrial policy—Whether reliance on non-statutory guidelines invalid—Inspector's recommendation following public inquiry rejected—Whether duty to give reasons—Town and Country Planning Act 1971 (c. 78), Sch. 4, para. 11[1] *(as substituted by Town and Country Planning (Amendment) Act 1972 (c. 42), s. 4(1), Sch. 1)*

C

The City of Westminster's district plan, adopted by the city council in April 1982 embodied in paragraphs 11.22 to 11.26 the council's industrial policy which provided for the protection of specific industrial activities with important linkages with central London activities. They were specified as long established industries such as clothing, fur and leather, and paper, printing and publishing whose central London location, necessary to maintain the required services, made them vulnerable to pressure for redevelopment from other more financially profitable uses.

D

In relation to office development, the city council in paragraphs 10.21 to 10.23 drew a distinction between a "central activities zone," in which office development was to be encouraged, and the rest of the city, where planning permission for office development would not be granted save in exceptional or special circumstances not outlined in the plan but expressed to be the subject of "non-statutory guidance . . . prepared after consultation following adoption of the plan." Objection was taken to the city council's office policy and a public inquiry was held. The inspector's report recommended that a policy of office development outside the central activities zone should be incorporated into the plan and not left to guidance outside it. The city council did not accept the inspector's report.

E

F

The applicants, a property company, applied under section 244(1) of the Town and Country Planning Act 1971 to quash paragraphs 11.22 to 11.26 on the ground that the provisions were not within the powers of Schedule 4, paragraph 11(2) of the Act of 1971, in that they were concerned with particular users of land rather than the development and use of land; and that the city council, in formulating the industrial policies, had had regard to an irrelevant consideration, the interests of individual occupiers of industrial premises within the city. The applicants applied to quash paragraphs 10.21 to 10.23 on the grounds that the city council's comment upon the inspector's report was not an adequate statement of their reasons for rejecting it, and that by relying upon non-statutory guidelines to

G

H

[1] Town and Country Planning Act 1971, Sch. 4, para. 11 (as substituted): see post, p. 666F–G.

indicate what would constitute the exceptional circumstances for office development outside the central activities zone, the city council had failed to comply with the requirement in Schedule 4 that the plan must contain their proposals for the development and use of land.

Woolf J. dismissed the application but the Court of Appeal held that paragraphs 10.21 to 10.23 and 11.22 to 11.26 of the plan should be quashed.

On appeal by the city council:—

Held, allowing the appeal in part, (1) that the test of what was a material consideration in the preparation of local plans or in the control of development was, as in the grant or refusal of planning permission, whether it served a planning purpose which related to the character of the use of the land; that on their true construction, the industrial policies of the plan were concerned not with the protection of existing occupiers but with a genuine planning purpose, the continuation of industrial use important to the character and functioning of the city and, accordingly, paragraphs 11.22 to 11.26 of the plan should stand (post, pp. 670C–D, 671C–D).

East Barnet Urban District Council v. British Transport Commission [1962] 2 Q.B. 484, D.C. and *Newbury District Council v. Secretary of State for the Environment* [1981] A.C. 578, H.L.(E.) applied.

(2) That notwithstanding the duty on a public body to give reasons, when so required by statute, that were proper, adequate and intelligible, those reasons could be briefly stated; and the city council's reasoning with respect to the office policies had been adequately explained in paragraphs 10.21 to 10.23 and by its comment on the inspector's report (post, p. 673D–G).

In re Poyser and Mills' Arbitration [1964] 2 Q.B. 467 and *Edwin H. Bradley and Sons Ltd. v. Secretary of State for the Environment* (1982) 264 E.G. 926 approved.

But (3) that the adoption by a local planning authority of non-statutory guidelines for the development and use of land in its area constituted a failure to comply with Schedule 4, paragraph 11 of the Act of 1971 and accordingly the order that paragraphs 10.21 to 10.23 of the plan should be quashed would be upheld (post, p. 674D–G).

Per curiam. Rights relating to the use and development of land, including those of landlords and others interested in land, take effect subject to the controls imposed by planning law (post, p. 671E).

Decision of the Court of Appeal (1983) 82 L.G.R. 44 varied.

The following cases are referred to in the opinion of Lord Scarman:

Bradley (Edwin H.) and Sons Ltd. v. Secretary of State for the Environment (1982) 264 E.G. 926

East Barnet Urban District Council v. British Transport Commission [1962] 2 Q.B. 484; [1962] 2 W.L.R. 134; [1961] 3 All E.R. 878, D.C.

Newbury District Council v. Secretary of State for the Environment [1981] A.C. 578; [1980] 2 W.L.R. 379; [1980] 1 All E.R. 731, H.L.(E.)

Poyser and Mills' Arbitration, In re [1964] 2 Q.B. 467; [1963] 2 W.L.R. 1309; [1963] 1 All E.R. 612

Westminster City Council v. British Waterways Board (1983) 82 L.G.R. 44, C.A.; [1985] A.C. 676; [1984] 3 W.L.R. 1047; [1984] 3 All E.R. 737, H.L.(E.)

A No additional cases were cited in argument.

APPEAL from the Court of Appeal.

This was an appeal by the appellants, Westminster City Council, by leave of the Court of Appeal (Lawton, Dillon and Purchas L.JJ.) on 6 December 1983 reversing the decision of Woolf J. on 25 February 1983 whereby he dismissed an application by the respondents, Great Portland B Estates Plc., for an order that the City of Westminster district plan be quashed in so far as it related to office development outside the central activities zone and to the protection of specific industrial activities. The Court of Appeal ordered that paragraphs 10.21 to 10.23 and 11.22 to 11.26 of the plan be quashed.

The facts are stated in the opinion of Lord Scarman.

C *Michael Barnes Q.C., Christopher Lockhart-Mummery* and *Anne Williams* for the appellants. The duty of a local planning authority to decide applications for planning permission is derived from section 29(1) of the Town and Country Planning Act 1971, which provides that in dealing with the application the authority shall have regard to the development plan, so far as material to the application, and to any other D material considerations. There is nothing express in the legislation to cut down the generality of the phrase "other material considerations." When a local planning authority consider an application it will be obvious that if permission is granted and then implemented the likely result is that an existing occupier of the premises (usually a tenant) will be displaced and the premises will not thereafter be available for occupation by that or any other potential occupier in their existing state. The premises will E cease to be available for occupation by the class or category of persons who desire to occupy premises of their particular age, type and location. The loss of such premises which, if they remained, would fulfil or cater for the needs of a particular category of occupier, can be a material consideration. It was to considerations of that kind that paragraphs 11.22 to 11.26 of the district plan were directed.

F The desirability of keeping premises in their existing state is a proper planning consideration, as is the question of the hardship that may be caused to an existing occupier. The approach of the courts below to the question of the validity of those paragraphs should have been to ask (1) whether the policies contained in them were proposals for the development or use of land and (2) if so, did they require the local planning authority to take into account considerations that were not G lawful. Here, the policies were plainly proposals for the development or use of land and the desirability of keeping premises in their existing physical state, to meet a need for premises in such a state, is a lawful consideration. It is accepted that that affords to some occupiers a protection they would not have if the policy did not exist, but that is not a vitiating factor.

H The Court of Appeal relied on *Westminster City Council v. British Waterways Board* [1985] A.C. 676. That case was wrongly decided in so far as it was held that it was not a material consideration in refusing planning permission that the implementation of that permission would extinguish the use of the land as a street cleansing depot or that the

occupiers of the land for that purpose would be displaced and would not be able to find alternative premises. If it were the law that the particular needs and circumstances of actual or potential occupiers of land were not relevant serious consequences would flow, for example (1) the need to preserve an existing use of land so as to keep it available for potential occupiers would not be a good reason for refusing permission to change the use, and (2) the hardship which would be caused to an occupier of neighbouring land with special needs could not be a material consideration. The law as it stands allows a very wide category of cases to be taken into account, including preserving an existing use, the effect on occupiers of adjoining properties, the "precedent effect" if planning permission is granted, the financial viability of the development, the availability of alternative sites, the question whether, in cases where a planning permission is applied for and there is already in existence a previous planning permission, that previous permission can be used, and the personal circumstances of the applicant.

In relation to paragraphs 10.21 to 10.23 of the plan, relating to office development, the main defect alleged is the use of non-statutory guidelines. The question to be asked is whether any reasonable council would have done so. Applying that test, the council, in deciding not to put such detail in the plan, had not acted unreasonably. On the contrary, it would have been unreasonable to put into the plan all the details for every area; the plan would have been too big. Further, the appellants, in their comment upon the inspector's report where they rejected his views and recommendations, had not failed to comply with the requirement to give reasons imposed by regulation 17 of the Town and Country Planning (Local Plans for Greater London) Regulations 1974. Their comment is an adequate statement of their reasons for rejecting the views.

David Woolley Q.C. and *William Hicks* for the respondents. The appellants state that the "industrial" policy in paragraphs 11.22 to 11.26 of the district plan is to preserve certain buildings in the physical state in which they are in today so that their presence in the areas where they are located is assured. The purpose and consequences are one and the same—to protect the occupation of existing occupiers. If the purpose of the policy is to preserve the buildings in their physical state, there is no reference to that in the plan. It would have been easy for the council to limit the occupations that could be used in the premises on redevelopment. But it is only to the trade and not to the individual that the council can offer protection. To go beyond that would invalidate the industrial policies. Small traders are essential to the quality of local life but it does not follow that because a small trader says he is satisfied with the 150 year old premises that the owners wish to redevelop, that he is right. It is not accepted that redevelopment automatically prices the small trader out of the market.

The council's objectives can be achieved by the imposition of conditions on the planning permission, and if the physical character of a building is important, it is open to the Secretary of State for the Environment to list the building; or there are other means, such as the creation of conservation areas.

A Dealing with the "office policy" in paragraphs 10.21 to 10.23 of the plan, we are not told why the non-statutory guidelines are necessary. Provisions as large as these precluding office development cannot be precluded from inquiry by means of non-statutory guidelines. Any policy dealing with half the City of Westminster must be included in the plan. Further, regulation 17 of the Town and Country Planning (Local Plans for Greater London) Regulations 1974 required the appellants to B give reasons for its decision to reject the independent inspector's recommendations as to their plan. The reasons must be clear and intelligible and deal with the substantial points that have been raised: *In re Poyser and Mills' Arbitration* [1964] 2 Q.B. 467, 478 per Megaw J. The council did not attempt to grapple with the reasoning of the inspector.

C *Barnes Q.C.* in reply. The aim of the industrial policies is to state that there are certain types of uses within central London which need to be there. In relation to the office policies, a construction of paragraph 11 of Schedule 4 to the Act of 1971 which would result in everything, whatever the level of particular detail, having to go into the plan, cannot be accepted. The planning authority should not have to deal with every detail at the outset.

D

Their Lordships took time for consideration.

31 October. LORD FRASER OF TULLYBELTON. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Scarman, and I agree with it. For the reasons given E by him I would vary the order of the Court of Appeal as he suggests.

LORD WILBERFORCE. My Lords, I concur.

LORD SCARMAN. My Lords, in these proceedings Great Portland Estates Plc. challenge certain parts of the City of Westminster district F plan. They made their challenge by application to the High Court pursuant to section 244 of the Town and Country Planning Act 1971. Woolf J. dismissed the application, but on appeal the Court of Appeal upheld the challenge and quashed part of the policies for industrial and office development embodied in the plan. The City of Westminster, who are the local planning authority responsible for the plan, appeal with the leave of the Court of Appeal to your Lordships' House.

G Section 244(1) of the Act of 1971 enables a person aggrieved to question the validity of a structure plan or a local plan on two grounds: either that it is not within the powers conferred by Part II of the Act of 1971 or that any requirement of Part II or of any regulations made thereunder have not been complied with in relation to the approval or adoption of the plan. The respondent company's case, which prevailed in the Court of Appeal, consists of two quite separate challenges. The H first is that one aspect of the industrial policies embodied in the plan is not within the powers conferred by Part II of the Act of 1971. The second, which relates to the plan's policy for office development, is that in adopting the plan the City of Westminster failed to comply with

certain requirements of the Act of 1971 and of the regulations made under it.

Section 244(2) of the Act of 1971 sets out the powers of the High Court. The court may grant interim relief by suspending the operation of the plan. The respondent company did seek such relief, but no question of an interim order now arises for consideration. Upon final determination of an application the court, if satisfied either that the plan is wholly or to any extent ultra vires or that the applicant's interests have been substantially prejudiced by failure to comply with a statutory requirement, may wholly or in part quash the plan. The subsection, therefore, confers upon the court a power to be exercised at its discretion. It would be surprising if a court were to refuse to quash if satisfied that the plan or part of it was ultra vires; but clearly discretion may bulk large in deciding whether or not to quash upon the second ground. In the instant case the appellant authority accepts that if any part of the plan is ultra vires it must be quashed. If, however, the House should hold that in respect of the office development policy there had been a failure to comply with a requirement in relation to the adoption of the plan, the appellant submits that the discretion should be exercised against making an order to quash the part of the plan affected by that failure.

Part II of the Act of 1971 makes provision for the preparation, adoption, and approval of development plans. Section 19 provides that in relation to Greater London Part II shall have effect subject to the provisions of Schedule 4 to the Act of 1971. The Schedule provides for a structure plan for Greater London. London borough councils may prepare local plans: the appellants, being a local planning authority, prepared and in April 1982 adopted a local plan for their area, namely the City of Westminster district plan. The general provisions set out in paragraph 11 of the Schedule (as substituted by the Town and Country Planning (Amendment) Act 1972, section 4(1) and Schedule 1) apply to the plan. So far as material to this appeal, the paragraph provides:

> "(2) The plan shall consist of a map and a written statement and shall—(*a*) formulate in such detail as the council think appropriate their proposals for the development and other use of land in the area . . . or for any description of development and other use of such land . . . (4) In formulating their proposals in the plan the council shall—(*a*) secure that the proposals conform generally to the Greater London development plan . . . and (*b*) have regard to any information and any other considerations which appear to them to be relevant . . ."

The Greater London structure plan lays down the general strategy for the development and use of land in London. A local plan applies and may adjust this strategy to meet the planning needs of its area. A local plan's proposals, though they must conform generally to the structure plan, can deviate from it; and, if they do, the provisions of the local plan prevail for all purposes: section 14(8) of the Act of 1971.

When a London council proposes to prepare a local plan, it must secure adequate publicity so as to ensure that adequate opportunity is

given for making representations (including, of course, objections) and the council "shall consider any representations made to them within the prescribed period": paragraph 12(1) of Schedule 4. And before the council adopts the plan it must make copies available for public inspection, and send copies to the Greater London Council and the Secretary of State. The Secretary of State has extensive powers (which include the giving of directions and the suspension of operation) in respect of local plans which it is not necessary to consider because none were exercised. The Greater London Council have a right to be consulted before a local plan is prepared.

Section 13 of the Act of 1971 makes provision for inquiries in respect of draft local plans. In the case of objections put forward in accordance with regulations made under Part II of the Act the council must cause a local inquiry to be held by a person appointed by the Secretary of State: section 13(1) of the Act of 1971. Section 14 (as amended by section 3(2) of the Town and Country Planning (Amendment) Act 1972) empowers the local planning authority after considering objections so made to adopt the plan entire as originally prepared or as modified so as to take account of objections or other material considerations.

Unless, therefore, the Secretary of State intervenes (which in this case he has not), the council as local planning authority has the power of decision. But the power is subject to a requirement which is to be found in regulation 17(1) of the Town and Country Planning (Local Plans for Greater London) Regulations 1974 (S.I. 1974 No. 1481). Where a local inquiry to consider objections has been held, the local planning authority shall:

> "consider the report of the person appointed to hold the inquiry . . . and decide whether or not to take any action as respects the plan in the light of the report and each recommendation, if any, contained therein; and that authority shall prepare a statement of their decisions, giving their reasons therefor."

Within the statutory frame which I have outlined it is now necessary to consider the two challenges made by the respondents to the district plan. I will deal first with the challenge to the industrial policies embodied in the plan: and secondly with the challenge to the plan's policy for office development.

The "industrial" challenge

The industrial policy under challenge is in paragraphs 11.21 to 11.26 of the plan. The general policy is that applications for planning permission for new industrial floor-space and the creation of new industrial employment will, subject to other policies, be encouraged. The plan, however, goes on to protect "specific industrial activities." The council explains what it means by these words in paragraph 11.22, which, because of its importance, I quote:

> "*Purpose*. The city council considers that those industrial activities with important linkages with central London activities, particularly in the central activities zone, should be maintained."

The critical words are "important linkages with central London activities," since they define the planning purpose of the policy of protection. Paragraph 11.23 gives the reasons for the policy:

> "In 1971 about half the industrial floorspace in Westminster was located in the central activities zone. The greater proportion of this floorspace was occupied by firms which had been long established in the area, such as clothing, fur and leather, and paper, printing and publishing. Many of these industries need a central location in order to maintain the services required, but this central location also makes them vulnerable to pressure from other more financially profitable uses. The city council feels that the loss of these supporting industrial activities may threaten the viability of other important central London activities."

The reason, therefore, for the policy of protection is that, in the opinion of the council as local planning authority, the loss of the specified industrial activities may threaten the viability of other important central London activities.

In paragraph 11.24 the council makes the comment that while it cannot influence "internal changes in the operation of a firm" (which I take to be a reference to such matters as a business's financial viability, its market success or failure, and its management) it can influence "external pressures" which could interfere with "established linkages." The point is clear, though the jargon may strike some as unattractive: by the exercise of its planning powers the council can protect the specified industrial activities from disappearance in the face of the competitive pressure to redevelop their sites for other more profitable uses which, however, do not assist the viability of other important central London activities.

Paragraph 11.25 offers the explanation which I have just summarised of the term "external pressures." In a critical passage the paragraph then reveals the approach which the council proposes to take towards applications for the grant of planning permission for redevelopment in such cases. The passage is in the following terms:

> "This source of conflict is particularly severe in the central activities zone. Here, many of the longer established industrial firms are often located in premises which are old and subject to historic rents or nearing the end of leases, and as a result are particularly susceptible to change and consequent displacement. Notwithstanding the need for modern industrial premises already identified in para. 11.19, where the existing occupants of premises in, or including, industrial use are satisfied with that accommodation and in the city council's view no apparent case can be made for development or major rehabilitation, then it would be against the aim of retaining such industry readily to grant permission for redevelopment, or in some cases, major rehabilitation."

In the paragraphs 11.21 to 11.25, therefore, the council explains the planning problem, states its planning purposes and the reasons for it, and indicates what will be its approach to applications for planning

A permission to redevelop the sites where there are presently carried on the industrial activities which in its judgment are so important to the life of central London. In paragraph 11.26 the council formulates its policy to meet the problem:

> "11.26 In order to ensure so far as possible, the continuation of those industrial uses considered important to the diverse character,
B vitality and functioning of Westminster, the city council has the following policies in addition to those set out above in para. 11.21: (i) Planning permission for major rehabilitation or the redevelopment of industrial premises containing industrial use will not normally be granted where it is considered that such development could be to the disadvantage of existing or potential industrial activities. In
C implementing this policy the city council will have regard to the need to seek improvement in the environment, and the impact on other occupiers of the premises."

Clearly the policy in 11.26 conflicts with the general policy in 11.21 for industrial development. Paragraph 11.12 takes care of the conflict by providing that the 11.26 policy to protect the specified existing industrial
D activities will normally be accorded precedence over the policy set out in 11.21.

The respondents challenge the 11.26 policy as being outside the powers conferred by Part II of the Act of 1971. The essence of the argument is that the 11.26 policy of protecting certain specified industrial activities is concerned not with the development and use of land but
E with the protection of particular users of land. The plan, it is submitted, has regard to an irrelevant factor, namely the interests of individual occupiers. The respondents seek to support this case by reference to the Landlord and Tenant Act 1954. One of the grounds on which a landlord may oppose a tenant's application for a new tenancy is that on termination of the current tenancy he intends to demolish or reconstruct the premises: section 30(1)(*f*). If there be a planning policy protecting
F the occupation of the tenant, its effect will be to deny the landlord the opportunity of invoking section 30(1)(*f*) in opposition to a tenant's application for a new tenancy since he will be unable to show that he will be likely to obtain planning permission for redevelopment.

My Lords, the principle of the law is now well settled. It was stated by Lord Parker C.J. in one sentence in *East Barnet Urban District*
G *Council v. British Transport Commission* [1962] 2 Q.B. 484. The issue in that case was whether the use of a parcel of land constituted development for which planning permission was required. The justices found that it did not and the Divisional Court, holding that the question of change of use was one of fact and degree, refused to intervene. In the course of his judgment, with which the other members of the court agreed, Lord Parker C.J. said, at p. 491, that when considering whether there has
H been a change of use "what is really to be considered is the character of the use of the land, not the particular purpose of a particular occupier." These words have rightly been recognised as extending beyond the issue of change of use: they are accepted as a statement of general principle

in the planning law. They apply to development plans as well as to planning control.

Development plans formulate policies and proposals for the development and other use of land: sections 7(3) and 11(3) of the Act of 1971. When adopted or approved they constitute an authoritative general guide to the approach which will be followed by local planning authorities when dealing with applications for planning permission. Plans are concerned with the use of land and more particularly with its "development," a term of art in the planning legislation which includes now, and has always included, the making of a material change in the use of land: section 22 of the Act of 1971.

It is a logical process to extend the ambit of Lord Parker C.J.'s statement so that it applies not only to the grant or refusal of planning permission and to the imposition of conditions but also to the formulation of planning policies and proposals. The test, therefore, of what is a material "consideration" in the preparation of plans or in the control of development (see section 29(1) of the Act of 1971 in respect of planning permission: section 11(9), and Schedule 4 paragraph 11(4) in respect of local plans), is whether it serves a planning purpose: see *Newbury District Council v. Secretary of State for the Environment* [1981] A.C. 578, 599 *per* Viscount Dilhorne. And a planning purpose is one which relates to the character of the use of land. Finally, this principle has now the authority of the House. It has been considered and, as I understand the position, accepted by your Lordships not only in this appeal but also in *Westminster City Council v. British Waterways Board* [1985] A.C. 676 in which argument was heard by your Lordships immediately following argument in this appeal.

However, like all generalisations Lord Parker C.J.'s statement has its own limitations. Personal circumstances of an occupier, personal hardship, the difficulties of businesses which are of value to the character of a community are not to be ignored in the administration of planning control. It would be inhuman pedantry to exclude from the control of our environment the human factor. The human factor is always present, of course, indirectly as the background to the consideration of the character of land use. It can, however, and sometimes should, be given direct effect as an exceptional or special circumstance. But such circumstances, when they arise, fall to be considered not as a general rule but as exceptions to a general rule to be met in special cases. If a planning authority is to give effect to them, a specific case has to be made and the planning authority must give reasons for accepting it. It follows that, though the existence of such cases may be mentioned in a plan, this will only be necessary where it is prudent to emphasise that, notwithstanding the general policy, exceptions cannot be wholly excluded from consideration in the administration of planning control.

Accordingly, I agree with Dillon L.J., who delivered the first judgment in the Court of Appeal that the respondents' challenge to the industrial policies of the plan is a question of the construction to be put upon paragraph 11.26 of the district plan. Of course, the paragraph cannot be considered in isolation from its context. One must look also at

A the other paragraphs to which I have referred. At first instance, Woolf J., adopting this approach, concluded that

> "the plan does not fall foul of the statement made by Lord Parker C.J. in *East Barnet Urban District Council v. British Transport Commission* [1962] 2 Q.B. 484, 491. It contains provisions designed to assist the position of a particular class of user of property which
B it is the policy of the City of Westminster, for planning reasons, to encourage to remain in the city."

And he went on to comment that the plan was formulated so as to afford room, nevertheless, for any specific proposal of industrial development to be considered on its merits. The Court of Appeal disagreed. In their view, as expressed by Dillon L.J., "the council's real
C concern is with the protection of existing occupiers."

I have no hesitation in accepting the view of Woolf J. A fair interpretation of this part of the plan is that the council was concerned to maintain, as far as possible, the continuation of those industrial uses "considered important to the diverse character, vitality and functioning of Westminster." Here was, in paragraph 11.26 of the plan, a genuine planning purpose. It could be promoted and perhaps secured by
D protecting from redevelopment the sites of certain classes of industrial use. Inevitably this would mean that certain existing occupiers would be protected: but this was not the planning purpose of the plan, though it would be one of its consequences. In my view, the council makes a strong planning case for its proposal: the "linkage" argument stated in paragraphs 11.23 and 11.24 is a powerful piece of positive thinking within a planning context.

E There remains the point on the Landlord and Tenant Act 1954. It is, in my judgment, based upon a misconception of the relationship between the planning legislation and private law. Rights to the use and development of land are now subject to the control imposed by the planning law. The rights of landlords, as of others interested in land, take effect subject to planning control.

F For these reasons, therefore, I think that the appellant council succeeds against the challenge to the industrial policies embodied in the plan.

The challenge to the "office policies"

The challenge is to paragraphs 10.21 to 10.23 of the plan. The plan
G divides the City of Westminster into two zones: the central activities zone which includes the West End and Whitehall and the rest of the city where in the council's view there is an overriding need that land use and development should be compatible with residential use. Paragraph 10.21 indicates that the policy of the plan is "to guide office development to locations within the central activities zone." I set out in full paragraphs 10.22 and 10.23 as being critical for the consideration of the respondents'
H challenge:

> "10.22 Outside the central activities zone office development will not normally be appropriate since the overriding need will be for the activities in residential areas to be wholly compatible with, and

to serve the needs of, those areas. The exceptional circumstances in which such office development may be permitted are best dealt with by non-statutory guidance for different locations in the city; these will be prepared after consultation following adoption of the plan.

"10.23 Bearing in mind the need in central London to guide new offices to areas where such development will be most advantageous and the protection of residential uses throughout the city, the city council's general policies on the location of offices are set out below. In implementing these policies the city council will not accept that proximity to significant facilities for passenger interchange is, in itself, a reason for granting permission for office use. (i) Office development may, in accordance with the Greater London Development Plan . . . be acceptable on individual sites within the central activities zone . . . (ii) Outside the central activities zone planning permission for office development will not be granted except in special circumstances."

This policy of prohibition of office development outside the central activities zone save in "exceptional" (paragraph 10.22) or "special" (paragraph 10.23) circumstances drew objections from many including the respondents who, as is well known, are substantial landowners in the City of Westminster. An independent public inquiry was held pursuant to sections 13 and 14 of the Act of 1971 to consider the objections. The inspector reported adversely to the plan's proposal in respect of office development outside the central activities zone. He reported that in his view the policy of "virtual proscription" of office development outside the zone was wrong. He noted that it did not conform with the Greater London structure plan. He argued that there must be occasions (his word) in the environment of a capital city when offices can be developed beyond the innermost core without harm to the structure of the city or the people who live there. He praised the council's proposals for protecting the central activities zone while allowing in it office and some industrial development and saw no reason why such protection should not be effective if extended to the rest of the city. He concluded that "offices should be an accepted use in the areas beyond the boundary of the central activities zone." His recommendation was:

"That consideration be given to modifying those parts of the plan concerned with office development beyond the boundaries of the central activities zone. This consideration should extend to the incorporation in the plan of policy statements indicating the opportunities for office development for central London activities to take place in areas outside the central activities zone."

In the Court of Appeal, Dillon L.J., who gave the leading judgment, summarised the objections of the inspector to the plan. They were two: (1) that the policy of virtual proscription of offices was wrong, particularly in the areas of Paddington and Marylebone stations; and (2) that a policy of office development outside the central activities zone should be incorporated in policy statements to be included in the plan and not left to guidance outside the plan.

A The council considered the inspector's report and recommendation. Its comment was brief and, as Dillon L.J. said, terse:

> "Not accepted. It is considered that the opportunities for office development to take place outside the central activities zone can be appropriately indicated in the non-statutory guidelines to be prepared in accordance with the plan, para. 10.22."

B The respondents submit that the council's comment upon the inspector's report is not an adequate statement of their reasons for rejecting the views expressed in the report or the recommendation, and so fails to comply with the requirement to give reasons imposed by regulation 17 of the Town and Country Planning (Local Plans for Greater London) Regulations 1974 which were made under Part II of C the Act of 1971. They further submit that by relying upon non-statutory guidelines to indicate what would constitute the exceptional or special circumstances in which it would permit office development outside the central activities zone the council failed to comply with the requirement of Schedule 4, paragraph 11 of the Act of 1971 that the plan must contain the council's proposals for the development and use of land.

D (i) *Failure to give reasons.* When a statute requires a public body to give reasons for a decision, the reasons given must be proper, adequate, and intelligible. In *In re Poyser and Mills' Arbitration* [1964] 2 Q.B. 467, Megaw J. had to consider section 12 of the Tribunals and Inquiries Act 1958 which imposes a duty upon a tribunal to which the Act applies or any minister who makes a decision after the holding of a statutory inquiry to give reasons for their decision, if requested. Megaw J. E commented, at p. 478:

> "Parliament provided that reasons shall be given, and in my view that must be read as meaning that proper, adequate reasons must be given. The reasons that are set out must be reasons which will not only be intelligible, but which deal with the substantial points that have been raised."

F He added that there must be something "substantially wrong or inadequate" in the reasons given. In *Edwin H. Bradley and Sons Ltd. v. Secretary of State for the Environment* (1982) 264 E.G. 926, 931 Glidewell J. added a rider to what Megaw J. had said: namely, that reasons can be briefly stated. I accept gladly the guidance given in these two cases. However, I also agree with Woolf J. that in this case the G council's reasoning in support of its view is made perfectly clear in paragraphs 10.21 to 10.23 of the plan and by its refusal to accept the inspector's report and recommendation. Accordingly, I reject this submission. This challenge to the plan, therefore, fails.

(ii) *The non-statutory guidelines.* Woolf J. rejected this challenge to the validity of the plan, holding that there was nothing in the Act which requires a local plan to elaborate what will be regarded as exceptional or H special circumstances: "the range" he said "of such circumstances can be regarded almost as never-ending."

The Court of Appeal took a different view. Dillon L.J. examined the non-statutory guidelines promulgated by the council and found that they

represented an endeavour to meet the point of principle expressed in the inspector's report that the policy of total proscription of office development outside the central activities zone was wrong and not in conformity with the Greater London structure plan. It is unnecessary for me to say more of the guidelines than that the council uses them to set out certain "non-statutory policies": paragraph 3.2 of the guidelines. In paragraphs 3.3 and 3.4 of the guidelines the council states what those policies are. In the view of the Court of Appeal the exclusion of those policies from the plan constituted a failure to comply with the requirements of Schedule 4, paragraph 11 of the Act of 1971.

My Lords, I find the point one of some difficulty. Development plans are no inflexible blueprint establishing a rigid pattern for future planning control. Though very important, they do not preclude a local planning authority in its administration of planning control from considering other material considerations: section 29(1) of the Act of 1971. Further, it is accepted that exceptional hardship to individuals or other special circumstances may be treated in some cases as a material consideration. A reference, therefore, to exceptional or special circumstances in a plan is not improper, though, strictly, it is never necessary. But what is the position if it can be shown, as in this case, that the reference to exceptional or special circumstances is a cover for policies excluded from the plan?

The statute requires that a local plan shall formulate in such detail as the council thinks appropriate their proposals for the development and use of land: section 11 and Schedule 4, paragraph 11(2) of the Act of 1971. If a local planning authority has proposals of policy for the development and use of land in its area which it chooses to exclude from the plan, it is, in my judgment, failing in its statutory duty. An attempt was made to suggest that the non-statutory guidance in this case went only to detail, as to which the council is given a discretion. But the council provides the answer to this point: it speaks in its guidelines of its non-statutory policies. In the Court of Appeal, Dillon L.J. demonstrated by his quotations from paragraphs 3.2, 3.3 and 3.4 of the non-statutory guidelines that they do indeed, as the council itself says, contain matters of policy relating to the control of office development outside the central activities zone.

It was the duty of the council under Schedule 4 of the Act of 1971 to formulate in the plan its development and land use proposals. It deliberately omitted some. There was therefore a failure on the part of the council to meet the requirement of the Schedule. By excluding from the plan its proposals in respect of office development outside the central activities zone the council deprived persons such as the respondents from raising objections and securing a public inquiry into such objections.

The council submits finally, that, if there was such a failure, the discretion of the court, which undoubtedly exists, to refuse an order to quash should be exercised in its favour. In the present case the discretion fell to be exercised by the Court of Appeal. The court made the order to quash because, in its view, it was wholly unreasonable and improper to put into extra-statutory guidelines matters which ought to have been

in the plan so that all interested persons might know what the policy of the council would be in granting permission for office development outside the central activities zone. I agree: but, even if I did not, I would not interfere: for this was a matter for the Court of Appeal, and I know of nothing which would justify the House in interfering with the exercise of their discretion in the present case.

In my judgment, therefore, the appeal is only partly successful. I would vary the order of the Court of Appeal so as to delete paragraphs 11.22 to 11.26 from the order quashing parts of the plan. The order to quash paragraphs 10.21 to 10.23 of the plan stands. I propose that there be no order for costs either in your Lordships' House or below.

LORD ROSKILL. My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Scarman. I agree with it and for the reasons he gives I, too, would vary the order of the Court of Appeal as he proposes. I would make no order for costs in your Lordships' House or in the courts below.

LORD BRIDGE OF HARWICH. My Lords, for the reasons given in the speech of my noble and learned friend Lord Scarman with which I agree, I would vary the order of the Court of Appeal as he proposes.

Appeal allowed in part.
Order of Court of Appeal varied.
No order as to costs.

Solicitors: Solicitor, Westminster City Council; Nabarro Nathanson.

C. T. B.

Seamab
Care Home Service

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Telephone: 01577 842 224

Type of inspection:
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Seamab

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Service no:
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About the service

Seamab is an independent charitable organisation, administered by the Board of Trustees of Seamab. The service provides care homes for a maximum of 15 children and young people, both male and female, aged five to 18 years, experiencing severe social, emotional and behavioural difficulties.

Referrals are made from across Scotland. Children and young people live in three bungalows, each with five single bedrooms, two bathrooms, two public rooms and separate staff facilities, set in private woodland five minutes drive away from Seamab School.

The bungalows are named:
- Whitewisp caring for a maximum of five children or young people
- Blairdenon caring for a maximum of five children or young people
- Dumyat caring for a maximum of five children or young people

Children who are accommodated in the homes attend or have attended Seamab School. On admission to the homes children are no older than 13 years of age.

What people told us

During the inspection we met with and talked to a number of children. Comments included:

"I can ski really well now, I learned from (staff member) and we taught (another staff member)"

"I love being outside, its great fun"

"I've only been here a short time but I really like it"

"It's fun having other kids to play with"

"I get time on my x box and I like going to the library, I also like swimming and go quite often"

"It's rubbish here! I wish I was back at my last place, I got to do more there. Don't like the food. When I want something after supper I'm not allowed and I am hungry"

"I brought some toys from home and got some from here"

"I like living here, I go to Brownies, did you go to brownies?"

"Have you seen the chickens and ducks. Sometimes there are deer and they come really close"

"I love my room, it's really cool and I have two x boxes"

"Terrible food"(said in a humorous way)

"Staff boring - particularly the manager" (but gave him a nickname and lots of good natured banter observed)

"The kids decide what we are eating".

"I didn't pick [the decoration] in my room but I do like it".

How well do we support children and young people's wellbeing? 5 - Very Good

We made an evaluation of overall very good for this key question as the performance demonstrates major strengths. There are few areas for improvement and those that do exist have minimal adverse impact on peoples experiences and outcomes. We evaluated some aspects of this key question as excellent where there was demonstrable track record of innovative practice and high quality performance across a wide range of activities from which others can learn.

The ethos and value base within Seamab focussed on relationships and love for the children they care for.

Children experienced very high quality relationships with the adults who cared for them with patience and fondness. Children were fully engaged in exciting and fun play opportunities, with staff playing alongside them and fully extending their play experiences. The staff demonstrated true regard for the children with lots of displays of affection, genuine praise and warmth. Children received extensive nurturing care from across the whole staff team where every member of staff knew the children from the neighbouring houses and knew how to make them feel valued.

Each child was treated as a respected individual by staff who were fully aware of their needs, plans and goals. Children were encouraged to achieve and extend their horizons whilst taking measured risks. Particular attention was paid to individual routines and recognition of each child's individual processing of their world and what that meant for them. This included particular attention to sensory sensitivity where staff fully understood how to help create environments specific to individual children.

We witnessed a sense of comfort and relaxation in all of the houses and a feeling that the staff had confidence in their approach to the children. All interactions were framed positively with emphasis on forming meaningful connections with the children.

There was a real sense of ambition for each of the children and motivation to ensure children achieved their potential. Staff were keen to know how children were doing after they had moved on showing true interest in the children who had left Seamab. Some staff had made further commitment to keeping in touch with children who had left and said this would be a lifetime commitment for as long as the child wanted it.

We heard about the commitment towards reduction of physical intervention. Staff were using strategies such as diversion, distraction, gentle and compassionate responses with safe holds as a last resort. We could see from analysis that there had been a reduction in safe holds or a lessening of the level of holds.

In the houses documents in the office provided reminders to staff about the principals of Seamab, using language that cares, being playful practitioners, new conversations around the dinner table being a therapeutic space and enjoying meals together. We saw that staff practiced these principals throughout their time with the children.

A working group had been established to promote the The Promise and whilst this was in the early stages we saw that Seamab had made some progress in working closely with parents and reduction in physical interventions. They had sought the views of children with regard to safe holds and had made changes

accordingly. Further focus groups with the children and their carers were planned in order to seek their views and carry forward the commitment of The Promise.

All admissions to Seamab are planned, which allowed all children to be prepared for new arrivals and the child being admitted having the added security of having met staff and other children and having visited the house they would be staying in. Children, parents and carers were fully involved in the admissions process.

Children had regular access to independent advocacy through a Who Cares worker. A number of children had successfully used the services of the Who Cares worker to present their views to care reviews and children's Hearings. The Who Cares worker also attended the Pupil Council Meetings and reflected the views of the children to Seamab staff.

We saw evidence of children making choices about the activities they were involved in. Staff were very open to children's suggestions and actively sought opportunities for them to extend their horizons. Activities such as horse riding, football, skiing, swimming, library, skatepark, trampolining and a variety of clubs such as Brownies and Beavers helped the children to feel part of the community and form new friendships whilst learning new skills. For some of the children this was significant progress and indicated substantial increase in confidence and self esteem. When children were reluctant to participate staff were alongside them providing support and encouragement. An example of this being a child who had been in a school play where everyone from his bungalow went to see him perform. Children were also well supported to continue with religious and cultural activities such as attending church.

All of the children led active and fulfilling lives and were having really good fun.

Staff and children fully embraced the therapeutic nature of outdoor play experiences. A member of staff said "Outdoor learning and experiences are important to the children here and help to ease the tension of the day". The major emphasis on outdoor play and environmental opportunities helped the children to explore their environment and take appropriate risks and enjoy challenges outdoors. They were actively encouraged to take part in activities such as den building, bikes (single and double), large playgrounds, trampoline, hide and seek, walking and camping.

Children also enjoyed time away from Seamab. Seamab had recently acquired a caravan at a coastal resort which had provided children with memorable holidays. In addition funds were made available for holidays chosen and planned by the children. Examples of this being one group of group of children holidaying in a lodge in Perthshire and another group going on a speed boat on Loch Lomond.

All of the houses had spaces which focused on sensory experiences and relaxation opportunities for children. A few of the children had learned to knit and had produced their own soft toys. Staff were fully encouraged to use their personal skills in this way to improve the lives of the children and give them a sense of achievement.

All of the children had a place at Seamab school and they were achieving high attendance. The school and care worked closely together to ensure consistency in approach and helping children reach potential.

Seamab had recognised that some children needed the security of continued care beyond primary age. To this end they were in the process of establishing a service to support these children through into adulthood.

The service had a very good system in place to respond to and record protection concerns. We made some suggestions of how this could be further improved, however we were very satisfied that child protection matters had been fully and appropriately managed.

The service had recently been involved in research alongside Stirling University looking at trauma responsive care within Seamab. It focused on good care and genuine relationships. The research provided a very positive view of practice at Seamab.

Seamab have consistently based their ethos on Dyadic Developmental Practice (DDP) They have in past years had significant training and support of a recognised DDP practitioner. They had made the recent decision to extend this support for children by introducing an integrating therapy team of Educational Psychologist, Play Therapist, Speech and Language Therapist and Theraplay specialist. The vision is for this team to fully develop individual assessment of needs and identify key areas for support, not only in therapy sessions but across the whole of Seamab.

All of the children had access to full medical services including mental health support.
Medication was in the main stored and administered effectively. We provided some advice on how to further improve this.

The environment was used effectively to support children's health and well being. All of the houses had a focus on wellbeing, using things such as bean bags instead of formal chairs, vibrating cushions and weighted blankets to help children feel secure and paying particular attention to lighting appropriate to individual needs. There was a firm commitment to continuing development of the sensory environment.

The children enjoyed positive food experiences, good nutrition and learned about healthy eating. Menu planners displayed on a notice board in the dining room with pictures and attractive writing provided evidence of healthy meals. The children told us about the meals that staff prepared and who was the best cook. They told us that they choose the menus. One young person said that he would like more to eat after supper time. We discussed this with the manager at feedback and he committed to looking at this.

Established rhythms and routines of the day included tables all set ready for children to arrive. Staff recognised the importance of mealtimes being a social time where children and adults could have meaningful conversations and enjoy their meals. Meal times and bed time settling provided predictable routines for the children helping them to feel safe and calm.

How good is our leadership? 5 - Very Good

We found significant strengths in aspects of leadership and how quality assurance supported positive outcomes for children and young people, therefore we evaluated this key question as very good.

The board of Trustees compromised of a good mixture of expertise over care, education and commerce. They met regularly to consider the governance of Seamab with a focus on improvement. They had worked hard to progress the development of Seamab, planning the build of a new school and development of a continued care service to provide continuity to children as they grow into adulthood. They had made changes to the processes between financing and resourcing to enable opportunities for the children, such as holidays throughout the year and providing each of the bungalows with a house budget.

The board had oversight of items such as child protection, incidents, physical intervention and education through a number of committees. The CEO, Head of care and head of education reported regularly to the board and sought their advice and expertise when necessary.

The board members kept up to date with best practice, participating in annual child protection training and

training in DDP. They had also experienced a session with Theraplay and a session on changes to practice to reduce physical restraint. Prior to the pandemic board members visited the bungalows regularly in order to get direct views from children and staff and to observe the care of the children. Over the past two years the board had been unable to carry out visits. They recognised this as a gap and were making plans to start visits again as soon as possible. However, in the past year trusteed had attended a presentation of the history of Seamab led by the children which provided them with some opportunities to meet with children.

Both the CEO and Head of Care had a high profile around the care campus. Children know them well and they were described by them as fun and by the staff as very approachable.

Very good quality assurance systems were in place across the organisation. The management team led quality assurance through a number of meetings such as Senior leadership meetings, Operational Management meetings, Children and Young Peoples Committee meeting and Health and Safety meeting. From there individuals held a list of tasks and responsibilities for quality assurance activities, overseen by the CEO and Head of Care. This ensured that the senior team had a clear understanding of what they were doing well and areas for improvement. A clear plan for improvement was in place.

Team meetings both within each house and as a whole staff group ensured effective communication. The recent promotion of a secure WatsApp page used by senior staff also aided staff communications. Team meetings minutes provided good evidence of identified issues and tensions and commitment to problem solving. In addition representative from HR and the therapy team visited the care camp at least once a week and were available for consultation to all staff in order to support them in their work with the children.

We saw outcomes which had improved children's lives such as decrease in physical restraint. Children had been fully consulted in relation to restraint and how it felt for them, resulting in the actions taken to reduce. The service had also improved recording of restraint resulting in better data analysis and therefor better understanding of incidents of restraint.

Any complaints were taken seriously, investigated thoroughly and responded to appropriately.

We saw evidence of high quality staff supervision and which identified individual support, developmental needs, and case work responsibilities. All staff including sessional staff received one to one supervision.

In the main the service provided appropriate notification information to the Care Inspectorate. At the time of the inspection they were familiarising with new notification guidance.

How good is our staff team? 5 - Very Good

We evaluated this key question as very good as we observed major strengths in the staff team which supported positive outcomes for children and young people.

At the time of inspection, Seamab was fully staffed including one extra post. We heard how the organisation took a decision to 'over staff' the team to minimise the impact of staff absences during the Covid 19 pandemic. The result of this, meant that the rota was covered by core staff which allowed consistency in relationships for the children. There was a large pool of sessional staff which meant that no agency cover had been required. During time of high staff absences, core and senior staff covered the gaps with additional shifts to keep the consistency for the children. This evidenced the staff commitment to the children they cared for and would contribute to children feeling safe.

We saw evidence of regular assessment on staffing levels as well as daily discussion on how individual staff skills could be best suited to support different houses or individual children. We saw examples of this within the staff team, but also in the leadership team with a member of management moving house to manage challenging dynamics and set group values. The flexibility shown by individual workers, a strong sense of team and strong ethos was evidenced during our inspection and would be contributing to children feeling prioritised by those that care for them.

Staff told us they felt supported by their colleagues. They were encouraged to make their own choices and received regular feedback on approaches which encouraged growth and confidence. Where issues were identified within individual practice, a plan was developed of additional supports, for example, intensive debriefs following physical interventions and encouraging reflective thinking to move away from black and white thinking.

We heard from a number of sources, there had been a change in dynamic and ethos in recent years. The involvement of Dyadic Developmental Practice (DDP) within the service brought a change of focus for many staff. The staff appear to fully embrace trauma informed practice which was evidenced in the interactions between the children and adults during the inspection.
There was a team of therapists available to the children and also available to offer support to staff when required. We heard how the team were regular faces around the houses to allow relationships to build and to gain the children's trust which will support positive interactions and engagement. During our inspection we observed natural interaction between the therapy team and the children, as well as some focused areas of work.

We heard that the care, education and therapy staff all worked together as a cohesive group. We observed positive interactions between staff members and good communication using the diaries, handover discussions and regular meetings. Staff told us they felt included in discussions and communication was clear.

Training had been online due to Covid 19 restrictions. Staff told us that they did not enjoy the virtual learning as much as face to face training and they were happy that this had begun again. We heard it had been a challenge to deliver safe hold training due to the ongoing restrictions however half of the staff team were up to date with this training on the point of inspection. Although there was a focus on reducing the use physical intervention, the full staff team need to be trained so they are available to support the children safely if interventions are required. We heard that following the inspection, dates were secured for the remaining staff team to receive this training. Most of the staff had completed some form of child protection training and other essential training sessions.

During the inspection, we could see that a spreadsheet for documenting staff training was being developed and this should be regularly updated to assess training needs across the team.

We viewed staff files and observed a good recruitment policy and safe recruitment processes were followed. Some of the staff files were electronic and some paper copies which meant that information for one staff member was across the two systems. In one file, it was noted that verbal discussions would take place with referees but these were not recorded in the file viewed.

We heard about the monthly 'star worker' which was voted by the rest of the team. There was a sense that staff felt valued, which contributed to a positive working environment and retention of staff. This subsequently would contribute to positive outcomes for the children.

How good is our setting? 6 - Excellent

We found the setting at Seamab supported the experiences and outcomes for children. The service promoted innovative and effective practice to promote connection, therefore we have evaluated this key question as excellent.

We visited each of the three houses and found them to be warm and comfortable. Each house had a very individual feel and there was evidence that the children were wholly involved in planning how the houses should look. We saw personal items and attractive photos within the main areas of the houses. This fully promoted a sense of belonging for the children and encouraged them to consider the house their home. A number of children showed us their bedrooms which were attractive, decorated to individual taste and to a very high standard. We heard how the kitchens were being upgraded in the houses and saw that these were well equipped and of high quality. Health and safety processes were diligently followed and regular checks completed.

The grounds were very well maintained with a number of play areas including climbing frames, trampolines and half pipe available for the children to use. This allowed the children to safely explore the outdoors. The extensive wooded area was well used with the construction of a den which was designed and built by the children along with trained staff. A nurture cabin within the grounds was used specifically to involve children with therapeutic work which allowed them to have a safe space within the grounds to engage in this sensitive work away from other children and interruptions.

We heard how staff were trained in areas of outdoor activities such as kayaking which they used to support the children to connect with nature and the outdoors with adults they trusted. All the children had bikes and we heard that the children and staff would cycle together to explore the surrounding area.

The children were encouraged to attend local groups and clubs. We heard of a variety of activities that the children participate in which encourages engagement and connection to the local area, for example, football and dancing. One child told us they went skiing with two members of staff and felt proud that they had taught one of the staff members how to ski.

We heard that care plans around family time were individualised and family connections were supported by staff where possible and safe to do so. At the time of inspection, the children all had different levels of family time. Some of the children went home to their families at the weekends or for one child during the week while others were supported in shorter family time periods. We saw a flexible approach from the service to ensure that the children's needs and wishes were supported and an understanding from staff that family time was very complex for some of the children.

We heard of one situation where the close family member was not engaging with the social worker and therefore arranging family time was not possible for the child. However the staff at Seamab had been able to manage this communication to ensure that the family time occurred positively for the child.

How well is our care and support planned? 5 - Very Good

We evaluated this key question as very good as we found significant strengths in the development of care plans and how they supported positive outcomes for children and young people.

A sample of care plans were viewed during the inspection. Most of the care plans were up to date and staff were fully aware of the plans and their implementation.

The language within the care plans was positive and caring, for example the use of positive framing of attention needing instead of attention seeking, and another where the desired outcome for the child was to be happy. Some of the plans were written from the child's perspective and children were fully involved through use of 'the outcome star' which was used to measure progress and set goals.

Whilst most of the care plans were of a high standard we found that one care plan did not appear to reflect the specific journey for the child as there was no reference to his transition to another care experience and how this would be managed. In addition, we found some of the outcome measures were non-specific and generic, for example, "I will have an understanding of Seamab and why I live here". We found there was not a date for review on all care plans and a lack of specific strategies in some to achieve the outcomes. For example, the care plan details what the outcome is and how we will know it has been achieved but not how it will be achieved. We could see that the care plans were linked to SHANARRI however these were not focused to specific indicators.

We then looked at daily observations for children and found that they expanded on the care plans providing missing information and strategies. The format of the daily observations provided a daily pen picture of the world of the child and also reflected the goals within the care plans. They were clear and detailed identifying progress or change to strategy. They provided attractive photographs of the children, magic moments and making memories. The observations are written to the child using positive language. They identified strategies to help children identify their feelings and how staff could help them manage difficult situations. They also evidenced effective working between care and education. The daily records demonstrate fun and 24 hour learning opportunities. We saw evidence within the daily observations where staff had worked closely with other professionals to find strategies to improve the lives of the children. For example, working with the occupational therapist to find approaches regarding skin desensitisation and alternative clothing to support this. The daily observations cross referenced with other documents such as incidents, accidents and child protection providing a full picture of the journey of the child.

We looked at a sample of risk assessments for children. These had all been recently updated. We found the risk assessments were clear to follow, with identified risks and protective factors. The colour coding made the risk level clear and the identified triggers were considered and evidenced the good level of understanding that the staff had for each child.

Within the risk assessments there was a strong focus on trauma informed practice, for example, positive redirection, de-escalation, positive framing, empathy and compassionate responses. We saw evidence of involvement from professional for example, CAMHS and enuresis nurse. We saw evidence of therapeutic involvement being taken forward by core staff with references to "volcano in my tummy" book or the "big bag of worries" book. Risk assessments evidenced the staff's high understanding of the children and their level of needs.

The service had made progress in carrying out individual risk assessments and permissions for the children with the internet use. These were changed according to individual risk in order to keep children safe.

Complaints

There have been no complaints upheld since the last inspection. Details of any older upheld complaints are published at www.careinspectorate.com.

Detailed evaluations

How well do we support children and young people's wellbeing?	5 - Very Good
1.1 Children and young people experience compassion, dignity and respect	6 - Excellent
1.2 Children and young people get the most out of life	6 - Excellent
1.3 Children and young people's health benefits from their care and support they experience	5 - Very Good

How good is our leadership?	5 - Very Good
2.2 Quality assurance and improvement are led well	5 - Very Good

How good is our staff team?	5 - Very Good
3.3 Staffing levels are right and meet children and young people's needs, with staff working well together	5 - Very Good

How good is our setting?	6 - Excellent
4.3 Children and young people can be connected with and involved in the wider community	6 - Excellent

How well is our care planned?	5 - Very Good
5.1 Assessment and care planning reflects children and young people's needs and wishes	5 - Very Good

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ਬੇਨਤੀ 'ਤੇ ਇਹ ਪ੍ਰਕਾਸ਼ਨ ਹੋਰ ਰੂਪਾਂ ਅਤੇ ਹੋਰਨਾਂ ਭਾਸ਼ਾਵਾਂ ਵਿਚ ਉਪਲਬਧ ਹੈ।

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Guidance

Disability: Equality Act 2010 - Guidance on matters to be taken into account in determining questions relating to the definition of disability (HTML)

Updated 8 March 2013

Contents

This publication is available at https://www.gov.uk/government/publications/equality-act-guidance/disability-equality-act-2010-guidance-on-matters-to-be-taken-into-account-in-determining-questions-relating-to-the-definition-of-disability-html

This guidance was first published in May 2011 in PDF format by the Office for Disability Issues (now the Disability Unit).

This HTML version was published in February 2022 to provide the content in a more accessible format. The content has not been changed or updated from the original publication.

Status and purpose of the guidance

This guidance is issued by the Secretary of State under section 6(5) of the Equality Act 2010. In this document, any reference to 'the Act' means the Equality Act 2010.

This guidance concerns the definition of disability in the Act. Section 6(5) of the Act enables a Minister of the Crown to issue guidance about matters to be taken into account in determining whether a person is a disabled person. The guidance gives illustrative examples.

This guidance does not impose any legal obligations in itself, nor is it an authoritative statement of the law.

However, Schedule 1, Paragraph 12 to the Act requires that an adjudicating body which is determining for any purpose of the Act whether a person is a disabled person, must take into account any aspect of this guidance which appears to it to be relevant.

> Schedule 1, Para 12 defines an 'adjudicating body' as a court, tribunal, or a person (other than a court or tribunal) who may decide a claim relating to a contravention of Part 6 (education).

This guidance applies to England, Wales and Scotland. Similar, but separate, guidance applies to Northern Ireland.

Introduction

The Equality Act 2010

The Equality Act 2010 prohibits discrimination against people with the protected characteristics that are specified in section 4 of the Act. Disability is one of the specified protected characteristics. Protection from discrimination for disabled people applies to disabled people in a range of circumstances, covering the provision of goods, facilities and services, the exercise of public functions, premises, work, education, and associations. Only those disabled people who are defined as disabled in accordance with section 6 of the Act, and the associated Schedules and regulations made under that section, will be entitled to the protection that the Act provides to disabled people. However, the Act also provides protection for non-disabled people who are subjected to direct discrimination or harassment because of their association with a disabled person or because they are wrongly perceived to be disabled.

Using the guidance

This guidance is primarily designed for adjudicating bodies which determine cases brought under the Act. The definition of disability for the purposes of the Act is a legal definition and it is only adjudicating bodies which can determine whether a person meets that definition. However, the guidance is also likely to be of value to a range of people and organisations as an explanation of how the definition operates.

In the vast majority of cases there is unlikely to be any doubt whether or not a person has or has had a disability, but this guidance should prove helpful in cases where the matter is not entirely clear.

The Act generally defines a disabled person as a person with a disability. A person has a disability for the purposes of the Act if he or she has a physical or mental impairment and the impairment has a substantial and long-term adverse effect on his or her ability to carry out normal day-to-day activities. Therefore, the general definition of disability has a number of elements. The Guidance covers each of these elements in turn. Each section contains an explanation of the relevant provisions of the Act which supplement the basic definition. Guidance and illustrative examples are provided where relevant. **Those using this Guidance for the first time should read it all, as each part of the Guidance builds upon the part(s) preceding it.** It is important not to consider any individual element in isolation.

Throughout the guidance, descriptions of statutory provisions in the legislation are immediately preceded by bold text and followed by a reference to the relevant provision of the Act or to regulations made under the Act. References to sections of the Act are marked **'S'**; references to schedules are marked **'Sch'**; and references to paragraphs in schedules are marked **'Para'**.

Other references to 'disability'

The definition of disability set out in the Act and described in this guidance is the only definition relevant to determining whether someone is a disabled person for the purposes of the Act. References to 'disability' or to mental or physical impairments in the context of other legislation are not necessarily relevant but may assist adjudicating bodies when determining whether someone is a disabled person in accordance with the definition in this Act.

There is a range of services, concessions, schemes and financial benefits for which disabled people may qualify. These include, for example: local authority services for disabled people; the Blue Badge parking scheme; tax concessions for people who are blind; and disability-related social security benefits. However, each of these has its own individual eligibility criteria and qualification for any one of them does not automatically confer entitlement to protection under the Act, nor does entitlement to the protection of the Act confer eligibility for benefits, or concessions. Similarly, a child who has been identified as having special educational needs is not necessarily disabled for the purposes of the Act. However, having eligibility for such benefits may assist a person to demonstrate that they meet the definition in the Act.

In order to be protected by the Act, a person must have an impairment that meets the Act's definition of disability, or be able to establish that any less favourable treatment or harassment is because of another person's disability or because of a perceived disability.

Section A: The Definition

Main elements of the definition of disability

A1. **The Act defines** a disabled person as a person with a disability. A person has a disability for the purposes of the Act if he or she has a physical or mental impairment and the impairment has a substantial and long-term adverse effect on his or her ability to carry out normal day-to-day activities (**S6(1)**).

A2. This means that, in general:

- the person must have an impairment that is either physical or mental (**see paragraphs A3 to A8**)
- the impairment must have adverse effects which are substantial (**see Section B**)
- the substantial adverse effects must be long-term (**see Section C**)
- the long-term substantial adverse effects must be effects on normal day-to-day activities (**see Section D**)

This definition is subject to the provisions in **Schedule 1 (Sch1)**.

All of the factors above must be considered when determining whether a person is disabled.

Meaning of ‘impairment’

A3. The definition requires that the effects which a person may experience must arise from a physical or mental impairment. The term mental or physical impairment should be given its ordinary meaning. It is not necessary for the cause of the impairment to be established, nor does the impairment have to be the result of an illness. In many cases, there will be no dispute whether a person has an impairment. Any disagreement is more likely to be about whether the effects of the impairment are sufficient to fall within the definition and in particular whether they are long-term. Even so, it may sometimes be necessary to decide whether a person has an impairment so as to be able to deal with the issues about its effects.

A4. Whether a person is disabled for the purposes of the Act is generally determined by reference to the **effect** that an impairment has on that person’s ability to carry out normal day-to-day activities. An exception to this is a person with severe disfigurement (**see paragraph B24**). It is not possible to provide an exhaustive list of conditions that qualify as impairments for the purposes of the Act. Any attempt to do so would inevitably become out of date as medical knowledge advanced.

A5. A disability can arise from a wide range of impairments which can be:

- sensory impairments, such as those affecting sight or hearing
- impairments with fluctuating or recurring effects such as rheumatoid arthritis, myalgic encephalitis (ME), chronic fatigue syndrome (CFS), fibromyalgia, depression and epilepsy
- progressive, such as motor neurone disease, muscular dystrophy, and forms of dementia
- auto-immune conditions such as systemic lupus erythematosis (SLE)
- organ specific, including respiratory conditions, such as asthma, and cardiovascular diseases, including thrombosis, stroke and heart disease
- developmental, such as autistic spectrum disorders (ASD), dyslexia and dyspraxia
- learning disabilities
- mental health conditions with symptoms such as anxiety, low mood, panic attacks, phobias, or unshared perceptions; eating disorders; bipolar affective disorders; obsessive compulsive disorders; personality disorders; post traumatic stress disorder, and some self-harming behaviour
- mental illnesses, such as depression and schizophrenia
- produced by injury to the body, including to the brain

A6. **It may not always be possible, nor is it necessary, to categorise a condition as either a physical or a mental impairment.** The underlying cause of the impairment may be hard to establish. There may be adverse effects which are both physical and mental in nature. Furthermore, effects of a mainly physical nature may stem from an underlying mental impairment, and vice versa.

A7. **It is not necessary to consider how an impairment is caused, even if the cause is a consequence of a condition which is excluded.** For example, liver disease as a result of alcohol dependency would count as an impairment, although an addiction to alcohol itself is expressly excluded from the scope of the definition of disability in the Act. What it is important to consider is the effect of an impairment, not its cause – provided that it is not an excluded condition. (**See also paragraph A12 (exclusions from the definition).**)

> A woman is obese. Her obesity in itself is not an impairment, but it causes breathing and mobility difficulties which substantially adversely affect her ability to walk.
>
> A man has a borderline moderate learning disability which has an adverse impact on his short-term memory and his levels of literacy and numeracy. For example, he cannot write any original material, as opposed to slowly copying existing text, and he cannot write his address from memory.
>
> It is the effects of these impairments that need to be considered, rather than the underlying conditions themselves.

A8. It is important to remember that not all impairments are readily identifiable. While some impairments, particularly visible ones, are easy to identify, there are many which are not so immediately obvious, for example some mental health conditions and learning disabilities.

Persons with HIV infection, cancer and multiple sclerosis

A9. **The Act states** that a person who has cancer, HIV infection or multiple sclerosis (MS) is a disabled person. This means that the person is protected by the Act effectively from the point of diagnosis. (**Sch1, Para 6**). (**See also paragraphs B18 to23 (progressive conditions).**)

Persons deemed to be disabled

A10. The Act provides for certain people to be deemed to meet the definition of disability without having to show that they have an impairment that has (or is likely to have) a substantial and long-term adverse effect on the ability to carry out normal day-to-day activities. Regulations provide for a person who is certified as blind, severely sight impaired, sight impaired or partially sighted by a consultant ophthalmologist to be deemed to have a disability.[footnote 1] (**Sch1, Para 7**)

A11. Anyone who has an impairment which is not covered by paragraphs A9 and A10 will need to meet the requirements of the definition as set out in paragraph A1 in order to demonstrate that he or she has a disability under the Act. (**But see paragraphs A16 to A17 for details of some people who are treated as having had a past disability.**)

Exclusions from the definition

A12. Certain conditions are not to be regarded as impairments for the purposes of the Act.[footnote 2] These are:

- addiction to, or dependency on, alcohol, nicotine, or any other substance (other than in consequence of the substance being medically prescribed)
- the condition known as seasonal allergic rhinitis (for example, hayfever), except where it aggravates the effect of another condition
- tendency to set fires
- tendency to steal
- tendency to physical or sexual abuse of other persons
- exhibitionism
- voyeurism

A13. The exclusions apply where the tendency to set fires, tendency to steal, tendency to physical or sexual abuse of other persons, exhibitionism, or voyeurism constitute an impairment in themselves. The exclusions also apply where these tendencies arise as a consequence of, or a manifestation of, an impairment that constitutes a disability for the purposes of the Act. It is important to determine the basis for the alleged discrimination. If the alleged discrimination was a result of an excluded condition, the exclusion will apply. However, if the alleged discrimination was specifically related to the actual disability which gave rise to the excluded condition, the exclusion **will not** apply. Whether the exclusion applies will depend on all the facts of the individual case.

> A young man has Attention Deficit Hyperactivity Disorder (ADHD) which manifests itself in a number of ways, including exhibitionism and an inability to concentrate. The disorder, as an impairment which has a substantial and long-term adverse effect on the young person's ability to carry out normal day-to-day activities, would be a disability for the purposes of the Act.
>
> The young man is not entitled to the protection of the Act in relation to any discrimination he experiences as a consequence of his exhibitionism, because that is an excluded condition under the Act.
>
> However, he would be protected in relation to any discrimination that he experiences in relation to the non-excluded effects of his condition, such as inability to concentrate. For example, he would be entitled to any reasonable adjustments that are required as a consequence of those effects.

A14. A person with an excluded condition may nevertheless be protected as a disabled person if he or she has an accompanying impairment which meets the requirements of the definition. For example, a person who is addicted to a substance such as alcohol may also have depression, or a physical impairment such as liver damage, arising from the alcohol addiction. While this person would not meet the definition simply on the basis of having an addiction, he or she may still meet the definition as a result of the effects of the depression or the liver damage.

A15. Disfigurements which consist of a tattoo (which has not been removed), non-medical body-piercing, or something attached through such piercing, are to be treated as not having a substantial adverse effect on the person's ability to carry out normal day-to-day activities.[footnote 3] (**See also paragraphs B24 to B26.**)

People who have had a disability in the past

A16. **The Act says** that, except for the provisions in Part 12 (Transport[footnote 4]) and section 190 (improvements to let dwelling houses), the provisions of the Act also apply in relation to a person who previously has had a disability as defined in paragraphs **A1 and A2 (S6(4) and Sch1, Para 9**). This means that someone who is no longer disabled, but who met the requirements of the definition in the past, will still be covered by the Act. Also protected would be someone who continues to experience debilitating effects as a result of treatment for a past disability.

> Four years ago, a woman experienced a mental illness that had a substantial and long-term adverse effect on her ability to carry out normal day-to-day activities, so it met the Act's definition of disability. She has experienced no recurrence of the condition, but if she is discriminated against because of her past mental illness she is still entitled to the protection afforded by the Act, as a person with a past disability.

A17. A particular instance of someone who is treated under the Act as having had a disability in the past is someone whose name was on the register of disabled persons under provisions in the Disabled Persons (Employment) Act 1944[footnote 5] on both 12 January 1995 and 2 December 1996. The Disability Discrimination Act 1995 provided for such people to be treated as having had a disability in the past, and those provisions have been saved so that they still apply for the purposes of the Equality Act 2010.

Section B: Substantial

> This section should not be read in isolation but must be considered together with sections A, C and D. Whether a person satisfies the definition of a disabled person for the purposes of the Act will depend upon the full circumstances of the case. That is, whether the adverse effect of the person's impairment on the carrying out of normal day-to- day activities is substantial and long term.

Meaning of 'substantial adverse effect'

B1. The requirement that an adverse effect on normal day-to- day activities should be a substantial one reflects the general understanding of disability as a limitation going beyond the normal differences in ability which may exist among people. A substantial effect is one that is more than a minor or trivial effect. This is stated in the **Act at S212(1)**. This section looks in more detail at what 'substantial' means. **It should be read in conjunction with Section D which considers what is meant by 'normal day-to-day activities'.**

The time taken to carry out an activity

B2. The time taken by a person with an impairment to carry out a normal day-to-day activity should be considered when assessing whether the effect of that impairment is substantial. It should be compared with the time it might take a person who did not have the impairment to complete an activity.

> A ten-year-old child has cerebral palsy. The effects include muscle stiffness, poor balance and unco-ordinated movements. The child is still able to do most things for himself, but he gets tired very easily and it is harder for him to accomplish tasks like eating and drinking, washing, and getting dressed. He has the ability to carry out everyday activities such as these, but everything takes much longer compared to a child of a similar age who does not have cerebral palsy. This amounts to a substantial adverse effect.

The way in which an activity is carried out

B3. Another factor to be considered when assessing whether the effect of an impairment is substantial is the way in which a person with that impairment carries out a normal day-to-day activity. The comparison should be with the way that the person might be expected to carry out the activity compared with someone who does not have the impairment.

A person who has obsessive compulsive disorder (OCD) constantly checks and rechecks that electrical appliances are switched off and that the doors are locked when leaving home. A person without the disorder would not normally carry out these frequent checks. The need to constantly check and recheck has a substantial adverse effect.

Cumulative effects of an impairment

B4. An impairment might not have a substantial adverse effect on a person's ability to undertake a particular day-to-day activity in isolation. However, it is important to consider whether its effects on more than one activity, when taken together, could result in an overall substantial adverse effect.

B5. For example, a person whose impairment causes breathing difficulties may, as a result, experience minor effects on the ability to carry out a number of activities such as getting washed and dressed, going for a walk or travelling on public transport. But taken together, the cumulative result would amount to a substantial adverse effect on his or her ability to carry out these normal day-to-day activities.

A man with depression experiences a range of symptoms that include a loss of energy and motivation that makes even the simplest of tasks or decisions seem quite difficult. He finds it difficult to get up in the morning, get washed and dressed, and prepare breakfast. He is forgetful and cannot plan ahead. As a result he has often run out of food before he thinks of going shopping again. Household tasks are frequently left undone, or take much longer to complete than normal. Together, the effects amount to the impairment having a substantial adverse effect on carrying out normal day-to-day activities.

B6. A person may have more than one impairment, any one of which alone would not have a substantial effect. In such a case, account should be taken of whether the impairments together have a substantial effect overall on the person's ability to carry out normal day-to-day activities. For example, a minor impairment which affects physical co-ordination and an irreversible but minor injury to a leg which affects mobility, when taken together, might have a substantial effect on the person's ability to carry out certain normal day-to-day activities. The cumulative effect of more than one impairment should also be taken into account when determining whether the effect is long-term, **see Section C**.

A person has mild learning disability. This means that his assimilation of information is slightly slower than that of somebody without the impairment. He also has a mild speech impairment that slightly affects his ability to form certain words. Neither impairment on its own has a substantial adverse effect, but the effects of the impairments taken together have a substantial adverse effect on his ability to converse.

Effects of behaviour

B7. Account should be taken of how far a person can **reasonably** be expected to modify his or her behaviour, for example by use of a coping or avoidance strategy, to prevent or reduce the effects of an impairment on normal day-to-day activities. In some instances, a coping or avoidance strategy might alter the effects of the impairment to the extent that they are no longer substantial and the person would no longer meet the definition of disability. In other instances, even with the coping or avoidance strategy, there is still an adverse effect on the carrying out of normal day-to-day activities.

For example, a person who needs to avoid certain substances because of allergies may find the day-to-day activity of eating substantially affected. Account should be taken of the degree to which a person can reasonably be expected to behave in such a way that the impairment ceases to have a substantial adverse effect on his or her ability to carry out normal day-to-day activities. (**See also paragraph B12.**)

When considering modification of behaviour, it would be reasonable to expect a person who has chronic back pain to avoid extreme activities such as skiing. It would not be reasonable to expect the person to give up, or modify, more normal activities that might exacerbate the symptoms; such as shopping, or using public transport.

B8. Similarly, it would be reasonable to expect a person with a phobia to avoid extreme activities or situations that would aggravate their condition. It would not be reasonable to expect him or her to give up, or modify, normal activities that might exacerbate the symptoms.

A person with acrophobia (extreme fear of heights which can induce panic attacks) might reasonably be expected to avoid the top of extremely high buildings, such as the Eiffel Tower, but not to avoid all multi-storey buildings.

B9. Account should also be taken of where a person avoids doing things which, for example, cause pain, fatigue or substantial social embarrassment, or avoids doing things because of a loss of energy and motivation. It would **not** be reasonable to conclude that a person who employed an avoidance strategy was not a disabled person. In determining a question as to whether a person meets the definition of disability **it is important to consider the things that a person cannot do, or can only do with difficulty**.

In order to manage her mental health condition, a woman who experiences panic attacks finds that she can manage daily tasks, such as going to work, if she can avoid the stress of travelling in the rush hour. In determining whether she meets the definition of disability, consideration should be given to the extent to which it is reasonable to expect her to place such restrictions on her working and personal life.

B10. In some cases, people have coping or avoidance strategies which cease to work in certain circumstances (for example, where someone who has dyslexia is placed under stress). If it is possible that a person's ability to manage the effects of an impairment will break down so that effects will sometimes still occur, this possibility must be taken into account when assessing the effects of the impairment.

(**See also paragraphs B12 to B17 (effects of treatment), paragraphs C9 to C11 (likelihood of recurrence) and paragraph D22 (indirect effects).**)

Effects of environment

B11. Environmental conditions may exacerbate or lessen the effect of an impairment. Factors such as temperature, humidity, lighting, the time of day or night, how tired the person is, or how much stress he or she is under, may have an impact on the effects. When assessing whether adverse effects of an impairment are substantial, the extent to which such environmental factors, individually or cumulatively, are likely to have an impact on the effects should, therefore, also be considered. The fact that an impairment may have a less substantial effect in certain environments does not necessarily prevent it having an overall substantial adverse effect on day-to-day activities. (**See also paragraphs C5 to C8, meaning of 'long-term' (recurring or fluctuating effects).**)

A woman has had rheumatoid arthritis for the last three years. The effect on her ability to carry out normal day-to-day activities fluctuates according to the weather conditions. The effects are particularly bad during autumn and winter months when the weather is cold and damp. Symptoms are mild during the summer months. It is necessary to consider the overall impact of the arthritis, and the extent to which it has a substantial adverse effect on her ability to carry out day-to-day activities such as walking, undertaking household tasks, and getting washed and dressed.

Effects of treatment

B12. **The Act provides** that, where an impairment is subject to treatment or correction, the impairment is to be treated as having a substantial adverse effect if, but for the treatment or correction, the impairment is likely to have that effect. In this context, 'likely' should be interpreted as meaning 'could well happen'. The practical

effect of this provision is that the impairment should be treated as having the effect that it would have without the measures in question (**Sch1, Para 5(1)**). **The Act states** that the treatment or correction measures which are to be disregarded for these purposes include, in particular, medical treatment and the use of a prosthesis or other aid (**Sch1, Para 5(2)**). In this context, medical treatments would include treatments such as counselling, the need to follow a particular diet, and therapies, in addition to treatments with drugs. (**See also paragraphs B7 and B16.**)

B13. This provision applies even if the measures result in the effects being completely under control or not at all apparent. Where treatment is continuing it may be having the effect of masking or ameliorating a disability so that it does not have a substantial adverse effect. If the final outcome of such treatment cannot be determined, or if it is known that removal of the medical treatment would result in either a relapse or a worsened condition, it would be reasonable to disregard the medical treatment in accordance with paragraph 5 of Schedule 1.

B14. For example, if a person with a hearing impairment wears a hearing aid the question as to whether his or her impairment has a substantial adverse effect is to be decided by reference to what the hearing level would be without the hearing aid. Similarly, in the case of someone with diabetes which is being controlled by medication or diet should be decided by reference to what the effects of the condition would be if he or she were not taking that medication or following the required diet.

> A person with long-term depression is being treated by counselling. The effect of the treatment is to enable the person to undertake normal day-to-day activities, like shopping and going to work. If the effect of the treatment is disregarded, the person's impairment would have a substantial adverse effect on his ability to carry out normal day-to-day activities.

B15. **The Act states** that this provision does not apply to sight impairments to the extent that they are capable of correction by spectacles or contact lenses. (**Sch1, Para 5(3)**). In other words, the only effects on the ability to carry out normal day-to-day activities which are to be considered are those which remain when spectacles or contact lenses are used (or would remain if they were used). This does not include the use of devices to correct sight which are not spectacles or contact lenses.

B16. Account should be taken of where the effect of the continuing medical treatment is to create a permanent improvement rather than a temporary improvement. It is necessary to consider whether, as a consequence of the treatment, the impairment would cease to have a substantial adverse effect. For example, a person who develops pneumonia may be admitted to hospital for treatment including a course of antibiotics. This cures the impairment and no substantial effects remain. (**See also paragraph C11, regarding medical or other treatment that permanently reduces or removes the effects of an impairment.**)

B17. However, if a person receives treatment which cures a condition that would otherwise meet the definition of a disability, the person would be protected by the Act as a person who had a disability in the past. (**See paragraph A16.**)

Progressive conditions

B18. Progressive conditions, which are conditions that have effects which increase in severity over time, are subject to the special provisions set out in **Sch1, Para 8**. These provisions provide that a person with a progressive condition is to be regarded as having an impairment which has a substantial adverse effect on his or her ability to carry out normal day-to-day activities **before** it actually has that effect.

B19. A person who has a progressive condition, will be treated as having an impairment which has a **substantial** adverse effect from the moment any impairment resulting from that condition first has some adverse effect on his or her ability to carry out normal day-to-day activities, provided that in the future the adverse effect is **likely** to become substantial. Medical prognosis of the likely impact of the condition will be the normal route to establishing protection under this provision. The effect need not be continuous and need not be substantial. (**See also paragraphs C5 to C8 on recurring or fluctuating effects**). The person will still need to show that the impairment meets the long- term condition of the definition. (**Sch1, Para 2**)

B20. Examples of progressive conditions to which the special provisions apply include systemic lupus erythematosis (SLE), various types of dementia, and motor neurone disease. This list, however, is not exhaustive.

> A young boy aged 8 has been experiencing muscle cramps and some weakness. The effects are quite minor at present, but he has been diagnosed as having muscular dystrophy. Eventually it is expected that

the resulting muscle weakness will cause substantial adverse effects on his ability to walk, run and climb stairs. Although there is no substantial adverse effect at present, muscular dystrophy is a progressive condition, and this child will still be entitled to the protection of the Act under the special provisions in Sch1, Para 8 of the Act if it can be shown that the effects are likely to become substantial.

A woman has been diagnosed with systemic lupus erythematosis (SLE) following complaints to her GP that she is experiencing mild aches and pains in her joints. She has also been feeling generally unwell, with some flu-like symptoms. The initial symptoms do not have a substantial adverse effect on her ability to carry out normal day-to-day activities. However, SLE is a progressive condition, with fluctuating effects. She has been advised that the condition may come and go over many years, and in the future the effects may become substantial, including severe joint pain, inflammation, stiffness, and skin rashes. Providing it can be shown that the effects are likely to become substantial, she will be covered by the special provisions relating to progressive conditions. She will also need to meet the 'long-term' condition of the definition in order to be protected by the Act.

B21. The Act provides for a person with one of the progressive conditions of cancer, HIV and multiple sclerosis to be a disabled person from the point at which they have that condition, so effectively from diagnosis. (**See paragraph A9.**)

B22. As set out in paragraph B19, in order for the special provisions covering progressive conditions to apply, there only needs to be **some** adverse effect on the person's ability to carry out normal day to day activities. It does not have to be a substantial adverse effect. If a person with a progressive condition is successfully treated (for example by surgery) so that there are no longer any adverse effects, the special provisions will not apply. However, if the treatment does not remove all adverse effects the provisions will still apply. In addition, where the treatment manages to treat the original condition but leads to other adverse effects the provisions may still apply.

A man has an operation to remove the colon because of progressing and uncontrollable ulcerative colitis. The operation results in his no longer experiencing adverse effects from the colitis. He requires a colostomy, however, which means that his bowel actions can only be controlled by a sanitary appliance. This requirement for an appliance substantially affects his ability to undertake a normal day-to-day activity and should be taken into account as an adverse effect arising from the original impairment.

B23. Whether the effects of any treatment can qualify for the purposes of **Sch1, Para 8**, which provides that a person with a progressive condition is to be regarded as having an impairment that has a substantial adverse effect on his or her ability to carry out normal day- to-day activities, will depend on the circumstances of the individual case.

Severe disfigurements

B24. **The Act provides** that where an impairment consists of a severe disfigurement, it is to be treated as having a substantial adverse effect on the person's ability to carry out normal day-to-day activities. **There is no need to demonstrate such an effect (Sch1, Para 3).**

A lady has significant scarring to her face as a result of a bonfire accident. The woman uses skin camouflage to cover the scars as she is very self conscious about her appearance. She avoids large crowds and bright lights including public transport and supermarkets and she does not socialise with people outside her family in case they notice the mark and ask her questions about it. This amounts to a substantial adverse effect. However, the Act does not require her to show that her disfigurement has this effect because it provides for a severe disfigurement to be treated as having a substantial adverse effect on the person's ability to carry out normal day-to-day activities.

B25. Examples of disfigurements include scars, birthmarks, limb or postural deformation (including restricted bodily development), or diseases of the skin. Assessing severity will be mainly a matter of the degree of the disfigurement which may involve taking into account factors such as the nature, size, and prominence of the disfigurement. However, it may be necessary to take account of where the disfigurement in question is (for example, on the back as opposed to the face).

B26. Regulations provide that a disfigurement which consists of a tattoo (which has not been removed) is not to be considered as a severe disfigurement. Also excluded is a piercing of the body for decorative purposes

including anything attached through the piercing.[footnote 6]

Section C: Long-term

> This section should not be read in isolation but must be considered together with sections A, C and D. Whether a person satisfies the definition of a disabled person for the purposes of the Act will depend upon the full circumstances of the case. That is, whether the adverse effect of the person's impairment on the carrying out of normal day-to- day activities is substantial and long term.

Meaning of 'long-term effects'

C1. **The Act states** that, for the purpose of deciding whether a person is disabled, a long-term effect of an impairment is one:

- which has lasted at least 12 months, or
- where the total period for which it lasts, from the time of the first onset, is likely to be at least 12 months, or which is likely to last for the rest of the life of the person affected (**Sch1, Para 2**)

Special provisions apply when determining whether the effects of an impairment that has fluctuating or recurring effects are long-term. (**See paragraphs C5 to C11**). Also a person who is deemed to be a disabled person does not need to satisfy the long-term requirement. (**See paragraphs A9 to A10.**)

C2. **The cumulative effect of related impairments should be taken into account when determining whether the person has experienced a long-term effect for the purposes of meeting the definition of a disabled person.** The substantial adverse effect of an impairment which has developed from, or is likely to develop from, another impairment should be taken into account when determining whether the effect has lasted, or is likely to last at least twelve months, or for the rest of the life of the person affected.

A man experienced an anxiety disorder. This had a substantial adverse effect on his ability to make social contacts and to visit particular places. The disorder lasted for eight months and then developed into depression, which had the effect that he was no longer able to leave his home or go to work. The depression continued for five months. As the total period over which the adverse effects lasted was in excess of 12 months, the long-term element of the definition of disability was met.

A person experiences, over a long period, adverse effects arising from two separate and unrelated conditions, for example a lung infection and a leg injury. These effects should not be aggregated.

Meaning of 'likely'

C3. The meaning of 'likely' is relevant when determining:

- whether an impairment has a long-term effect (**Sch1, Para 2(1), see also paragraph C1**)
- whether an impairment has a recurring effect (**Sch1, Para 2(2), see also paragraphs C5 to C11**)
- whether adverse effects of a progressive condition will become substantial (**Sch1, Para 8, see also paragraphs B18 to B23**), or
- how an impairment should be treated for the purposes of the Act when the effects of that impairment are controlled or corrected by treatment or behaviour (**Sch1, Para 5(1), see also paragraphs B7 to B17**)

In these contexts, 'likely', should be interpreted as meaning that it could well happen.

C4. In assessing the likelihood of an effect lasting for 12 months, account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in

assessing this likelihood. Account should also be taken of both the typical length of such an effect on an individual, and any relevant factors specific to this individual (for example, general state of health or age).

Recurring or fluctuating effects

C5. **The Act states** that, if an impairment has had a substantial adverse effect on a person's ability to carry out normal day-to-day activities but that effect ceases, the substantial effect is treated as continuing if it is likely to recur. (In deciding whether a person has had a disability in the past, the question is whether a substantial adverse effect has in fact recurred.) Conditions with effects which recur only sporadically or for short periods can still qualify as impairments for the purposes of the Act, in respect of the meaning of 'long-term' (**Sch1, Para 2(2), see also paragraphs C3 to C4 (meaning of likely).**)

C6. For example, a person with rheumatoid arthritis may experience substantial adverse effects for a few weeks after the first occurrence and then have a period of remission. **See also example at paragraph B11**. If the substantial adverse effects are likely to recur, they are to be treated as if they were continuing. If the effects are likely to recur beyond 12 months after the first occurrence, they are to be treated as long-term. Other impairments with effects which can recur beyond 12 months, or where effects can be sporadic, include Menières Disease and epilepsy as well as mental health conditions such as schizophrenia, bipolar affective disorder, and certain types of depression, though this is not an exhaustive list. Some impairments with recurring or fluctuating effects may be less obvious in their impact on the individual concerned than is the case with other impairments where the effects are more constant.

A young man has bipolar affective disorder, a recurring form of depression. The first episode occurred in months one and two of a 13-month period. The second episode took place in month 13. This man will satisfy the requirements of the definition in respect of the meaning of long-term, because the adverse effects have recurred beyond 12 months after the first occurrence and are therefore treated as having continued for the whole period (in this case, a period of 13 months).

In contrast, a woman has two discrete episodes of depression within a ten-month period. In month one she loses her job and has a period of depression lasting six weeks. In month nine she experiences a bereavement and has a further episode of depression lasting eight weeks. Even though she has experienced two episodes of depression she will not be covered by the Act. This is because, as at this stage, the effects of her impairment have not yet lasted more than 12 months after the first occurrence, and there is no evidence that these episodes are part of an underlying condition of depression which is likely to recur beyond the 12-month period. However, if there was evidence to show that the two episodes did arise from an underlying condition of depression, the effects of which are likely to recur beyond the 12-month period, she would satisfy the long term requirement.

C7. It is not necessary for the effect to be the same throughout the period which is being considered in relation to determining whether the 'long-term' element of the definition is met. A person may still satisfy the long-term element of the definition even if the effect is not the same throughout the period. It may change: for example activities which are initially very difficult may become possible to a much greater extent. The effect might even disappear temporarily. Or other effects on the ability to carry out normal day-to-day activities may develop and the initial effect may disappear altogether.

A person has Menières Disease. This results in his experiencing mild tinnitus at times, which does not adversely affect his ability to carry out normal day-to-day activities. However, it also causes temporary periods of significant hearing loss every few months. The hearing loss substantially and adversely affects his ability to conduct conversations or listen to the radio or television. Although his condition does not continually have this adverse effect, it satisfies the long-term requirement because it has substantial adverse effects that are likely to recur beyond 12 months after he developed the impairment.

C8. Regulations specifically exclude seasonal allergic rhinitis (for example, hayfever) except where it aggravates the effects of an existing condition.[footnote 7] For example, this may occur in some cases of asthma. (**See also paragraphs A12 to A15 (exclusions).**)

Likelihood of recurrence

C9. Likelihood of recurrence should be considered taking all the circumstances of the case into account. This should include what the person could reasonably be expected to do to prevent the recurrence. For example, the person might reasonably be expected to take action which prevents the impairment from having such effects (for example, avoiding substances to which he or she is allergic). This may be unreasonably difficult with some substances.

C10. In addition, it is possible that the way in which a person can control or cope with the effects of an impairment may not always be successful. For example, this may be because an avoidance routine is difficult to adhere to, or itself adversely affects the ability to carry out day-to-day activities, or because the person is in an unfamiliar environment. If there is an increased likelihood that the control will break down, it will be more likely that there will be a recurrence. That possibility should be taken into account when assessing the likelihood of a recurrence. (**See also paragraphs B7 to B10 (effects of behaviour), paragraph B11 (environmental effects); paragraphs B12 to B17 (effect of treatment); and paragraphs C3 to C4 (meaning of likely).**)

C11. If medical or other treatment is likely to permanently cure a condition and therefore remove the impairment, so that recurrence of its effects would then be unlikely even if there were no further treatment, this should be taken into consideration when looking at the likelihood of recurrence of those effects. However, if the treatment simply delays or prevents a recurrence, and a recurrence would be likely if the treatment stopped, as is the case with most medication, then the treatment is to be ignored and the effect is to be regarded as likely to recur.

Assessing whether a past disability was long-term

C12. **The Act provides** that a person who has had a disability within the definition is protected from some forms of discrimination even if he or she has since recovered or the effects have become less than substantial. In deciding whether a past condition was a disability, its effects count as long-term if they lasted 12 months or more after the first occurrence, or if a recurrence happened or continued until more than 12 months after the first occurrence (**S6(4) and Sch1, Para 2). For the forms of discrimination covered by this provision see paragraph A16.**

A person was diagnosed with a digestive condition that significantly restricted her ability to eat. She received medical treatment for the condition for over a year, but eventually required surgery which cured the condition. As the effects of the condition had lasted for over 12 months, and they had a substantial adverse effect on her ability to carry out a normal day-to-day activity, the condition met the Act's definition of a disability. The woman is entitled to the protection of the Act as a person who has had a past disability.

Section D: Normal day-to-day activities

This section should not be read in isolation but must be considered together with sections A, B and C. Whether a person satisfies the definition of a disabled person for the purposes of the Act will depend upon the full circumstances of the case. That is, whether the adverse effect of the person's impairment on the carrying out of normal day-to- day activities is substantial and long term.

D1. The Act looks at a person's impairment and whether it substantially and adversely affects the person's ability to carry out normal day-to- day activities.

Meaning of 'normal day-to-day activities'

D2. **The Act does not define what is to be regarded as a 'normal day- to-day activity'**. It is not possible to provide an exhaustive list of day- to-day activities, although guidance on this matter is given here and illustrative examples of when it would, and would not, be reasonable to regard an impairment as having a substantial adverse effect on the ability to carry out normal day-to-day activities are shown in the Appendix.

D3. In general, day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities. Normal day-to-day activities can include general work-related activities, and study and education- related activities, such as interacting with colleagues, following instructions, using a computer, driving, carrying out interviews, preparing written documents, and keeping to a timetable or a shift pattern.

> A person works in a small retail store. His duties include maintaining stock in a stock room, dealing with customers and suppliers in person and by telephone, and closing the store at the end of the day. Each of these elements of the job would be regarded as a normal day-to-day activity, which could be adversely affected by an impairment.

D4. The term ‘normal day-to-day activities’ is not intended to include activities which are normal only for a particular person, or a small group of people. In deciding whether an activity is a normal day-to- day activity, account should be taken of how far it is carried out by people on a daily or frequent basis. In this context, ‘normal’ should be given its ordinary, everyday meaning.

D5. A normal day-to-day activity is not necessarily one that is carried out by a majority of people. For example, it is possible that some activities might be carried out only, or more predominantly, by people of a particular gender, such as breast-feeding or applying make-up, and cannot therefore be said to be normal for most people. They would nevertheless be considered to be normal day-to-day activities.

D6. Also, whether an activity is a normal day-to-day activity should not be determined by whether it is more normal for it to be carried out at a particular time of day. For example, getting out of bed and getting dressed are activities that are normally associated with the morning. They may be carried out much later in the day by workers who work night shifts, but they would still be considered to be normal day-to- day activities.

D7. In considering the ability of a child aged six or over to carry out a normal day-to-day activity, it is necessary to take account of the level of achievement which would be normal for a person of a similar age. (**See also Section E (Disabled children).**)

Specialised activities

D8. Where activities are themselves highly specialised or involve highly specialised levels of attainment, they would not be regarded as normal day-to-day activities for most people. In some instances work- related activities are so highly specialised that they would not be regarded as normal day-to-day activities.

> A watch repairer carries out delicate work with highly specialised tools. He develops tenosynovitis. This restricts his ability to carry out delicate work though he is able to carry out activities such as general household repairs using more substantial tools.
>
> Although the delicate work is a normal working activity for a person in his profession, it would not be regarded as a normal day-to-day activity for most people.

D9. The same is true of other specialised activities such as playing a musical instrument to a high standard of achievement; taking part in activities where very specific skills or level of ability are required; or playing a particular sport to a high level of ability, such as would be required for a professional footballer or athlete. Where activities involve highly specialised skills or levels of attainment, they would not be regarded as normal day-to-day activities for most people.

> A woman plays the piano to a high standard, and often takes part in public performances. She has developed carpal tunnel syndrome in her wrists. This does not prevent her from playing the piano, but she cannot achieve such a high standard.
>
> This restriction would not be an adverse effect on a normal day-today activity, because playing the piano to such a specialised level would not be normal for most people.

D10. However, many types of specialised work-related or other activities may still involve normal day-to-day activities which can be adversely affected by an impairment. For example they may involve normal activities

such as: sitting down, standing up, walking, running, verbal interaction, writing, driving; using everyday objects such as a computer keyboard or a mobile phone, and lifting, or carrying everyday objects, such as a vacuum cleaner.

The work of the watch repairer referred to above also includes preparing invoices and counting and recording daily takings. These are normal day-to-day activities. The effects of his tenosynovitis increase in severity over time resulting in greater restriction of movement in his hands. As a consequence he experiences substantial difficulties carrying out these normal day-to-day activities.

Adverse effects on the ability to carry out normal day-to-day activities

D11. This section provides guidance on what should be taken into account in deciding whether a person's ability to carry out normal day-to- day activities might be restricted by the effects of that person's impairment. The examples given are purely illustrative and **should not in any way be considered as a prescriptive or exhaustive list.**

D12. In the Appendix, examples are given of circumstances where it **would be reasonable** to regard the adverse effect on the ability to carry out a normal day-to-day activity as substantial. In addition, examples are given of circumstances where it would **not be reasonable** to regard the effect as substantial. In these examples, the effect described should be thought of as if it were the only effect of the impairment.

D13. The examples of what it would, and what it would not, be reasonable to regard as substantial adverse effects on normal day-to-day activities **are indicators and not tests**. They do not mean that if a person can do an activity listed then he or she does not experience any substantial adverse effects: the person may be affected in relation to other activities, and this instead may indicate a substantial effect. Alternatively, the person may be affected in a minor way in a number of different activities, and the cumulative effect could amount to a substantial adverse effect. (**See also paragraphs B4 to B6 (cumulative effects).**)

D14. The examples in this section describe the effect which would occur when the various factors described in Sections A, B and C have been allowed for, including for example disregarding the impact of medical or other treatment.

D15. Some of the examples in this section show how an adverse effect may arise from either a physical or a mental impairment. Where illustrations of both types of impairment have not been given, this does not mean that only one type of impairment could result in that particular effect. **Physical impairments can result in mental effects and mental impairments can have physical manifestations.**

- A person with a physical impairment may, because of pain or fatigue, experience difficulties in carrying out normal activities that involve mental processes.
- A person with a mental impairment or learning disability may experience difficulty in carrying out normal day-to-day activities that involve physical activity.

A journalist has recurrent severe migraines which cause her significant pain. Owing to the pain, she has difficulty maintaining concentration on writing articles and meeting deadlines.

A young man with severe anxiety and symptoms of agoraphobia is unable to go out more than a few times a month. This is because he fears being outside in open spaces and gets panic attacks which mean that he cannot remain in places like theatres and restaurants once they become crowded.

This has a substantial adverse effect on his ability to carry out normal day-to-day activities such as social activities.

A woman has Downs Syndrome and is only able to understand her familiar local bus route. This means that she is unable to travel unaccompanied on other routes, because she gets lost and cannot find her way home without assistance.

This has a substantial adverse effect on her ability to carry out the normal day-to-day activity of using public transport.

D16. Normal day-to-day activities also include activities that are required to maintain personal well-being or to ensure personal safety, or the safety of other people. Account should be taken of whether the effects of an impairment have an impact on whether the person is inclined to carry out or neglect basic functions such as eating, drinking, sleeping, keeping warm or personal hygiene; or to exhibit behaviour which puts the person or other people at risk.

A woman has had anorexia, an eating disorder, for two years and the effects of her impairment restrict her ability to carry out the normal day-to-day activity of eating.

A man has had paranoid schizophrenia for five years. One of the effects of this impairment is an inability to make proper judgements about activities that may result in a risk to his personal safety. For example, he will walk into roads without checking if cars are coming.

This has a substantial adverse effect on his ability to carry out the normal day-to-day activity of crossing the road safely.

D17. Some impairments may have an adverse impact on the ability of a person to carry out normal day-to-day communication activities. For example, they may adversely affect whether a person is able to speak clearly at a normal pace and rhythm and to understand someone else speaking normally in the person's native language. Some impairments can have an adverse effect on a person's ability to understand human non-factual information and non-verbal communication such as body language and facial expressions. Account should be taken of how such factors can have an adverse effect on normal day-to-day activities.

A six-year-old boy has verbal dyspraxia which adversely affects his ability to speak and make himself clear to other people, including his friends and teachers at school.

A woman has bipolar disorder. Her speech sometimes becomes over- excited and irrational, making it difficult for others to understand what she is saying.

A man has had a stammer since childhood. He does not stammer all the time, but his stammer, particularly in telephone calls, goes beyond the occasional lapses in fluency found in the speech of people who do not have the impairment. However, this effect can often be hidden by his avoidance strategies. He tries to avoid making or taking telephone calls where he believes he will stammer, or he does not speak as much during the calls. He sometimes tries to avoid stammering by substituting words, or by inserting extra words or phrases.

In these cases there are substantial adverse effects on the person's ability to carry out normal day-to-day communication activities.

A man has Asperger's syndrome, a form of autism. He finds it hard to understand non-verbal communications such as facial expressions, and non-factual communication such as jokes. He takes everything that is said very literally. He is given verbal instructions during office banter with his manager, but his ability to understand the instruction is impaired because he is unable to isolate the instruction from the social conversation.

This has a substantial adverse effect on his ability to carry out normal day-to-day communication.

D18. A person's impairment may have an adverse effect on day-to- day activities that require an ability to co-ordinate their movements, to carry everyday objects such as a kettle of water, a bag of shopping, a briefcase, or an overnight bag, or to use standard items of equipment.

A young man who has dyspraxia experiences a range of effects which include difficulty co-ordinating physical movements. He is frequently knocking over cups and bottles of drink and cannot combine two activities at the same time, such as walking while holding a plate of food upright, without spilling the food.

This has a substantial adverse effect on his ability to carry out normal day-to-day activities such as making a drink and eating.

A man with achondroplasia has unusually short stature, and arms which are disproportionate in size to the rest of his body. He has difficulty lifting everyday items like a vacuum cleaner, and he cannot reach a

standard height sink or washbasin without a step to stand on.

This has a substantial adverse effect on his ability to carry out normal day-to-day activities, such as cleaning, washing up and washing his hands.

D19. A person's impairment may adversely affect the ability to carry out normal day-to-day activities that involve aspects such as remembering to do things, organising their thoughts, planning a course of action and carrying it out, taking in new knowledge, and understanding spoken or written information. This includes considering whether the person has cognitive difficulties or learns to do things significantly more slowly than a person who does not have an impairment.

A woman with bipolar affective disorder is easily distracted. This results in her frequently not being able to concentrate on performing an activity like making a sandwich or filling in a form without being constantly distracted from the task. Consequently, it takes her significantly longer than a person without the disorder to complete these types of task. Therefore there is a substantial adverse effect on normal day-to-day activities

Environmental effects

D20. Environmental conditions may have an impact on how an impairment affects a person's ability to carry out normal day-to-day activities. Consideration should be given to the level and nature of any environmental effect. Account should be taken of whether it is within such a range and of such a type that most people would be able to carry out an activity without an adverse effect. For example, whether background noise or lighting is of a type or level that would enable most people to hear or see adequately. (**See also paragraph B11.**)

A woman has tinnitus which makes it difficult for her to hear or understand normal conversations. She cannot hear and respond to what a supermarket checkout assistant is saying if the two people behind her in the queue are holding a conversation at the same time.

This has a substantial adverse effect on her ability to carry out the normal day-to-day activity of taking part in a conversation.

A man has retinitis pigmentosa (RP), a hereditary eye disorder which affects the retina. The man has difficulty seeing in poor light and experiences a marked reduction in his field of vision (referred to as tunnel vision). As a result he often bumps into furniture and doors when he is in an unfamiliar environment, and can only read when he is in a very well-lit area.

This has a substantial adverse effect on his ability to carry out normal day-to-day activities such as socialising in a cinema or lowly lit restaurant.

D21. Consideration should be given to whether there may also be an adverse effect on the ability to carry out a normal day-to-day activity outside of that particular environment.

A man works in a factory where chemical fumes cause him to have breathing difficulties. He is diagnosed with occupational asthma. This has a substantial adverse effect while he is at work, because he is no longer able to work where he would be exposed to the fumes.

Even in a non-work situation he finds any general exertion difficult. This has some adverse effect on his ability to carry out a normal dayto-day activity like changing a bed.

Although the substantial effect is only apparent while he is at work, where he is exposed to fumes, the man is able to demonstrate that his impairment has an adverse effect on his ability to carry out normal day-to-day activities.

Indirect effects

D22. An impairment may not directly **prevent** someone from carrying out one or more normal day-to-day activities, but it may still have a substantial adverse effect on how the person carries out those activities. For example:

- pain or fatigue: where an impairment causes pain or fatigue, the person may have the ability to carry out a normal day-to-day activity, but may be restricted in the way that it is carried out because of experiencing pain in doing so. Or the impairment might make the activity more than usually fatiguing so that the person might not be able to repeat the task over a sustained period of time. (**See also paragraphs B7 to B10 (effects of behaviour)**)

A man with osteoarthritis experiences significant pain in his hands undertaking tasks such as using a keyboard at home or work, peeling vegetables, opening jars and writing.

The impairment substantially adversely affects the man's ability to carry out normal day-to-day activities.

A man has had chronic fatigue syndrome for several years. Although he has the physical capability to walk and to stand, he finds these very difficult to sustain for any length of time because he experiences overwhelming fatigue. As a consequence, he is restricted in his ability to take part in normal day-to-day activities such as travelling, so he avoids going out socially, and works from home several days a week.

Therefore there is a substantial adverse effect on normal day-to-day activities.

- medical advice: where a person has been advised by a medical practitioner or other health professional, as part of a treatment plan, to change, limit or refrain from a normal day-to-day activity on account of an impairment or only do it in a certain way or under certain conditions. (**See also paragraphs B12 to B17 (effects of treatment).**)

A woman who works as a teacher develops sciatic pain which is attributed to a prolapsed inter-vertebral disc. Despite physiotherapy and traction her pain became worse. As part of her treatment plan her doctor prescribes daily pain relief medication and advises her to avoid carrying moderately heavy items or standing for more than a few minutes at a time.

This has a substantial adverse effect on her carrying out a range of normal day-to-day activities such as shopping or standing to address her pupils for a whole lesson.

- frequency: some impairments may require the person to undertake certain activities, or functions at such frequent intervals that they adversely affect the ability to carry out normal day-to-day activities

A young woman is a sales representative. She has developed colitis, an inflammatory bowel disease. The condition is a chronic one which is subject to periods of remission and flare-ups. During a flare-up she experiences severe abdominal pain and bouts of diarrhoea. This makes it very difficult for her to drive, including for the purposes of her job, as she must ensure she is always close to a lavatory.

This has a substantial adverse effect on her ability to carry out normal day-to-day activities.

Effect of treatment or correction measures

D23. Except as explained below, where a person is receiving treatment or correction measures for an impairment, the effect of the impairment on day-to-day activities is to be taken as that which the person would experience without the treatment or measures. (**See also paragraphs B12 to B17.**)

A man has a hearing impairment which has the effect that he cannot hold a conversation with another person even in a quiet environment. He has a hearing aid which overcomes that effect. However, it is the effect of the impairment without the hearing aid that needs to be considered.

In this case, the impairment has a substantial adverse effect on the day-to-day activity of holding a conversation.

D24. If a person's sight is corrected by spectacles or contact lenses, or could be corrected by them, what needs to be considered is any adverse effect that the visual impairment has on the ability to carry out normal day-to-day activities which remains while the person is wearing spectacles or lenses.

Section E: Disabled children

E1. The effects of impairments may not be apparent in babies and young children because they are too young to have developed the ability to carry out activities that are normal for older children and adults. Regulations provide that an impairment to a child under six years old is to be treated as having a substantial and long-term adverse effect on the ability of that child to carry out normal day-to-day activities where it would normally have a substantial and long-term adverse effect on the ability of a person aged six years or over to carry out normal day-to-day activities.[footnote 8]

A six month old girl has an impairment that results in her having no movement in her legs. She is not yet at the stage of crawling or walking. So far the impairment does not have an apparent effect on her ability to move around. However, the impairment is to be treated as having a substantial and long-term adverse effect on her ability to carry out a normal day-to-day activity like going for a walk. This is because it would normally have such an adverse effect on the ability of a person aged six years or over to carry out normal day-to-day activities.

E2. Children aged six and older are subject to the normal requirements of the definition. That is, that they must have an impairment which has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities. However, in considering the ability of a child aged six or over to carry out a normal day-to-day activity, it is necessary to take account of the level of achievement which would be normal for a person of a similar age.

A six-year-old child has been diagnosed as having autism. He has difficulty communicating through speech and in recognising when someone is happy or sad. When going somewhere new or taking a different route he can become very anxious. Each of these factors amounts to a substantial adverse effect on his ability to carry out normal day-to-day activities, such as holding a conversation or enjoying a day trip, even for such a young child.

E3. Part 6 of the Act provides protection for disabled pupils and students by preventing discrimination against them at school or in post-16 education because of, or for a reason related to, their disability. A pupil or student must satisfy the definition of disability as described in this guidance in order to be protected by Part 6 of the Act. The duties for schools in the Act, including the duty for schools to make reasonable adjustments for disabled children, are designed to dovetail with duties under the Special Educational Needs (SEN) framework which are based on a separate definition of special educational needs. Further information on these duties can be found in the SEN Code of Practice and the Equality and Human Rights Commission's Codes of Practice for Education.

Examples of children in an educational setting where their impairment has a substantial and long-term adverse effect on the ability to carry out normal day-to-day activities:

A 10-year-old girl has a learning disability. She has a short attention span and has difficulty remembering facts from one day to the next. She can read only a few familiar words. Each of these factors has a substantial adverse effect on her ability to participate in learning activities.

A 14-year-old boy has been diagnosed as having attention deficit hyperactivity disorder (ADHD). He often finds it difficult to concentrate and skips from task to task forgetting instructions.

Either of these factors has a substantial adverse effect on his ability to participate in class and join in team games in the playground.

A 12-year-old boy has cerebral palsy and has limited movement in his legs. This has a substantial adverse effect on his ability to move around the school and take part in physical sports activities.

Section F: Disability as a particular protected characteristic or as a shared protected characteristic

F1. The Act provides protection from discrimination based on a range of protected characteristics and disability, as defined in the Act and related, is a protected characteristic.

F2. Certain provisions in the Act apply where a person has a “particular” protected characteristic. In the case of disability, **the Act states** that a reference to a person with a particular protected characteristic is a reference to a person who has a particular disability (**S6(3)**).

A disabled man has a mobility impairment. This has a substantial and long-term adverse effect on his ability to carry out normal day-today activities like shopping and gardening. Therefore he is protected by the Act in general because he has the protected characteristic of disability. However, for the purposes of the provisions of the Act that apply specifically to people with a particular protected characteristic, he would have the particular characteristic of being mobility impaired.

F3. Some provisions in the Act apply where persons share a protected characteristic. In the case of disability, **the Act states** that a reference to persons who share a particular characteristic is a reference to persons who have the same disability (**S6(3)**).

For the purposes of the provisions that apply specifically to people who share a protected characteristic, the disabled man would share the protected characteristic with other people who have mobility impairments.

F4. This may be illustrated by reference to the following provisions in the Act.

- Schedule 9 paragraph 1 of the Act provides that it is not discrimination, under a range of work provisions, for it to be an occupational requirement that the job holder has a particular protected characteristic.

A charitable organisation that provides services to people with HIV and Aids has vacancies for counsellors for which being HIV positive is an occupational requirement.

It is not discriminatory for the organisation to only appoint people who have a particular protected characteristic which, in this instance, is having the particular disability of being HIV positive.

- Schedule 16 paragraph 1 relating to associations or clubs for people who have a single protected characteristic, apply where persons share a protected characteristic.

A group of people with hearing impairments form a private club that provides advice, support and recreational activities specifically for people who have that particular impairment.

For the purposes of the Act, a reference to people who share a protected characteristic would, in this instance, be to people who have hearing impairments.

Appendix

An illustrative and non-exhaustive list of factors which, if they are experienced by a person, it would be reasonable to regard as having a substantial adverse effect on normal day-to-day activities.

Whether a person satisfies the definition of a disabled person for the purposes of the Act will depend upon the full circumstances of the case. That is, whether the substantial adverse effect of the impairment on normal day-to-day activities is long term.

In the following examples, the effect described should be thought of as if it were the **only** effect of the impairment:

- difficulty in getting dressed, for example, because of physical restrictions, a lack of understanding of the concept, or low motivation
- difficulty carrying out activities associated with toileting, or caused by frequent minor incontinence
- difficulty preparing a meal, for example, because of restricted ability to do things like open cans or packages, or because of an inability to understand and follow a simple recipe
- difficulty eating; for example, because of an inability to co-ordinate the use of a knife and fork, a need for assistance, or the effect of an eating disorder
- difficulty going out of doors unaccompanied, for example, because the person has a phobia, a physical restriction, or a learning disability
- difficulty waiting or queuing, for example, because of a lack of understanding of the concept, or because of pain or fatigue when standing for prolonged periods
- difficulty using transport; for example, because of physical restrictions, pain or fatigue, a frequent need for a lavatory or as a result of a mental impairment or learning disability
- difficulty in going up or down steps, stairs or gradients; for example, because movements are painful, fatiguing or restricted in some way
- a total inability to walk, or an ability to walk only a short distance without difficulty; for example because of physical restrictions, pain or fatigue
- difficulty entering or staying in environments that the person perceives as strange or frightening
- behaviour which challenges people around the person, making it difficult for the person to be accepted in public places
- persistent difficulty crossing a road safely, for example, because of physical restrictions or a failure to understand and manage the risk
- persistent general low motivation or loss of interest in everyday activities
- difficulty accessing and moving around buildings; for example because of inability to open doors, grip handrails on steps or gradients, or an inability to follow directions
- difficulty operating a computer, for example, because of physical restrictions in using a keyboard, a visual impairment or a learning disability
- difficulty picking up and carrying objects of moderate weight, such as a bag of shopping or a small piece of luggage, with one hand
- inability to converse, or give instructions orally, in the person's native spoken language
- difficulty understanding or following simple verbal instructions
- difficulty hearing and understanding another person speaking clearly over the voice telephone (where the telephone is not affected by bad reception)
- persistent and significant difficulty in reading or understanding written material where this is in the person's native written language, for example because of a mental impairment, or learning disability, or a visual impairment (except where that is corrected by glasses or contact lenses)
- intermittent loss of consciousness
- frequent confused behaviour, intrusive thoughts, feelings of being controlled, or delusions
- persistently wanting to avoid people or significant difficulty taking part in normal social interaction or forming social relationships, for example because of a mental health condition or disorder
- persistent difficulty in recognising, or remembering the names of, familiar people such as family or friends
- persistent distractibility or difficulty concentrating
- compulsive activities or behaviour, or difficulty in adapting after a reasonable period to minor changes in a routine

An illustrative and non-exhaustive list of factors which, if they are experienced by a person, it would not be reasonable to regard as having a substantial adverse effect on normal day-to-day activities.

Whether a person satisfies the definition of a disabled person for the purposes of the Act will depend upon the full circumstances of the case. That is, whether the substantial adverse effect of the impairment on normal day-to-day activities is long term:

- inability to move heavy objects without assistance or a mechanical aid, such as moving a large suitcase or heavy piece of furniture without a trolley
- experiencing some discomfort as a result of travelling, for example by car or plane, for a journey lasting more than two hours
- experiencing some tiredness or minor discomfort as a result of walking unaided for a distance of about 1.5 kilometres or one mile
- minor problems with writing or spelling
- inability to reach typing speeds standardised for secretarial work
- inability to read very small or indistinct print without the aid of a magnifying glass
- inability to fill in a long, detailed, technical document, which is in the person's native language, without assistance
- inability to speak in front of an audience simply as a result of nervousness
- some shyness and timidity
- inability to articulate certain sounds due to a lisp
- inability to be understood because of having a strong accent
- inability to converse orally in a language which is not the speaker's native spoken language
- inability to hold a conversation in a very noisy place, such as a factory floor, a pop concert, sporting event or alongside a busy main road
- inability to sing in tune
- inability to distinguish a known person across a substantial distance (for example, across the width of a football pitch)
- occasionally forgetting the name of a familiar person, such as a colleague
- inability to concentrate on a task requiring application over several hours
- occasional apprehension about significant heights
- a person consciously taking a higher than normal risk on their own initiative, such as persistently crossing a road when the signals are adverse, or driving fast on highways for own pleasure
- simple inability to distinguish between red and green, which is not accompanied by any other effect such as blurring of vision
- infrequent minor incontinence
- inability to undertake activities requiring delicate hand movements, such as threading a small needle or picking up a pin

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1. Regulation 7 of The Equality Act 2010 (Disability) Regulations 2010 (S.I. 2010/2128).
2. The Equality Act 2010 (Disability) Regulations 2010 (S.I. 2010/2128).
3. Provisions in The Equality Act 2010 (Disability) Regulations 2010 (S.I. 2010/2128).
4. Covering: taxis etc; public service vehicles and rail transport.
5. The Disability Discrimination Act 1995 (DDA) provided that any individual who was registered as a disabled person under the Disabled Persons (Employment) Act 1944 and whose name appeared on the register both on 12 January 1995 and 2 December 1996 was treated as having a disability for during the period of three years starting on 2 December 1996 (when the DDA employment provisions came into force). This applied regardless of whether the person met the DDA definition of a disabled person during that period. Following the end of the three-year transitional period, those persons who were treated by this provision as being disabled are now treated as having a disability in the past. This provision is preserved for the purposes of the Equality Act 2010.
6. The Equality Act 2010 (Disability) Regulations 2010 (S.I. 2010/2128).
7. The Equality Act 2010 (Disability) Regulations 2010 (S.I. 2010/2128).
8. The Equality Act 2010 (Disability) Regulations 2010 (S.I. 2010/2128).

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Comments on road safety issues and the proposed access contained in the supporting statement submitted by Davidson, Chalmers & Stewart (solicitors acting on behalf of the applicant SEAMAB), dated 17th August 2023

Positive Amenity of Front Car Park

In response to points raised by the appellant's solicitor regarding use of the front car park rather than the rear access from Canal Court :-

In road safety terms the use of the front car park cannot be supported. Canal Court is a public adopted road and its junction with B9080 meets the design guidelines for visibility and design so therefore is much safer for vehicles to use rather than the front entrance to the site.

During the determination of the application Transportation considered the impact of a few vehicles entering and exiting the site and was content that as the road is for public use it is accepted that use by a few vehicles singular infrequent vehicle use for collection and drop off would be deemed acceptable on the basis that signage is in place permanently to indicate no right hand turning. is not a problem. Normal car use and road safety were considered.

By using the front entrance by more than one vehicle creates an increased road safety concern. The visibility from the access is restricted when looking eastward to such an extent that there could be an unsafe manoeuvre due to speed of traffic on the main B9080 carriageway. The driver exiting the access may not see the approaching vehicle from the east.

Pedestrian usage along the front of the property was not considered to be an issue as access to the site was aimed at from Canal Court.

REASON FOR REFUSAL 2: THE USE OF THE VEHICLE ENTRANCE ON THE B9080 WILL CREATE A SAFETY RISK TO ROAD USERS.

The historic use of the access is not in question. The appellant is correct in that evidence suggests that the access has been used by vehicles since before 2009. However, it was for a single vehicle at any one time. The historic street view shots actually reveal that in March 2021 there was no vehicular entrance in operation and that a slabbed pathway was evident. Prior to that in April 2011 and June 2009 it was used by at least one vehicle. The current view from April 2023 shows a potential hard standing for numerous vehicles with an assessment for potential 12 vehicles.

As the application is in retrospect, rather than ask for the proposed use of the front car park and how many vehicles were proposed to occupy the area I took the view that about a dozen vehicles could park there and hence my response on behalf of Transportation. These vehicles could be coming and going at the same time with a potential of a vehicle wanting to turn in at the same time a one is waiting to turn out. This could create a road safety danger.

Although the access has so far not had any accident, the reason for not supporting the use going forward is due to the potential traffic increase due to the Winchburgh area housing development. It is anticipated that the main route connection to Linlithgow will have reasonable traffic increases and so there is an opportunity to make the existing access safer for users by not permitting increased usage.

Although the appellant has stated that signage has been erected at the exit from the car park indicating left turn only there is no statutory requirement for this manoeuvre. Promoting a right

turn ban would not be supported as the motoring offence can only be caught if there is a police car watching the access. This operation is unlikely to be supported.

Chris Nicol
Roads & transport Engineer
West Lothian Council

Received by email on 19 Sept 2023

Davidson Chalmers Stewart

Lawyers. For Business.

APPLICANT COMMENTS ON

FURTHER INFORMATION FROM OTHER PARTIES DATED 19 SEPTEMBER 2023

Council:	**West Lothian Council**
Matter:	**Local Review Body ("LRB") Appeal, Follow Up from Meeting 30 August 2023**
Applicant:	**Seamab Care and Education**
Application:	**0130/H/23**
Works:	**Timber fence and gates and gravel surfaced car park (in retrospect)**
Site:	**Threemiletown Farmhouse, Linlithgow, West Lothian EH49 6NF**

1. INTRODUCTION AND SUMMARY OF RESPONSES

BACKGROUND

- We are instructed by Seamab to comment on the Further Information provided by the Appointed Person from the Council's Planning Department (the "**AP**"), the Council's Transportation Department ("**Transportation**") and third party objectors on 19 September 2023.
- Key issues covered in this Commentary are:
  - the impact on amenity of the Works;
  - traffic and transportation impacts of the Works; and
  - compliance with planning policy in NPF 4 and the LDP.
- This Commentary does not address:
  - Equality Act 2010 compliance points raised by the AP, which have since been addressed by the Applicant in its Further Information Statement dated 19 September 2023 (the "**FIS**");
  - the acceptability of the use of the Site as a care home, as this has been established since the grant of the Certificate of Lawfulness reference 0917/CLU/22 and is not relevant here; or
  - the previous use of the car park to the front of the Site abutting the A9080 (the "**Front Car Park**"), which Transportation has confirmed is not in question and which continues to be lawful (as there has been no long interruption in its use nor any intervening change of use, per DPEA decision ref CLUD-260-2014 available here: https://www.dpea.scotland.gov.uk/CaseDetails.aspx?id=121975).
- This Commentary refers to of other documents, including:
  - excerpt of correspondence between Seamab and the Council regarding road safety

- photographs of vehicular access to/from the B9080 (for the Site and nearby properties) at **Appendix 2;**

- excerpts from documents produced in connection with the Winchburgh masterplan development (Council planning application reference 1012/P/05) (the "**Winchburgh Application**") available from the Council's public, online planning register are at **Appendix 3**;

- the DPEA decision referenced above and Transport Scotland collision data which are accessible via the links embedded in this Commentary;

- materials which are readily available in the public domain (such as legislation, statutory documents, local, Scottish and UK government guidance, policy documents) are not provided, for brevity;

- this intended to be read with documents previously submitted to the Council on behalf of Seamab, including the Application, the Supplementary Statement of Support dated 17 August 2023 (the "**SSS**") and the Further Information Statement dated 19 September 2023 (the "**FIS**").

- Unless otherwise stated, defined terms below have the same meanings as given to them in the SSS.

2. IMPACT ON AMENITY

CONDUCT AND BEHAVIOUR

2.1 Concerns have been raised by objectors about the need for the Works. These indicate that objectors are essentially worried about the behaviour of the residents. This Commentary seeks to clarify apparent misconceptions about why the use of the Front Car Park, the Canal Court Car Park and the fencing are required for the everyday operation of the Site.

2.2 Seamab provides a safe, secure environment to support traumatised children to become independent adults. The Site is not a prison. The staff are not guards. The residents are able-bodied children who have had difficult experiences in life. Staff are present on Site 24 hours a day but they do not shadow the residents or monitor their every movement. The Site is consented for a maximum of 4 residents. They are all under 13 years of age. They are not violent. They are children, entitled to play outdoors, be transported to school, use the garden or to take a walk in the neighbourhood.

2.3 The Canal Court residential community is mixed and includes families with children. It is doubtful the objectors would complain about those children playing locally or taking short walks in the area. As with all young children living by a road, it is sensible to fence-off the garden. As with all young children, it is a normal part of growing up to explore the area they live in.

2.4 There have been no substantive complaints about the conduct of the residents or the operations at the Site. The parties to which any complaints would be addressed are: Hopetoun Estate (the owner of the Site and Seamab's landlord), Seamab itself, the Police and the Care Inspectorate.

2.5 Complaints have been made by neighbours to Hopetoun Estate in its capacity as landlord of the Site. These complaints related to land management issues and did not concern Seamab as tenant of the

Site, e.g. septic tank maintenance costs. We understand that all issues have been resolved directly between the complainants and Hopetoun Estate.

2.6 Complaints have been made by neighbours to the Care Inspectorate. Details of these have been requested and are awaited from the Care inspectorate but we understand they related to use of the Site as a care home. As noted above, this is not within the scope of the present LRB review.

2.7 One complaint by neighbours to Seamab concerned a small amount of litter being found at the boundary wall of the Site. There is no evidence that it was left by a resident, staff member or visitor to the Site but Seamab have taken action to prevent its residents, staff or visitors from accidentally littering in future. No complaints have been received since.

2.8 No complaints have been made to the Police about Seamab's operations or the conduct of any of the residents, staff or visitors. As part of Seamab's educational programme, local Police sometimes visit the Site to get to know the staff and residents and generally foster good relationships. The residents have often had negative experiences with authority figures in the past and building trust with the Police is a therapeutic activity. No concerns have been raised by Police who have been to the Site to date.

2.9 The only complaint to any of the above parties relating to behaviour or conduct has been a concern raised by Seamab to the Police about neighbours seeking to impede access to the Canal Court parking area on or around 17 May 2023.

3. CAR PARKING AND TRAVEL TO/FROM THE SITE

CAR PARK CAPACITY

3.1 Objectors have claimed there are large numbers (up to 11) of large vehicles (e.g. minivans) using the front car park. Seamab is aware of only one occasion where this occurred. This was for a single event on one day in August 2023, a summer barbeque to celebrate the opening of the Site to residents. Transportation notes in its FIS that there is potential for 12 vehicles to use the Front Car Park but this is not its actual or intended use. The normal, day-to-day use of the Front Car Park is for parking for 3 family-sized cars.

3.2 The number of cars using the Front Car Park can be controlled by way of planning condition, if the Council considers this necessary. Seamab would welcome a reasonable limitation on the use of the Front Car Park, for example, to a maximum of 4 vehicles parked at any one time.

VEHICULAR MOVEMENTS

3.3 At present, the Front Car Park is used for staff parking. This leaves space in the Canal Court car park for house vehicles (which belong to Seamab and are used by residents) and avoids the use of the adopted road for parking. Once they arrive at the Site, staff do not use their own cars until they have finished their shift so there is very limited movement to/from the Front Car Park. In terms of staff movements, there are 2 separate teams, each comprising 3 staff members per shift. Morning shift staff arrive around 7.30am and depart between 12.30pm and 2.00pm. Afternoon shift staff arrive at 2.00pm and depart at 10.00pm. One staff member attends for each night shift, arriving at 9.00pm and departing the following morning at 9.00am.

3.4 Transportation for the residents is provided using Seamab's house cars. These currently park to the rear of the Site, accessing the car park from Canal Court. Should a resident experience anxiety with transitions (e.g. getting in and out of vehicles, changing location), the ability to use the Front Car Park for a house car will be essential as it is more private than the Canal Court car park and would allow staff and residents to avoid interacting with neighbours.

3.5 The weekday school run leaves the Site using house cars between 8.15am-8.30am. The journey takes between 33 and 43 minutes using the M9 and A-roads. The house cars return to the Site around 10.00am after dropping of the residents at school and are not used again until the school pick up. The house cars leave to pick up the residents from school at 1.45pm-2.00pm, returning to the Site at 3.15pm.

3.6 Based on the current use of the car parks, the following summarises the use of the Front Car Park and access to/from the B9080 on a typical weekday.

SHIFT	MORNING		AFTERNOON		EVENING	
	Arrive	Depart	Arrive	Depart	Arrive	Depart
Approx. Timings	7.30am	9.00am	2.00pm	12.30pm – 2.00pm	9.00pm	10.00pm
Number of Trips	3	1	3	3	1	3

Blue shading is used to denote a single trip during standard peak hours of travel. Peak hours are assumed to be 7.00am -10.00am and 4.00pm – 7.00pm, in line with the transport assessments carried out for the Winchburgh Application (see the Local Roads Assessment (2008) at para 3.5.1, excerpt provided at **Appendix 3**). Only 4 single trips are generated by the use of the Front Car Park on a typical weekday.

LOCAL TRAFFIC

3.7 Transportation states that one reason for its safety concerns is the increased traffic to be generated as the large-scale residential development at Winchburgh progresses. However, there is nothing to support this in the Winchburgh Application documents. The Officer's Report of Handling for the Winchburgh Application (at page 14, see excerpts at **Appendix 3**) states:

> *"The transport impacts have been fully assessed and Transportation is satisfied that, subject to appropriate improvements […], the proposals are acceptable. The improvements will include those […] at existing junctions at Newton, Threemiletown, Broxburn and Uphall […] With these improvements the existing road network can accommodate up to 1000 residential units".*

3.8 Since consent was granted for the Winchburgh Application, rather than increasing as anticipated, traffic has reduced. The Winchburgh "Local Roads Assessment - Review of Broxburn & Threemiletown Junction Performance 115190/AT/160303 (Part 1)" dated 2016 (see **Appendix 3**) states at para 5.4:

> *"Based on the [2016 surveys], it is apparent that mitigation at these junctions is currently not required as they continue to operate under capacity even after the addition of 300 residential units…".*

3.9 In addition, fewer houses than expected have been built to date. This means the number of vehicle trips generated by Winchburgh is much lower than projected. As a result of the reduced traffic and housing numbers, the Winchburgh developer applied in 2022 to delay the delivery of traffic mitigation measures as they are not yet needed. The Planning Statement dated March 2022 in support of application reference 0232/FUL/22 includes a House Occupations Programme which states at paras 3.9 – 3.10:

> *"As of December 2022, there have been 662 housing occupations from an anticipated 3,800 […] The reason for the low rate of delivery to date is simply that infrastructure procurement and delivery […] was put on hold […] At an annual occupation rate of 250 dwellings per year, this would require a further 12.4 years of construction which would take the ongoing development to 2033 to achieve."*

3.10 Based on the latest projections, the 1,000 houses which the Council considers can be accommodated by the existing road network will not be built until at least 2025. After that point, upgrades to the M9 and public transportation will be triggered to accommodate the further 2,800 houses comprised in the development. In this context, it is not credible to claim that 4 car trips spread across peak morning period on an under-utilised road will make a material difference to traffic levels.

ROAD SAFETY

3.11 As noted in the SSS, Transport Scotland's Raw Collision Data does not indicate any safety concerns on the B9080 around Threemiletown. This data is publicly available free of charge via this link: https://www.scotland.police.uk/about-us/how-we-do-it/road-traffic-collision-data/. We are not aware of any other collisions or near-misses from publicly available records. From a brief review, there are also no obvious safety concerns raised in relation to the B9080 in the Winchburgh Application (which included detailed transportation analyses and was approved by the Council).

3.12 The objectors indicate there have been multiple accidents on the B9080 but we are not aware of any in the vicinity of the Site based on publicly available records and the statements of staff at the Site. Transportation has not raised any accidents or incidents in its representations on the Application or to the LRB to date.

3.13 We are not aware of any accidents or incidents caused by the use of the front car park or of damage to entrances to the Site. **Appendix 2** includes photographs taken on 2 October and 28 September 2023 showing the original entrance pillars intact at the entrance to the Front Car Park. Seamab is not aware of any accidents, incidents or damage at all, let alone any involving vehicular traffic moving to/from the Front Car Park.

3.14 The only incident Seamab is aware of was a near collision caused by a neighbour who did not see a staff member exiting the rear car park at Canal Court on 3 September 2023. The Site Manager was involved in this incident. She also has oversight of the use of the front car park as part of her duties.

3.15 The Site Manager is prepared formally to swear an affidavit (capable of being submitted as evidence in Court) to confirm both that there have been no accidents or incidents in or around the front car

park at all and that the only incident she is aware of is the one on 3 September 2023 affecting the rear car park.

3.16 Transportation states in its Further Information dated 19 September 2023:

> *"use by a few vehicles singular infrequent vehicle use for collection and drop off would be deemed acceptable on the basis that signage is in place permanently to indicate no right hand turning. is not a problem [sic]."*

3.17 It is not entirely clear what this means but from what we understand of this statement, Transportation is content with the use of the Front Car Park by a "few" vehicles if signage advising against right turns is in place. 3 staff cars using the front car park clearly qualifies as a "few". As described above, the use would be infrequent. Signage is already in place on directing drivers exiting the Front Car Park to "Stop" and turn left on to the B9080 (see **Appendix 2**). All Seamab staff are briefed about the safe and proper use of the front car park. Staff which are less confident are advised to use the Canal Court car park out of an abundance of caution.

3.18 Seamab has taken steps, on its own initiative, to try to minimise any potential vehicular safety risks at the Site. For example, even though Seamab was led to believe by Transportation during a Site visit on 3 March 2023 that visibility from the right was good for vehicles exiting the Front Car Park, it sought to further enhance visibility by suggesting the use of mirrors (but this was not considered appropriate by Transportation, see email dated 20 March 2023 at **Appendix 1**).

3.19 Transportation states that there are no statutory requirements for left turns in this type of situation, which raises a point about enforceability. However, we note that:

3.19.1 there are no statutory or Highway Code requirements relating to turns on to B roads;

3.19.2 the lanes on the B9080 are separated with a broken white line, enabling cars to overtake and cross freely. There is no solid white line or double white line in the road which would prevent this; and

3.19.3 we are not aware of any legal precedent for objecting to access proposals on this basis.

3.20 In addition, there are at least 5 other direct vehicular access points to/from the B9080 from properties abutting the road (shown indicated by yellow dots in the photographs provided at **Appendix 2**). These are all within close proximity of the Site (within 120m) and are of comparable size and age. These other access points include access to a surfaced area to the West of St James Place that accommodates 4 cars. This parking area is not set back from the road at all, with the pavement being the only space between the parked cars and the B9080. The photograph of this area at **Appendix 2** shows 2 vehicles parked at the time of the photograph which would need to reverse directly on to B9080 to exit. We would query what steps any of the users of these other accesses have taken in respect of road safety and whether they have been subject to the same level of scrutiny as Seamab (given they are ostensibly riskier than the Front Car Park access to/from the B9080).

4. PLANNING POLICY COMPLIANCE

NPF4 POLICY 16

4.1 The fundamental question for the LRB is whether or not the Works are acceptable in planning terms, taking into account all material considerations. The answer to this question is "yes" regardless of whether or not Policy 16 of NPF 4 is deemed to apply.

4.2 As previously noted, the application of Policy 16 is unclear as NPF 4 is so recent. To better understand its aims, both the AP and Applicant previously referred to different case law on the meaning of "household" in the Use Classes Order. The fact is that neither of these cases is on point. Neither case clarifies the definition of "householder development" for the purposes of NPF 4. This term is not defined in NPF4, in any other planning policy documents or in statute. It will remain a matter of debate unless and until it is tested in Court in future. For the sake of argument, we have considered the Application both assuming Policy 16 applies and assuming that it does not apply.

4.3 If Policy 16 applies, paragraph (g) states:

> *"Householder development proposals will be supported where they: (i). do not have a detrimental impact on the character or environmental quality of the home and the surrounding area in terms of size, design and materials; and (ii). do not have a detrimental effect on the neighbouring properties in terms of physical impact, overshadowing or overlooking.*

4.4 In terms of sub-paragraph (i), the environmental quality of the home includes its ability to be used as a home. Fencing is a normal feature of the houses in Canal Court (as shown in the SSS). The materials used for the Works are the same as those used by neighbours (as shown in the SSS). The Works are not permanent, fixed structures, they can be removed in future if they are no longer required. As the fence and gravel wear, their colour will more closely match that of surrounding houses. Unless other fences and gravel in the neighbourhood are considered to have a detrimental impact, it is inconsistent to claim the Works are unacceptable in terms of impact on local character or environmental quality. Sub para (ii) is not relevant given the nature of the Works.

4.5 To the extent any features are unacceptable, Seamab has been open to adjusting the Works and has asked for input on design from the Council. It did not receive any substantive feedback on what would be appropriate. In any event, the size, design and materials of the Works can be controlled by way of planning condition.

4.6 Policy 16 (h) clearly supports the Works, stating:

> *"Householder development proposals […] relating to people with health conditions that lead to particular accommodation needs will be supported".*

The protected characteristics and requirements of the residents at the Site have been outlined above, in the SSS and in the FIS.

4.7 If, on the other hand, Policy 16 does not apply, LDP DES 1 is the relevant policy for assessing the acceptability of the Works. Their compliance with DES 1 is set out in the FIS.

NPF POLICIES 7(A) AND POLICY 14

4.8 The AP states that the Works are contrary to Policy 7(a) as the overall impact of the fence and the car park are in "stark contrast with the existing building" and this "detracts from the character of the listed building". The AP also states that "development is considered contrary to Policy 14(c) in that the proposal in particular the fence is poorly designed and detrimental to the amenity of the surrounding area." Detailed rebuttals to these statements have been provided in the FIS and are not repeated here.

4.9 In addition, we would emphasise that surrounding houses also fall within the setting of the listed building (see HES Guidance: *Managing Change in the Historic Environment – Setting* (updated 3 February 2020). As such, the design and impacts of neighbouring properties are also relevant.

4.10 As shown in the SSS, the materials used for fences and gravel by neighbours in Canal Court are the same as those used at the Site. We also note that planning permission has been granted for a large, modern two storey house and two car garage on land adjacent to the Site to the west (under planning application reference 0767/FUL/20). This land to the west of the Site was originally part of the wider farmhouse and steading settlement and has historic value in its own right, in addition to being included in the setting of the Site. It would be irrational for the Council to refuse the Application on the basis that the Works have more of an impact than the consented two storey house.

5. CONCLUSIONS

5.1 The majority of concerns expressed by objectors relate to the use of the Site as a care home. These are not within the scope of this LRB determination.

5.2 Road safety concerns, including those based on traffic generation by the Winchburgh Application, are not substantiated by evidence from objectors or the Council. They are not supported by any information on the public record or within the knowledge of Seamab.

5.3 Regardless of which planning policy is deemed to be relevant to the Works, there is no amenity impact sufficiently significant to justify the refusal of the Application due to policy non-compliance.

5.4 Although Seamab recognises that planning decisions involve a degree of judgment and the exercise of discretion, these are not being applied consistently, fairly or reasonably in the circumstances. More onerous requirements are being applied to Seamab than to comparable neighbouring developments. There is no rationale provided for this approach and there has been insufficient consideration of Seamab's provision of a valuable service for vulnerable children in determining the Application.

Davidson Chalmers Stewart LLP
3 October 2023

APPENDIX 1
EXCERPT FROM EMAIL CORRESPONDENCE SEAMAB/COUNCIL RE ROAD SAFETY

From: McMillan-Kerr, Elaine <Elaine.McMillan-Kerr@westlothian.gov.uk>
Sent: Monday, March 20, 2023 5:10 PM
To: Jean MacKinnon <jmackinnon@seamab.org.uk>
Subject: Request to erect a mirror - [OFFICIAL]

DATA LABEL: OFFICIAL

Dear Ms McKinnon,

I refer to your enquiry in relation to erecting a mirror on a post on the B9080.

Unfortunately, the provision of mirrors on any part of the adopted road network is not acceptable on safety grounds for a number of reasons. These include:

- Misaligned mirrors can dazzle motorists which therefore can have obvious safety implications, and
- There is no proof that mirrors make junctions any safer. Again, in instances where the mirrors become misaligned, they can mislead motorists into thinking the junction is clear when it is not.

Council policy is to remove mirrors where they have been erected on the public road.

I trust that you will find this information useful.

Kind Regards

Elaine McMillan Kerr
Road Safety & Traffic Management Technician
Operational Services, West Lothian Council
Whitehill Service Centre, 4 Inchmuir Road, Whitehill Industrial Estate, Bathgate

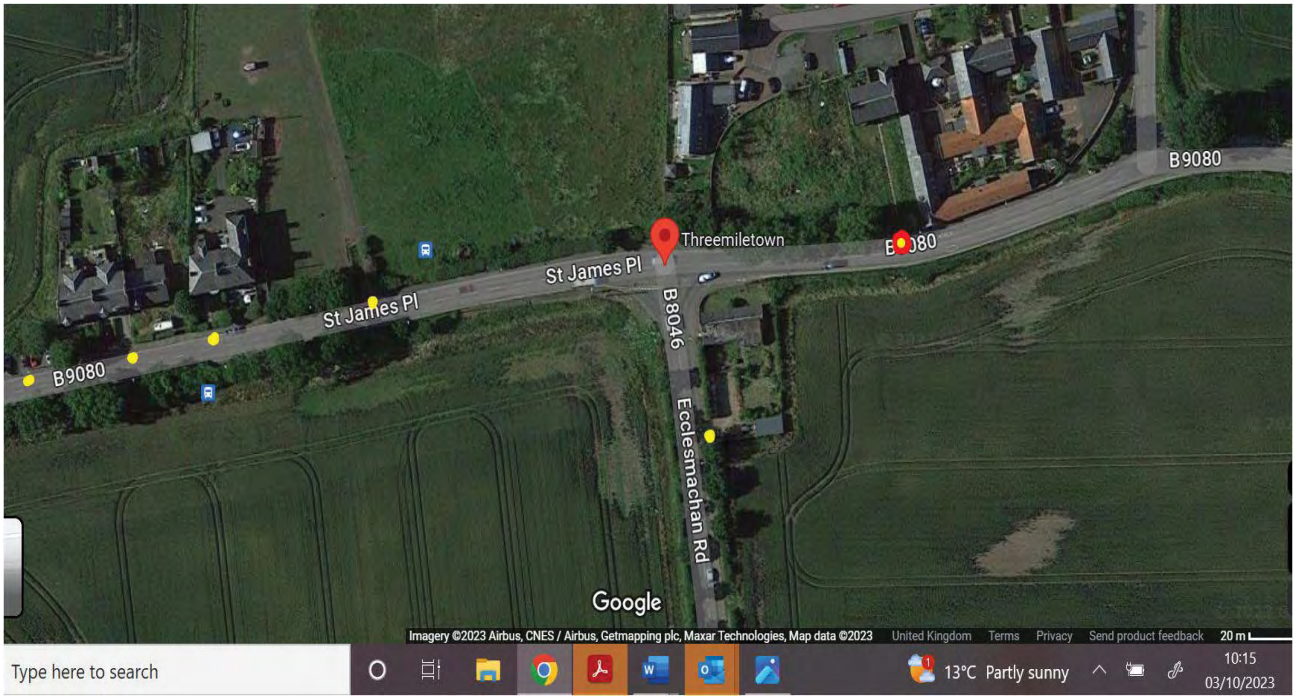
APPENDIX 2
PHOTOGRAPHS OF B9080 ACCESS

Front Car Park Signage (Photograph taken 2 October 2023)

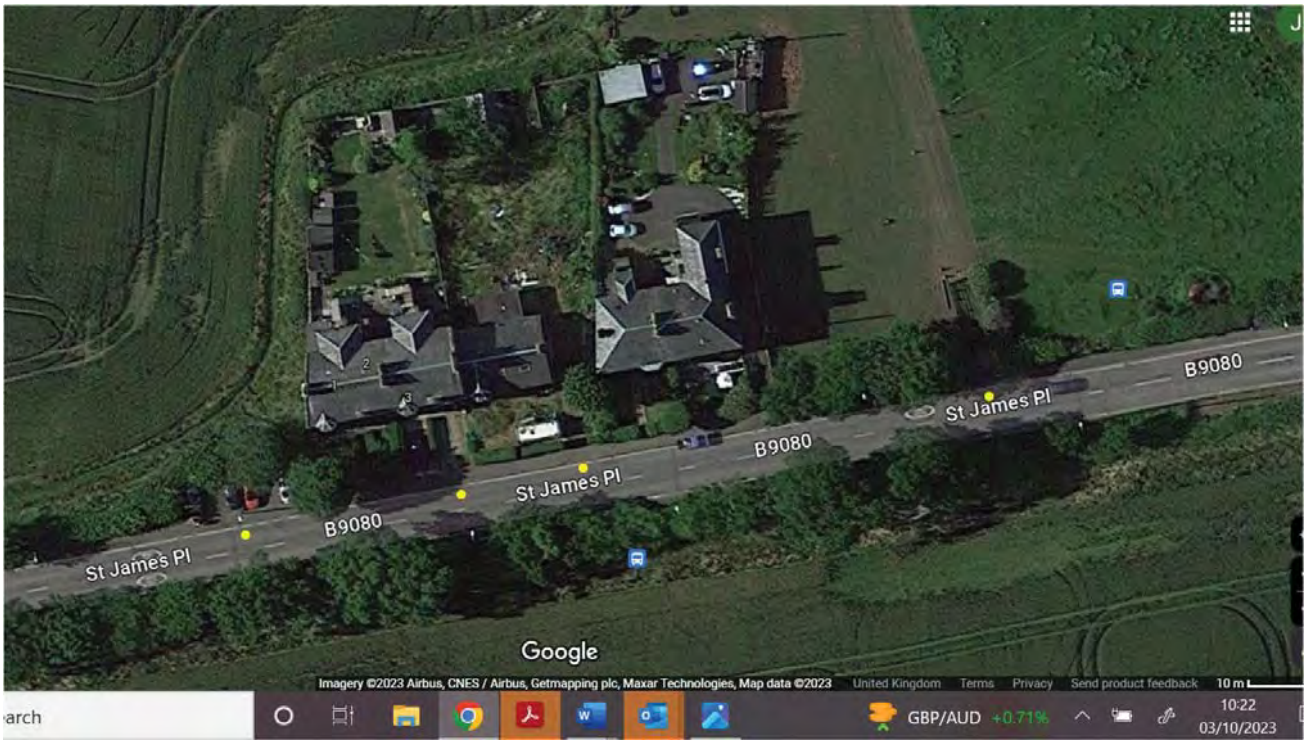
Pillars at Front Car Park (Photograph taken 28 September 2023)

B9080 Vehicular Access Points

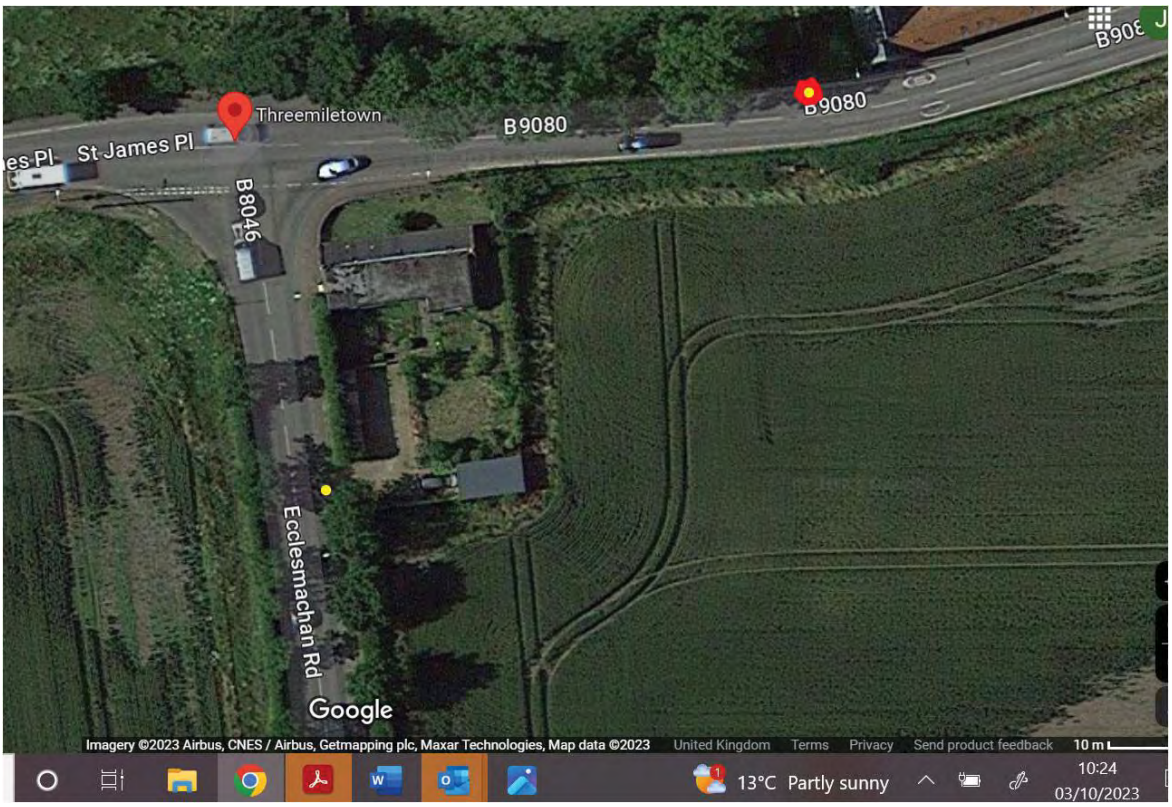
Point of Site access to/from Front Car Park is shown with red and yellow dot. Points of vehicular access to/from B9080 from other properties within 120m of the Site are shown with yellow dots.



St James Place Properties with direct access to B9080, approximately 120m west of the Site access:



Ecclesmachan Road Property with direct access to B9080, approximately 100m from the Site access:



APPENDIX 3

EXCERPTS FROM WINCHBURGH PLANNING APPLICATION DOCUMENTS REF 1012/P/05

Local Roads Assessment (2008)

3.5 Traffic Surveys 2008

3.5.1 Manual classified turning count surveys and queue surveys were undertaken on Tuesday 17th June 2008. They were undertaken at the ten junctions referenced in section 1.2 for the hours 07:00 – 10:00 and 16:00 – 19:00. This was during school term-time as the summer break did not start until 27th June 2008. The traffic flow diagrams for the AM and PM peak hours can be seen in Appendix A, Figure A1 and A2.

Table 6.5 – Summary of the Threemiletown Results

	2016 AM Peak+Com Dev		2016 AM Peak+Com Dev+Test 4		Cycle time 90 seconds	Am Peak + test 4 Mitigation	
	RFC	Queue	RFC	Queue	Results	Deg of Sat	Queue
B8046 to B9080 E/W	1.035	14	1.232	45	B8090 East	60.1	11
B9080 W to B8046	0.254	0	0.271	0	B8046 North	61.4	7
					B9080 centre	68.6	15
					B9080 centre	67.4	10
					B8046 South	56.2	9
					B9080 West	37.1	6

	2016 PM Peak+Com Dev		2016 PM Peak+Com Dev+Test 4		Cycle time 90 seconds	Pm Peak + test 4 Mitigation	
	RFC	Queue	RFC	Queue	Results	Deg of Sat	Queue
B8046 to B9080 E/W	0.918	6	1.178	35	B8090 East	55.1	10
B9080 W to B8046	0.187	0	0.193	0	B8046 North	62.5	7
					B9080 centre	50.8	11
					B9080 centre	62.2	11
					B8046 South	59.1	9
					B9080 West	18.6	3

6.6.2 The junction is over capacity in the AM Peak 2016 base situation and is worsened by the proposed development creating overcapacity in both the AM and PM peaks. The proposed mitigation measure is to signalise the junction. This would involve signalising both the B8046 south and the B8046 north due to their close proximity in the format of a staggered junction.

7.1.1 This report has assessed the impact of the development contained within the initial phase of the Winchburgh Masterplan on the local road network. This phase consists of 1000 residential units, interim secondary school provision for 660 pupils and community facilities. For the purpose of the assessment the development has been considered incrementally in four separate tests.

7.1.2 The network assessed was agreed with West Lothian Council. Of the junctions included this assessment has determined that the two junctions within Winchburgh itself and the A904/B8046 junction in combination with the M9 eastbound slip will not be critical.

7.1.3 There are capacity issues at five other junctions within the network at Kirkliston, Broxburn, Uphall, Threemiletown and Newton. Nevertheless the assessment has identified appropriate mitigation that if implemented would allow the development trips to be accommodated. The mitigation identified is as follows:

- Signalisation of the Threemiletown staggered junction;
- Signalisation of the Newton junction;
- Optimisation of the signal timings at the Broxburn junction together with the restriction of Strathbrock Place to entry only at the junction;
- Optimisation of the signal timings at the Uphall junction and the removal of some on-street parking to improve lane usage

7.1.6 The results of operational assessments for the 1,000 house and secondary school scenario shows that if critical junctions are improved then there would remain an element of spare capacity. An initial test of 1,500 houses and school has been undertaken that

Grontmij www.grontmij.co.uk

demonstrates that even at this level the junctions can be shown to perform within capacity (degree of saturation < 100%).

Refer to Section 6.7.

Threemiletown Results		AM Peak											
		2008		2016 + com		2016 + com test1		2016 + com test2		2016 + com test3		2016 + com test4	
Arm	Name	RFC	Queue	RFC	Queue	RFC	Queue	RFC	Queue	RFC	Queue	RFC	Queue
2	B8046	0.886	5	1.035	14	1.143	28	1.182	35	1.206	39	1.232	45
3	B9080 West	0.222	0	0.254	0	0.26	0	0.267	0	0.271	0	0.271	0

Threemiletown Results		PM Peak											
		2008		2016 + com		2016 + com test1		2016 + com test2		2016 + com test3		2016 + com test4	
Arm	Name	RFC	Queue	RFC	Queue	RFC	Queue	RFC	Queue	RFC	Queue	RFC	Queue
2	B8046	0.789	3	0.918	6	0.999	9	1.082	14	1.125	21	1.135	35
3	B9080 W	0.199	0	0.187	0	0.194	0	0.195	0	0.194	0	0.193	0

Provision of Signalised Stagered Junction

Threemiletown Results		AM Peak											
						2016 + com test1		2016 + com test2		2016 + com test3		2016 + com test4	
Arm	Name					Deg. Of Sat	Queue	Deg. Of Sat	Queue	Deg. Of Sat	Queue	Deg. Of Sat	Queue
1	B9080 East					46.2	8	52.6	9	56.1	10	60.1	11
2	B8046 North					60.8	7	61	7	61.2	7	61.4	7
3	B9080 Central East					65.7	14	67	14	67.7	14	68.6	15
4	B9080 Central West					55.4	9	61	9	64	10	67.4	10
5	B8046 South					53.5	8	54.6	9	55.4	9	56.2	9
6	B9080 West					36.6	5	36.9	6	36.9	6	37.1	6

Threemiletown Results		PM Peak											
						2016 + com test1		2016 + com test2		2016 + com test3		2016 + com test4	
Arm	Name					Deg. Of Sat	Queue	Deg. Of Sat	Queue	Deg. Of Sat	Queue	Deg. Of Sat	Queue
1	B9080 East					49.5	8	52.1	9	53.4	9	55.1	10
2	B8046 North					59.8	6	61	6	61.8	7	62.5	7
3	B9080 Central East					42.5	9	46.3	10	48.3	11	50.8	11
4	B9080 Central West					57.2	10	59.5	11	60.6	11	62.2	11
5	B8046 South					50.3	8	54.3	8	56.5	9	59.1	9
6	B9080 West					17.5	2	18	3	18.2	3	18.6	3

Local Roads Assessment
Review of Broxburn & Threemiletown Junction Performance 115190/AT/160303 (Part 1) (2016)

2.2 2008 to 2016 Traffic Flow Comparison

Flows from the surveys carried out in 2008 and the recent 2016 traffic surveys were compared to highlight changes in travel patterns in the area. The analysis of the data shows that there are numerous changes in junction movements between the two survey years. Key points to note are:

Broxburn Junction

- 155 extra vehicle trips during the AM peak travelling eastbound straight from the A899 Main Street (West) approach to the Main Street/ Greendykes Road junction in Broxburn. This represents an 86% increase in that particular movement. All other movements are similar to the 2008 traffic surveys.

Threemile Town Junction

- The reduction in southbound traffic is reflected at the Threemiletown junction (B8046/B9080), where right turners from the northern B8046 approach reduce by over half during both the AM and PM peaks.
- Through Winchburgh itself, eastbound straight-on traffic on the B9080 during the AM peak has reduced by 217 trips (48%). During the PM peak, westbound straight-on traffic falls by 57 trips, or 24%.

5.4 Threemiletown Junction

The performance of the B8046/B9080/Ecclesmachan Road junction was assessed using TRL Software 'PICADY', with results of the analysis presented in terms of the ratio of flow to capacity (RFC) and the corresponding maximum queue. A priority junction is predicted to operate within 'practical capacity' where an RFC of 0.85 or below is recorded. The performance of the junction is graded with a letter between A-F with F classifying the junction as failing (RFC>0.85). Where an RFC of over 1.00 is predicted the roundabout is considered to operate over capacity.

In line with guidance on stagger lengths outlined by TRL, and for consistency with the 2009 models, the Threemiletown junction has been modelled as two separate T-junctions.

Table 5.2 shows that combined, the priority Threemiletown junction currently operates below its maximum capacity during both surveyed peaks. At the Ecclesmachan Road approach to the junction, the busiest traffic stream is associated with vehicles turning from Ecclesmachan Road onto the B9080 during the weekday morning peak. A RFC value of 0.72 has been calculated at this arm. At the B8046/ B9080 junction, the busiest period has been identified as the weekday evening peak, where a RFC value of 0.54 has been calculated for the B8046 approach to the junction.

Approach Arm	Weekday AM				Weekday PM			
	2016 Base		2016 Base + Development		2016 Base		2016 Base + Development	
	RFC	Max. Queue	RFC	Max. Queue	RFC	Max. Queue	RFC	Max. Queue
B9080/Ecclesmachan Road priority junction								
Ecclesmachan Road – B9080 (E & W)	0.72	3	0.75	3	0.35	1	0.42	1

Approach Arm	Weekday AM				Weekday PM			
	2016 Base		2016 Base + Development		2016 Base		2016 Base + Development	
	RFC	Max. Queue	RFC	Max. Queue	RFC	Max. Queue	RFC	Max. Queue
B9080 (W) – Ecclesmachan Road	0.01	0	0.01	0	0.02	0	0.02	0
B8046/B9080 priority junction								
B8046 – B9080 (E & W)	0.47	1	0.49	1	0.54	1	0.56	1
B9080 (E) – B8046	0.17	1	0.19	1	0.16	1	0.16	0

Table 5.2 – PICADY Modelling Results

RFC values increase slightly after the occupation of 300 additional dwellings however the junction is still expected to operate below its practical capacity. The RFC value for the Ecclesmachan Road approach during the weekday morning peak has increased from 0.72 to 0.75, while the RFC value for the B8046 approach during the weekday evening peak has increased by 0.02, from 0.54 to 0.56. Both of these figures are significantly below the 85% practical capacity value. A full summary of the PICADY results for the junction are available in **Appendix E**.

6. Summary

Up to date traffic surveys were undertaken in January 2016 when 250 residential units in Winchburgh were occupied. The 2016 traffic surveys were compared against the 2008 traffic surveys used in the original Local Roads Assessment. What is evident is that the traffic growth of 12% to 2016 has not happened along with the large committed development flows that were added to the area, meaning predictions of over-capacity junctions at Broxburn and Threemile Town have not happened. Vehicle trips from an additional 300 residential trips have been added to the network and the key junctions based on planning condition 28 and 29 Broxburn and Threemiletown were assessed.

Based on the travel distribution and junction assessment results, it is apparent that mitigation at these junctions is currently not required as they continue to operate under capacity even after the addition of 300 residential units at the Winchburgh development.

Therefore it is recommend that condition 28 and 29 be postponed until they may be required at a future date post 550 units.

Winchburgh Application
Report to Committee by Development Management Manager dated 2 June 2010

		replacement planting will be undertaken.
4.	**Transportation** • Without rail link only 300 houses would be acceptable • Road congestion & traffic impact (5,000 extra cars) • Impacts on junctions at Kirkliston, A89 & A8 • The roads north of the M9 are narrow and will lead to road safety issues • The M9 junction should be at Muriehall • The junction will impact on the setting of Duntarvie Castle • Need new combined bus & rail links	The transport impacts have been fully assessed and Transportation is satisfied that, subject to appropriate improvements to existing roads and junctions, the proposals are acceptable. The improvements will include those to the road north of the M9 and the Beatlie bridge and at existing junctions at Newton, Threemiletown, Broxburn and Uphall, which will be required as conditions of consent. With these improvements the existing road network can accommodate up to 1000 residential units and beyond this the new motorway junction will need to be in place. Bus services and facilities will be supplemented as the settlement expands and the council will continue to discuss the need for a new rail station with Transport Scotland. The reporters at the PLI concluded that because of constraints with the delivery of a rail station, an enhanced bus service would be acceptable to deliver the necessary improvements in public transport. Historic Scotland has not objected to the location of the junction in relation to Duntarvie Castle.

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		quality contemporary design.	
WLC Transportation	NO	The transportation and access principles contained in the master plan are acceptable. Full vehicular/pedestrian/cycle access proposals will be required with each detailed application that is submitted. Developers will also be required to undertake the appropriate improvement/mitigation measures on the existing network at certain points throughout the development. The number of houses that are occupied will trigger the requirement for the works. During the construction of the first 550 units the following works will need to be undertaken: Signal and direction change at Greendykes traffic lights, Broxburn, Installation of traffic signals at Threemiletown Other triggers will then need to be conditioned up to the 1000th unit, including changes to signals at Uphall and new signals at Newton. The motorway junction, the railway station (or an enhanced bus service) and appropriate park and ride facilities will need to be in place prior to the occupation of the 1001st unit.	Noted. The transportation requirements and triggers have been agreed with the developer and will be incorporated into conditions or legal agreements as required.

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Section 42 application reference 0232/FUL/22

Variation of Condition 3 of the Winchburgh Application Planning Permission in Principle Planning Statement dated March 2022

House Occupations Programme

3.9 As of December 2022, there have been 662 housing occupations from an anticipated 3,800 occupations leaving a balance of circa 3,100 units. The reason for the low rate of delivery to date is simply that infrastructure procurement and delivery, post Phase 1, was put on hold until the Tri-partite Agreement was signed. Infrastructure delivery, with the Tri-partite Agreement signed, is accelerating rapidly and is a material factor in the new forecasts of housing occupations.

3.10 At an annual occupation rate of 250 dwellings per year, this would require a further 12.4 years of construction which would take the ongoing development to 2033 to achieve. This ties in with the longer term WDL timeline in Appendix 2 and would necessitate a number of residential and supporting infrastructure MSC applications for development post 2027 as a result.

Hi Val,

Many thanks for sending this info through.
I have the same concerns about the car parking for Seamab.
I totally agree with roads and transport that the front car park should not be used. How will this be enforced?
At the moment this is an accident waiting to happen and as residents this puts us at more risk.
The back car park accessed through Canal court should be sufficient for this company to be able to run successfully without using any lay bus or other areas in Canal court.

Kind Regards
Jenny McDonagh

Sent from my iPhone

Received by email on 19th Sept at 19:50

Hello again and thank you for your email and attached document.

It is clear, in our opinion, that this car park is unsafe and was therefore correctly refused planning permission. Visibility does not meet official safety requirements, period. No amount of platitudes from Seamab can change this. Common sense must prevail in the interest of safety, despite Seamab's apparent efforts to overlook this as it does not fit in with their plans.

Regards,

Robin & Dianne Risbridger

Received by email on 19 Sept 2023 at 23:04

Hello again and many thanks for your email and attached documents.

Our comments are as follows, based on our experience of both West Lothian Council and Seamab to date:

In summary, Seamab, in our opinion, clearly have a very high opinion of themselves and do not like to be challenged. This is evident in their need to engage a solicitor to fight their corner.

The contents of their inspection report fly in the face of how they treat neighbours - it's such a pity they don't show us the same consideration. We note there is no reference to care facilities run by Seamab sited within the midst of a long established, small residential development such as Canal Court, and we are of the opinion this is where the problem lies. Who in their right mind sets up such a specialised care facility with all the complexities accompanying it right at the heart of a small community inhabited by so many elderly and unwell people? Little wonder this is proving to be a disaster for both sides! Seamab's lack of due diligence is now being used against both West Lothian Council and, more importantly, the innocent vulnerable residents who have lived peacefully here for many years. How unprofessional!

The letter from their solicitor contradicts many of the claims made in their application.

The definition of the Farmhouse changes on a whim to suit whatever description Seamab needs at any particular time.

They completely disregard the needs of those of us neighbours who are disabled and who should have been involved in such a major change to our surroundings and subsequent way of life from the outset.

In our opinion, it was clear from the start that this whole process has been badly handled by those in a supposedly professional capacity. Seamab did not tell the truth in their application for a Certificate of Lawfulness, arrogant enough to assume this retrospective car park application would also pass unchecked. West Lothian Council have failed miserably by not undertaking thorough enough checks, resulting in a failure to protect those of us most at risk from having such a specialised business facility located in our street. Must we remind you West Lothian Council have a duty of care to **all** residents, not only those of Seamab. However, our needs have clearly fallen on deaf ears and, as a consequence, are being completely ignored.

Shame on you all!

Robin & Dianne Risbridger

Received by email on 19th Sept at 22:51

Development Management
West Lothian Civic Centre
Howden South Road
Howden
Livingston
EH54 6FF

Tel: 01506 280000

Our Ref: 0130/H/23
Direct Dial No:
Email:
mahlon.fautua@westlothian.gov.uk
3 July 2023

Draft Justification and conditions/reasons

This permission is granted subject to the following conditions:

1. Within one month from the date of decision, details of the finishing of the fencing shall be submitted for the written approval of the planning authority.

   The submission shall include details of the finished colour or hedging of the new fence.

   Once approved, the new fencing shall be installed within three months of the decision, to the satisfaction of the planning authority.

   Reason: To ensure the setting and character of the listed building is protected.

Standard Notes:

Please read the following notes carefully as they contain additional information which is of relevance to your development.

Contaminated land procedures

In the event that contamination is found at any time when carrying out the approved development that was not previously identified, work on site shall cease and the issue shall be reported in writing to the planning authority immediately. The developer is required to follow the councils Supplementary Planning Guidance Development of land potentially affected by contamination. This document provides developers and their consultants with information on dealing with the planning process in West Lothian when development is proposed on land which is suspected of being affected by contamination. This document and further guidance is provided via the Councils web pages at
https://www.westlothian.gov.uk/article/34731/Contaminated-Land

Liaison with the Coal Authority

As the proposed development is within an area which could be subject to hazards from current or past coal mining activity, the applicant is advised to liaise with the Coal Authority before work begins on site, to ensure that the ground is suitable for development.

Any activities which affect any coal seams, mine workings or coal mine entries (shafts) require the written permission of the Coal Authority. Failure to obtain such permission constitutes trespass, with the potential for court action. The Coal Authority is concerned, in the interest of public safety, to ensure that any risks associated with existing or proposed coal mine workings are identified and mitigated.

To contact the Coal Authority to obtain specific information on past, current and proposed coal mining
activity you should contact the Coal Authority's Property Search Service on 0845 762 6848 or at
www.groundstability.com.

Advisory note to developer - SGN

There are a number of risks created by built over gas mains and services; these are:

- Pipework loading - pipes are at risk from loads applied by the new structure and are more susceptible to interference damage.
- Gas entry into buildings - pipework proximity increases risk of gas entry in buildings. Leaks arising from previous external pipework able to track directly into main building from unsealed entry.
- Occupier safety - lack or no fire resistance of pipework, fittings, or meter installation. Means of escape could be impeded by an enclosed meter.

Please note therefore, if you plan to dig, or carry out building work to a property, site, or public highway within our gas network, you must:

1. Check your proposals against the information held at https://www.linesearchbeforeudig.co.uk/ to assess any risk associated with your development and
2. Contact our Plant Protection team to let them know. Plant location enquiries must be made via email, but you can phone us with general plant protection queries. See our contact details: Phone 0800 912 1722 / Email plantlocation@sgn.co.uk

In the event of an overbuild on our gas network, the pipework must be altered, you may be temporarily disconnected, and your insurance may be invalidated.

Further information on safe digging practices can be found here:

- Our free Damage Prevention e-Learning only takes 10-15 minutes to complete and highlights the importance of working safely near gas pipelines, giving clear guidance on what to do and who to contact before starting any work https://www.sgn.co.uk/damage-prevention

- Further information can also be found here https://www.sgn.co.uk/help-and-advice/digging-safely.

SGN personnel will contact you accordingly.

Advisory note to developer - General

Please note that it is the developer's responsibility to ensure that all relevant consents and certificates are in place prior to starting work on site and that it is the developer's responsibility to speak with service authorities to ensure safe connection is possible to allow the development to proceed.

How to challenge the council's Decision

If your application was for a local development and was determined by an officer appointed by the council and you disagree with the decision or with conditions which have been attached, you can apply for a review of the decision/conditions by the council's Local Review Body. In all other cases, if you disagree with the decision you can seek an appeal of the decision/conditions to the Scottish Government Planning and Environmental Appeals Division. You can find information on these processes at https://www.westlothian.gov.uk/article/33128/Decisions-Reviews-and-Appeals

OR

The council in exercise of its powers under the Town and Country Planning (Scotland) Act 1997 (as amended) refuses planning permission for planning application . for the reason(s) set out as follows: