Our ref: Q220592
Your ref: EN010138
Email: [redacted]@quod.com
Date: 23 July 2024

The Planning Inspectorate
National Infrastructure Applications Team
Temple Quay House
Temple Quay
Bristol
BS1 6PN

For the attention of Mr Jonathan Manning

Dear Mr Manning

Application for a Development Consent Order by Indaver Rivenhall Ltd for the Rivenhall Integrated Waste Management Facility (PINS Ref EN01038) – Deadline 5 Submission

As set out in your Rule 8 Letter [PD-003], the Examining Authority ('ExA') has requested the following information of relevance to the Applicant to be submitted at Deadline 5:

- Comments on responses to the Examining Authority's ExQ2;
- Comments on responses to ExA's proposed Schedule of Changes to the dDCO;
- Final draft DCO to be submitted by the Applicant in clean, tracked, word versions and in the statutory Instrument (SI) template with the SI template validation report;
- Comments on any other information and submissions received at D4;
- Any further information requested by the Examining Authority under Rule 17 of the Examination Procedure Rules.

Details pursuant to each are set out below. A schedule of the Applicant's Deadline 5 submissions is provided at **Appendix 1**.

1 Comments on responses to the Examining Authority's ExQ2

1.1 Both Essex County Council ('ECC') and Braintree District Council ('BDC') have provided responses to Q2.2.1 of ExQ2 in their Deadline 4 submissions ([REP4-011] and [REP4-010] respectively). These are broadly the same comments made by each party in their respective Local Impact Reports and thus the Applicant has no comments beyond those set out in Table 4 of the Applicant's Comments on Deadline 1 Submissions [REP2-004]; and its submissions to Agenda Item 3 of the Issue Specific Hearing as set out in the Summary of Applicant Oral Submissions to ISH [REP3-012].

1.2 ECC have provided a response to Q2.5.2 which is supported by a Legal Note. The Applicant has prepared a response to this setting out why the Existing Section 106 Agreement [REP1-013] does not need to be updated, which is provided at **Appendix 2** of this covering letter.

2 Comments on responses to ExA's proposed Schedule of Changes to the dDCO

2.1 The Applicant notes both ECC and BDC have supported the inclusion of a cap on energy generation. The Applicant has provided submissions on this throughout the Examination, setting out why a cap is not needed and does not deliver any planning benefits. The location of these submissions is as set out in Section 4 of the Applicant's Deadline 4 Covering Letter [REP4-006].

3 Final draft DCO to be submitted by the Applicant in clean, tracked, word versions and in the statutory Instrument (SI) template with the SI template validation report

3.1 No changes have been made to the dDCO compared to the version that was submitted at Deadline 4 (version 3 [REP4-003]). A **word version** of the dDCO (v3) and the **SI template validation report** are submitted.

4 Comments on any other information and submissions received at D4

4.1 As noted in the Applicant's Deadline 4 submission, a finalised, dated and signed version of the **Statement of Common Ground** has been prepared (Version 5, Doc Ref 8.1) in clean and tracked changed versions.

4.2 An updated version of the **Statement of Commonality** has also been prepared (Doc Ref 8.2).

5 Any further information requested by the Examining Authority under Rule 17 of the Examination Procedure Rules.

5.1 No such further information has been requested.

6 Summary

6.1 If the Applicant can be of any further assistance or the ExA considers any further clarification is required in response to the information and documentation submitted as part of this submission, please do not hesitate to contact the Applicant using the details already provided.

Yours sincerely

[redacted]

Carly Vince on behalf of the Applicant
Senior Director

enc. As per Appendix 1 – Deadline 5 Applicant Submission Schedule
Appendix 2 – Note on Changes to the Existing Section 106 Agreement

Appendix 1 – Applicant's Deadline 5 Submission Schedule

Document No.	Document Title	Version
3.1	Draft Development Consent Order (word version)	3
3.1	Draft Development Consent Order (SI template validation report)	3
8.1	Statement of Common Ground with the Host Authorities	5
8.1	Statement of Common Ground with the Host Authorities (TRACKED)	5
8.2	Statement of Commonality	2
9.5.1	Deadline 5 - Cover Letter 23 July 2024	1

Appendix 2 - Note on the interpretation of the existing section 106 agreement

HERBERT SMITH FREEHILLS

Deadline 5

RIVENHALL IWMF DCO APPLICATION (EN010138)

APPLICANT NOTE ON THE INTERPRETATION OF THE EXISTING SECTION 106 AGREEMENT

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1. INTRODUCTION AND EXECUTIVE SUMMARY

1.1 For the reasons set out in the Applicant's response to ExQ1 1.5.5 [REP1-011] and in this Note (which should be read together), the Applicant does not consider that a variation of the Existing Section 106 Agreement [REP1-013] is necessary to bind the authorised development under the DCO.

1.2 The arguments set out in ECC's note dated 20 June 2024 (the "**ECC Note**") submitted at Deadline 4 [REP4-011] requiring such a deed of variation are based upon a misunderstanding of the judgment in the case of *Norfolk Homes Ltd* v *North Norfolk District Council* [2020] EWHC 2265 (**Appendix 1**).

1.3 The Existing Section 106 Agreement must be interpreted in accordance with the "natural and ordinary meaning" of its terms. These terms and their meaning are broad in nature and do not refer specifically to the TCPA permission.

1.4 Therefore, the authorised development under the DCO, which comprises limited internal works, will not result in the planning obligations in the Existing Section 106 Agreement from being superseded, ceasing to have effect or prevent any outstanding obligations from being triggered in due course.

2. SUMMARY OF THE ECC NOTE

2.1 As set out in the ECC Note, ECC's view is that the Existing Section 106 Agreement must be varied prior to the grant of the DCO to ensure that the development of the Site remains bound by the existing planning obligations.

2.2 ECC's view is based on the following arguments:

1. The interpretation of the Existing Section 106 Agreement is subject to the principles set out in *Norfolk Homes Ltd v North Norfolk District Council* [2020] EWHC 2265 (para 1.7 of the ECC Note).
2. In *North Norfolk*, the High Court found that where the drafting of a section 106 agreement is clear and unambiguous, it does not apply to subsequent developments (para 1.7 of the ECC Note).
3. The drafting of the Existing Section 106 Agreement (particularly the definition of Development) is clear, unambiguous and precise. Therefore, the Existing Section 106 Agreement can only be interpreted as capturing the planning applications made to ECC at the time it was completed and does not capture the DCO (para 1.7 of the ECC Note).
4. As ECC does not have authority to determine applications where the capacity is over 50MW, the definitions in the Existing Section 106 Agreement must be interpreted as subject to the statutory capacity threshold of 50MW and so excluding the authorised development and DCO (para 1.10 of the ECC Note).
5. There are no grounds to imply wording to incorporate the DCO into the Existing Section 106 Agreement (para 1.11 of the ECC Note).
6. The Applicant has entered into further section 106 agreements prior to the grant of section 73 permissions at the Site (para 1.9 of the ECC Note).

3. SUMMARY OF THE APPLICANT'S POSITION

3.1 The Applicant maintains its position set out in its response to ExQ1 1.5.5 [REP1-011] that a deed of variation or supplemental agreement is not required to ensure that the development of the Site remains bound by the obligations in the Existing Section 106 Agreement following implementation of the DCO.

3.2 The Existing Section 106 Agreement binds the Site and will not be superseded or cease to have effect following the implementation of the DCO. Nor will the implementation of the DCO prevent any outstanding planning obligations (such as those relating to occupation) from being triggered.

3.3 This is because the definitions in the Existing Section 106 Agreement are sufficiently broad to ensure that the relevant obligations in the Existing Section 106 Agreement will continue to bind the Site.

3.4 As the definitions are sufficiently broad, there is no need to imply additional terms into the Existing Section 106 Agreement to include a reference to the DCO.

3.5 There is no lawful reason to interpret the definitions more narrowly or to imply further terms into the Existing Section 106 Agreement to limit the planning obligations to the TCPA permission (and exclude the DCO).

4. SUMMARY OF NORTH NORFOLK

4.1 In *North Norfolk*, a developer entered into a section 106 agreement in 2012 (the "**2012 Agreement**") and consequently obtained an outline planning permission for a housing development (the "**2012 Permission**"). The developer subsequently obtained two section 73 permissions in respect of the same development in 2013 and 2015 (the "**2013 Permission**" and the "**2015 Permission**"). The developer did not enter into any further section 106 agreements prior to obtaining these later permissions.

4.2 The developer implemented and carried out development under the 2015 Permission. The 2012 Permission was not implemented and accordingly lapsed after becoming time-expired.

4.3 A dispute then arose between the developer and the council as to whether the obligations in the 2012 Agreement were binding on the developer as it carried out development under the 2015 Permission.

4.4 The council stated that either (i) the definitions in the 2012 Agreement should be interpreted so as to include reference to the 2015 Permission or (ii) wording should be implied into the definitions in the 2012 Agreement to add references to the 2015 Permission.

4.5 The High Court was not persuaded by either of the council's arguments and determined that the 2015 Permission was not bound by the 2012 Agreement. This decision was based upon the Court's interpretation of the drafting of the 2012 Agreement.

4.6 As set out in paragraphs 21 to 24 of the judgment, the 2012 Agreement was drafted as follows:

4.6.1 *'"Development" means the development to be carried out pursuant to the Planning Permission granted in accordance with the Application';*

4.6.2 *'"Planning Permission" means the outline planning permission subject to conditions to be granted by the Council pursuant to the Application set out in the Second Schedule';*

4.6.3 *'"Application" means the application made by the Developer for outline planning permission submitted to the Council for the Development and allocated reference number PO/11/0978';* (emphasis added)

4.6.4 The entire 2012 Agreement was conditional upon the "*Commencement of Development"* (i.e. when a material operation forming part of the Development begins).

4.6.5 The specific obligations (once the 2012 Agreement became unconditional) were triggered by either Commencement of Development, Commencement of Construction, or Occupation. Each of these defined terms used either "*Development*" or "*Planning Permission*" and so again were limited to the permission granted pursuant to the application with reference PO/11/0978 (i.e. the 2012 Permission).

4.7 The High Court decided that the definitions in the 2012 Agreement were clearly drafted and all cross-referred to the term *"Application"* (which was itself defined by reference to the specific reference number PO/11/0978).

4.8 In such circumstances, the definitions in the 2012 Agreement could not be interpreted as also including references to development under the later 2015 Permission. Nor could implied terms be inserted into the 2012 Agreement to result in the 2015 Permission being bound.

4.9 Therefore, the 2012 Agreement was conditional upon the commencement of development pursuant to the 2012 Permission. As the 2012 Permission had lapsed without being implemented, the 2012 Agreement remained unconditional and none of the obligations had been (or could be) triggered.

5. RESPONSE TO ECC'S NOTE

Is the interpretation of the Existing Section 106 Agreement and the implication of any terms into subject to the principles set out in *North Norfolk*?

5.1 Paragraphs 62 to 75 and 104 to 112 of the judgment in *North Norfolk* provide a helpful summary of the legal principles underpinning interpretation of section 106 agreements and the circumstances in which additional terms may be implied into section 106 agreements.

5.2 The Applicant agrees that these general principles are binding upon the interpretation of the Existing Section 106 Agreement.

5.3 The Applicant does not agree that the decision in *North Norfolk,* which was based on the precise drafting of the 2012 Agreement in that case, is binding in the current circumstances which can be distinguished.

5.4 Indeed, the principles of interpretation summarised in *North Norfolk*, which have been misunderstood by ECC for the reasons set out below, support the Applicant's position that the Existing Section 106 Agreement should be interpreted as binding any development pursuant to the DCO.

Is *North Norfolk* binding precedent, as suggested by ECC, that "where the drafting of a section 106 agreement is clear and unambiguous, it does not apply to subsequent developments" (para 1.7 of the ECC Note)?

5.5 ECC's position in paragraph 1.7 the ECC Note is based on a misunderstanding of the decision in *North Norfolk*.

5.6 A correct analysis of the decision should be 'where the drafting of a section 106 agreement is clear and unambiguous **and relates only to a specific planning application**, a section 106 agreement did not apply to subsequent developments.'

5.7 As set out in section 4 above, the wording of the 2012 Agreement in *North Norfolk* clearly and unambiguously referred to the application reference number in the relevant definitions. Therefore, the 2012 Agreement did not apply to subsequent developments.

5.8 *North Norfolk* does not support any blanket proposition that all clear and unambiguous section 106 agreements must be interpreted as excluding subsequent developments.

5.9 Indeed, at paragraph 93 of the judgment, it was recognised that a section 106 agreement could be clearly and unambiguously worded so as to include subsequent developments:

"The parties might have chosen to make the triggering of the obligations dependent upon the carrying out of development defined in terms which were not tied to the application PO/11/0978 or to the permission granted on that application, for example, by a description of the site and the key components of a scheme. If they had done that, and had also expressed the term "dwelling" by reference to that broader definition of development, then plainly the 2012 agreement would have applied to the carrying out of development so defined, whether pursuant to the 2012 permission or any subsequent grant of permission confirming to that description."

5.10 This paragraph supports the Applicant's position that where a description of a site and key components of a scheme is general rather than tied to a particular application, subsequent planning permissions are caught.

Does the drafting of the Existing 106 Agreement clearly, unambiguously and precisely only relate to the development pursuant to the TCPA Permission?

5.11 ECC's view is that the definition of "*Development*" in the Existing Section 106 Agreement "relates to the planning application made to ECC at the time" (paragraph 1.6 of the ECC Note).

5.12 Rather than relying upon the judgment in *North Norfolk* as providing a blanket and overarching precedent that a section 106 agreement can only ever apply to development carried out pursuant to the planning application with which it is associated, ECC should have instead considered the "*natural and ordinary meaning*"[1] of the wording used in the Existing Section 106 Agreement following the overarching principles of contractual interpretation summarised in (and not altered by) *North Norfolk* itself.

5.13 ECC's Note does not analyse or engage with the wording of the Existing Section 106 Agreement in order to explain or support ECC's view that the wording excludes any development pursuant to the DCO. In particular it does not engage with the wording of the definition of "Development":

> *'"the Development" shall mean an integrated Waste Management Facility comprising an anaerobic digestion plant treating mixed organic waste producing biogas converted to electricity through biogas generators; a materials recovery facility for mixed dry recyclable waste to recover materials for example paper, plastic, metals; a mechanical biological treatment facility for the treatment of residual municipal and/or commercial and industrial wastes to produce a solid recovered fuel; a Paper Recycling Facility to reclaim paper; a combined heat and power plant utilising solid recovered fuel to produce electricity, heat and steam; the extraction of minerals to enable buildings to be partially sunken below ground level within the resulting void; a visitor/ education centre; an extension to the existing access road; the provision of offices and vehicle parking; associated engineering works and storage tanks at the Application Site'*

5.14 This definition itself cross-refers to three defined terms:

5.14.1 *"Waste Management Facility" shall mean a facility for processing and disposing of municipal and/or commercial and industrial waste including anaerobic digestion, a materials recycling facility, a mechanical biological treatment plant, a Paper Recycling Facility and a combined heat and power plant. The facility also*

[1] See paragraphs 62 to 75 of *North Norfolk* which set out a summary of the general principles of interpretation.

includes energy generation from biogas as well as from the combined heat and power plant;

5.14.2 *"Paper Recycling Facility" shall mean a de-inking and pulping paper recycling facility to be situated within the Application Site;*

5.14.3 *"Application Site" shall mean the land at Rivenhall Airfield Coggeshall Road (A 120) Braintree COS 9DF shown for identification edged red on Figure 1-2 annexed hereto*

5.15 None of these terms include any reference to a particular planning application or planning permission.

5.16 Neither do they include any wording in their descriptions which exclude or contradict the proposed development pursuant to the DCO:

5.16.1 The DCO Site is located entirely within the Application Site and so it will take place on land already bound by the Existing Section 106 Agreement.

5.16.2 The authorised works to the valves in the CHP do not prevent the overall plant from being "a combined heat and power plant utilising solid recovered fuel to produce electricity, heat and steam; " (as that element of the Consented Scheme is described in the definition of Development);

5.16.3 Nor do the works prevent the overall Consented Scheme from being carried out. The development pursuant to the TCPA permission and DCO will not conflict with the overall definition of Development.

5.17 The natural and ordinary meaning of the words used in the Existing Section 106 Agreement is clear and unambiguous. The development controlled by the Existing Section 106 Agreement is defined by reference to a particular site and a particular described development.

5.18 Such clear and unambiguous wording is sufficiently broad to include the works to the valve in the CHP as proposed by the DCO.

5.19 The TCPA permission has already been implemented and the Existing Section 106 Agreement is no longer conditional (in *North Norfolk* the 2012 Agreement could no longer be triggered as the 2012 Permission had lapsed). Moreover, the definitions in the Existing Section 106 Agreement do not include references to any particular planning permission or application (as they clearly did in *North Norfolk*).

5.20 There is nothing in ECC's Note or *North Norfolk* which prevents the DCO from being bound by the Existing Section 106 Agreement.

Does the fact that ECC does not have authority to determine applications where the capacity if over 50MW mean that the definitions in the Existing Section 106 Agreement should be interpreted as being subject to a 50MW cap or such a cap implied into the Existing Section 106 Agreement?

5.21 There are two reasons why the Existing Section 106 Agreement does not need to be interpreted as being subject to a 50MW cap (or have such a cap implied).

5.22 First, the DCO and planning permission regimes are not mutually exclusive. There is nothing in the Town and County Planning Act 1990 (as amended) which prevents an application for planning permission being made for an NSIP.

5.23 Therefore, ECC has the power to grant planning permission for generating stations with a capacity of over 50MW. In practice, such a planning permission would be very unusual as the authorised development could not lawfully be carried out without a DCO also being obtained. The law on this issue was considered by the High Court in paragraphs 49 to 55 of *Durham County Council & Anor* v *Secretary of State for Levelling Up, Housing and*

Communities [2023] EWHC 1394 (Admin) (**Appendix 2**) and it was determined that the local planning authority had jurisdiction to accept and decide such application.

5.24 Second, a section 106 agreement is a "*freestanding legal instrument*" which "*does not have to be linked to, or entered into in connection with, the grant of a planning permission*" (see paragraphs 48-49 of *North Norfolk*). There is no practical or legal requirement to always interpret section 106 agreements as being tied to a specific planning permission.

5.25 Therefore, even if were ECC prohibited from granting planning permission for development with a capacity of over 50MW, this cannot override the clear and precise drafting of the Existing Section 106 Agreement which does not include reference to any such cap or specific planning permission.

Are there any grounds to imply wording to incorporate the DCO into the Existing Section 106 Agreement (para 1.11 of the ECC Note)?

5.26 This statement by ECC is based on a misunderstanding of the Applicant's position. The Applicant's argument does not require additional terms relating to the DCO to be implied into the Existing Section 106 Agreement. The Applicant's position is based on interpretation.

Does the fact that the Applicant has previously entered into section 106 agreements prior to the grant of Section 73 permissions mean that the Existing Section 106 Agreement must be interpreted as excluding the DCO authorised development?

5.27 The judgment of *North Norfolk* clearly states at paragraph 70 that, given the public nature of planning documents, it is not permissible *"to have regard to post-contract conduct or an omission"* when seeking to interpret a section 106 agreement.

5.28 Therefore, it is clear that the Applicant and ECC's practice in entering into supplemental section 106 agreements or deeds of variation prior to the grant of any Section 73 permissions cannot influence how the terms of the Existing Section 106 Agreement should be interpreted.

5.29 Even if such behaviour could be used to establish the proper interpretation of the Section 106 Agreement, it is also clear that the current Application for the DCO is not analogous to the previous applications to ECC pursuant to Section 73 of the Town and County Planning Act 1990. When a planning permission is granted pursuant to Section 73, it forms an independent permission and the developer is entitled to choose between the alternative permissions.

5.30 This means that the original permission could lapse unimplemented (as was the case in *North Norfolk*).

5.31 Even where the original permission has been implemented, if development inconsistent with the original permission is then carried out pursuant to the Section 73 permission, the original permission would lapse or be incapable of further implementation (in accordance with the *Hillside* principle).

5.32 The DCO would not have this effect on the planning permissions affecting the Site. The DCO does not provide an alternative consent which the Applicant may choose to implement instead of the TCPA permission.

5.33 The authorised development under the DCO is limited to works to an internal valve within the Consented Scheme and the operation of the CHP at the Consented Scheme at a generating capacity above 50MW. This development is: (i) physically dependent upon part of the Consented Scheme being carried out; and (ii) not incompatible with the Consented Scheme.

5.34 Moreover, Article 6 of the dDCO [REP4-003] expressly provides that the carrying out of the authorised development under the DCO will not prevent the continued implementation of the TCPA permission. As set out in the Explanatory Memorandum to the draft Development Consent Order [REP3-006], this wording has been included for the avoidance of doubt only, to ensure that no argument can be made pursuant to the *Hillside* case that the implementation of the DCO prevents further implementation of the TCPA permission.

5.35 As the DCO does not have the same implications for the TCPA permission as a Section 73 permission, the Applicant's argument that no section 106 agreement is required is not inconsistent with its previous behaviour in respect of completing supplemental agreements.

Herbert Smith Freehills LLP

22 July 2024

HERBERT
SMITH
FREEHILLS

APPENDIX 1

Norfolk Homes Ltd v North Norfolk District Council [2020] EWHC 2265

Neutral Citation Number: [2020] EWHC 2265 (QB)

Case No: QB-2019-004500

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/08/2020

Before :

THE HON. MR JUSTICE HOLGATE

- -

Between :

Norfolk Homes Limited	**Claimant**
- and -	
(1) North Norfolk District Council	**Defendants**
(2) Norfolk County Council	

- -
- -

Mr. Christopher Lockhart-Mummery QC (instructed by **DLA Piper**) for the **Claimant**
Ms. Estelle Dehon (instructed by **eastlaw**) for the **First Defendant**
The **Second Defendant** did not appear and was not represented

Hearing date: 21st July 2020

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

THE HON. MR JUSTICE HOLGATE

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and released to BAILII. The date and time for hand-down is deemed to be 14:00 on the 20th August 2020

Mr Justice Holgate :

Introduction

1. The Claimant, Norfolk Homes Limited ("NHL") is a developer and the owner of land off Cley Road, Woodfield Road, Holt Norfolk ("the site"). The First Defendant, North Norfolk District Council ("NNDC") is the relevant local planning authority.

2. On 15 August 2011 NHL an outline application (with all matters reserved apart from means of access) was submitted to NNDC for planning permission for the erection of up to 85 dwellings, access, public open space and associated infrastructure. NNDC resolved to grant planning permission subject to the prior execution of a deed under s.106 of the Town and Country Planning Act 1990 ("TCPA 1990") between the then landowner, NNDC and Norfolk County Council ("NCC") to secure the provision of 45% of the total number of units constructed as affordable housing together with a number of financial contributions. On 22 June 2012 the section 106 obligation was executed ("the 2012 agreement"). On 26 June 2012 NNDC issued the decision notice granting planning permission under reference PO/11/0978 ("the 2012 permission").

3. On 19 September 2013 NNDC granted a planning permission under s.73 of TCPA 1990 (reference PF/15/0774) for the purpose of varying two of the conditions on the 2012 permission ("the 2013 permission"). On 2 September 2015 NNDC granted another s.73 planning permission (reference PF/15/0774), in order to remove conditions 19 and 20 of permission PO/11/0978 and substitute a new condition requiring construction details for reducing energy demand to be submitted for approval ("the 2015 permission"). The grant of the 2013 and the 2015 permissions was not made contingent upon the prior execution of any further s.106 obligation, in particular, one imposing the same requirements as those contained in the agreement dated 22 June 2012.

4. On 7 September 2018 NNDC issued a decision notice under s.192 of TCPA 1990 refusing a certificate that PF/15/0774 could lawfully be implemented without triggering the landowner's obligations under the 2012 agreement. NNDC set out their reasoning as to why development could not lawfully be carried out under permission PF/15/0774 without complying with that agreement. NHL explained that the s.192 application had been made as a straightforward and economical way of testing the legality of continuing to implement the 2015 permission.

5. NHL did not appeal NNDC's refusal of the application for the certificate because they recognised that it had been "made outside the limited terms of section 192 of the Act, and there would be no jurisdiction to determine the appeal" (footnote 1 of NHL's skeleton). That would appear to be correct. Section 191 enables the planning authority to determine (inter alia) whether operations which have been carried out are lawful and whether "any other matter constituting a failure to comply with any condition or limitation subject to which planning permission has been granted is lawful". Section 192 enables the authority to determine whether any operations proposed to be carried out on land would be lawful. These provisions do not enable the legal effect of non-compliance with a s.106 obligation to be tested (see also s. 193(5)). Such an obligation is a freestanding legal instrument which does not form part of the grant of any planning permission and its conditions (see further below).

6. Accordingly, NHL brings the present proceedings under CPR Part 8 seeking:-

(i) A declaration that the continuing residential development of land off Cley Road and Woodfield Road, Holt, Norfolk pursuant to the 2015 permission (PF/15/0774) is not subject to any of the owner's obligations contained in the 2012 agreement; and

(ii) An order requiring NNDC to remove any reference to the 2012 agreement from the local land charges register within 28 days of the Court's judgment.

If NHL is entitled to relief under (i) above, NNDC does not resist relief under (ii). That is because it is common ground that both the 2012 and 2013 permissions have lapsed by becoming time-expired, and so the 2012 agreement must have ceased to have effect (under clause 7.7 referred to below) unless the term "Planning Permission" in the 2012 agreement includes the 2015 permission.

7. Ms. Estelle Dehon submits on behalf of NNDC that NHL is not entitled to that relief, relying on two alternative lines of argument:-

(1) On a proper interpretation of the 2012 agreement and the subsequent "variations" of the 2012 planning permission according to their plain and natural meaning, and in the light of the Supreme Court's decision in Lambeth London Borough Council v Secretary of State for Housing, Communities and Local Government [2019] 1 WLR 4317, the owner's obligations in the 2012 agreement apply to development carried out under the 2015 permission; or

(2) Additional wording should be implied into the 2012 agreement so that: "Development" would mean "the development carried out pursuant to the Planning Permission granted in accordance with the Application [i.e. PO/11/0978] *or any variation under section 73 of the Act*"; and "Planning Permission" would mean "the outline planning permission subject to conditions to be granted by the Council pursuant to the Application as set out in the Second Schedule, *or any variations of those conditions under s.73 of the Act*".

8. The words I have italicised in [7(2)] above represent the additional wording which NNDC seeks to imply into the 2012 agreement. It is common ground between the parties that if the implication of that language can be justified, the legal consequence would be that the owner's obligations in that agreement would apply to the carrying out of development under the 2015 permission. However, Mr Lockhart-Mummery QC submitted on behalf of NHL that each of NNDC's arguments is unsustainable.

9. NCC was also due to receive various financial contributions under the 2012 agreement. However, in its Acknowledgement of Service NCC stated that it did not intend to contest the claim. This was in line with an email sent by its legal department on 4 September 2019.

10. NHL applied for summary judgment on its claim. The application came before Thornton J on 5 March 2020. The judge dismissed the application. In her judgment she explained why she was not satisfied that the case raised any short points of law or, more particularly, that the parties had had an adequate opportunity in the context of that

application to make submissions on the legal issues involved, or that NNDC did not have a real prospect of successfully defending the claim. Accordingly, the matter proceeded to trial.

11. I wish to express my gratitude to both Counsel for their helpful written and oral submissions.

12. The remainder of this judgment is set out under the following headings:-

The 2012 planning permission and the 2012 agreement

13. The 2012 planning permission (PO/11/0978) granted permission for the development of up to 85 dwellings, access, public open space and infrastructure subject to 22 conditions.

14. Condition 2 provided that the reserved matters related to the appearance, landscaping, layout and scale of the development. Condition 1 imposed a standard time limit for the duration of the consent. All applications for approval of reserved matters had to be made within 3 years beginning with 26 June 2012 and these matters had to be approved before any development could commence. The development had to be begun not later than the expiration of 2 years from final approval of the reserved matters. Other conditions on the permission required further detailed approvals to be obtained before development could lawfully commence.

15. Condition 3 provided that the permission was granted in accordance with certain specified plans, which included a Site Parameters Plan (drawing PL-003 Revision E) and Junction Access Plans (G261/APP1; G261/APP2 and G261/APP3).

16. Linked to NNDC's approval of the access arrangements under the 2012 permission, condition 7 provided that a maximum of 12 dwellings could be served by the vehicular access off Cley Road.

17. Condition 19 required all dwellings to achieve a rating of "Code Level 3" for sustainable methods of construction and to be certified as such prior to occupation. Condition 20 required details to be submitted and approved, prior to commencement of any development, as to how at least 10% of energy supply for the development would be secured from renewable or low-carbon sources.

18. The 2012 permission was accompanied by "Notes" which did not form part of the permission itself. Note 1 stated that:-

> "the application site is the subject of an Obligation under Section 106 of the Town and Country Planning Act 1990"

That reflected the fact that the 2012 agreement had already been entered into on 22 June 2012.

19. The 2012 agreement was entered into between the then landowner Mr. Nicholas Deterding and the two authorities, NNDC and NCC. By section 106(3) and (4) a planning authority identified in an agreement or unilateral undertaking as being entitled to enforce an obligation, may take such action against a successor in title of the person entering into that obligation. In other words, the burdens of a s. 106 obligation "run with the land". Thus, when NHL became the owner of the development site it became liable to comply with the obligations in the 2012 agreement entered into by the "owner" (clauses 2.6 and 3.2 of the agreement).

20. Recital 3 stated:-

> "The Developer has submitted the Application to the Council and the Owner has agreed to enter into this Deed in order to secure the planning obligations contained in this Deed."

21. Clause 1 contained the following core definitions:-

> "Application" – the application made by the Developer for Outline planning permission submitted to the Council for the Development and allocated reference number PO/11/0978
>
> "Development" – the development to be carried out pursuant to the Planning Permission granted in accordance with the Application
>
> "Planning Permission" – the outline planning permission subject to conditions to be granted by the Council pursuant to the Application as set out in the Second Schedule

22. Clause 4 headed "Conditionality" provided that:-

> "This deed is conditional upon:
>
> (i) the grant of the Planning Permission; and
>
> (ii) the Commencement of Development "

23. The expression "Commencement of Development" was defined in clause 1 as:-

> "the date on which any material operation (as defined in Section 56(4) of the Act) forming part of the Development begins to be carried out other than (for the purposes of this Deed and for no other purpose) operations consisting of site clearance, demolition work, archaeological investigations, investigations for the purpose of assessing ground conditions, remedial work in respect of any contamination or other adverse ground conditions, erection of any temporary means of enclosure, the temporary display of site notices or advertisements and "Commence Development" shall be construed accordingly."

24. Some of the owner's obligations in the agreement were related to the "commencement of development". Others were related to "commencement of construction" or to "the occupation" of a "dwelling" or "open market dwelling" or dwellings. Clause 1 contained the following relevant definitions:-

> "Commencement of Construction" – means in relation to a Dwelling to be constructed as part of the Development the commencement of construction of the built foundations of the Dwellings
>
> "Occupation" and "Occupied" – residential occupation for the purposes permitted by the Planning Permission but not including occupation by personnel engaged in construction, fitting out or decoration or occupation for marketing or display or occupation in relation to security operations
>
> "Dwelling" – a dwelling (including a house flat bungalow or maisonette) to be constructed pursuant to the Planning Permission
>
> "Open Market Dwellings" – those Dwellings within the Development but excluding the Affordable Housing Units

25. By clause 5.1 the owner covenanted with NNDC to perform the covenants in the Third Schedule. Clauses 2, 3, 4 and 5 provided for the payment by the owner of financial contributions to NNDC by various defined stages of the development relating to public open space and play facilities at a recreation ground managed by Holt Town Council, compensation for the loss of car parking spaces on Cley Road, and assistance in relieving visitor pressure on the North Norfolk Coast Special Protection Area, Ramsar and Special Area of Conservation.

26. By clause 5.2 the owner covenanted with NCC to perform the covenants in the Fourth Schedule. These comprised financial contributions at various defined stages of the development towards improving the local library service and high school, for carrying out highway improvements to Peacock Lane, and a "monitoring charge".

27. Clause 1 of the Third Schedule set out the owner's obligations for the provision of on-site affordable housing as part of the "Development". Clause 1.1 required the owner to

submit to NNDC for its approval an "affordable housing scheme," *before* submitting any application for approval of reserved matters pursuant to "the Planning Permission".

28. Clause 1 of the 2012 agreement defined the "affordable housing scheme" as:-

> "the scheme submitted pursuant to paragraph 1.1 of the Third Schedule showing the number, tenure, location and size of Affordable Housing Units to be provided as part of the Development and the programme and timetable for provision of the Affordable Housing Units such scheme to be agreed by the Council having regard to a Viability Assessment (if any)"

"Affordable housing" was defined as:-

> "social rented, affordable rented and intermediate housing, provided to eligible households whose needs are not met by the market. Eligibility is determined with regard to local incomes and local house prices."

"Viability assessment" was defined as:-

> "an assessment of the financial viability of the Development to be prepared on behalf of the Owner and submitted to the Council when the Owner states that it is not viable to provide the full requirement of Affordable Housing Units such viability assessment to be an open book appraisal proving accurate and robust data reflecting the costs and incomes incurred and anticipated in relation to the Development"

"Affordable housing units" were defined as:-

> "45% of the total number of Dwellings to be constructed as part of the Development or such other reduced percentage as may be approved by the Council as part of the Affordable Housing Scheme having regard to a Viability Assessment (if any) such Affordable Housing Units to be provided in accordance with the Affordable Housing Scheme and subject to paragraph 1.7 of the Third Schedule to be protected in perpetuity as affordable housing or if sold (through any statutory scheme or where an occupier of Intermediate Housing staircases to 100% ownership) any receipt is to be reinvested in the provision of affordable housing in the North Norfolk district. The Council to be advised when this occurs and where monies have been used to provide replacement affordable housing"

"Affordable housing tenure mix" was defined as:-

> "the tenure mix of Affordable Housing Units to be provided as part of the Development being:

- 80% of the Affordable Housing Units to be provided as Affordable Rented; and

- 20% of the Affordable Housing Units to be provided as Intermediate Housing

or such other tenure mix as is approved by the Council as part of the Affordable Housing Scheme having regard to a Viability Assessment (if any)"

29. Clause 1.2 of the Third Schedule required the owner to transfer the "affordable housing units" provided in accordance with the "affordable housing scheme" to a "registered provider" as defined in Part 2 of the Housing and Regeneration Act 2008. Clause 1.4 prohibited the occupation or sale of 50% or more of the "open market dwellings" until 50% of the affordable housing units were completed and transferred to a registered provider. Clause 1.5 prohibited the occupation or sale of the final "open market dwelling" until all affordable housing units were so completed and transferred. Clause 1.7 imposed a prohibition on the use of the completed affordable housing units for any purpose other than "affordable housing" (except where, for example, a right to buy is exercised by a "protected tenant", as defined in clause 1 of the agreement).

30. The parties' submissions also referred to clause 7.7 of the agreement:-

> "This Deed shall cease to have effect (insofar only as it has not already been complied with) if the Planning Permission shall be quashed, revoked or otherwise withdrawn or (without the consent of the Owner) it is modified by any statutory procedure or expires prior to the Commencement of Development."

and to clause 7.10:-

> "Nothing in this Deed shall prohibit or limit the right to develop any part of the Site in accordance with a planning permission (other than the Planning Permission) granted (whether or not on appeal) after the date of this Deed."

The section 73 planning permissions

31. On 19 September 2013 NNDC granted a s.73 permission for "development" described as:-

> "Variation of Conditions 3 & 7 of planning permission reference: 11/0978 (residential development of up to 85 dwellings) to permit revised specification for Cley Road access which would serve 15 dwellings in lieu of 12 dwellings."

The object was to vary the design of the approved access so that 15, rather than 12, dwellings could be accessed from Cley Road.

32. Condition 1 therefore substituted a new condition for condition 3 of the 2012 permission identifying the approved plans. The Site Parameters plan was amended so as to refer to the use of Cley Road to serve 15 dwellings. The 2013 permission no

longer approved drawing G261/APP1 but did approve a drawing for a revised Cley Road access, 1228/HWY/001F. This condition was also expressed to be subject to condition 14 of the 2012 permission, which required detailed schemes for the off-site highway improvement works to be submitted and approval obtained.

33. Condition 2 of the 2013 permission read:-

> "A maximum of 15 dwellings shall be served from the vehicular access off Cley Road."

34. There is no dispute that the 2013 permission should be interpreted as if all the conditions of the 2012 permission applied, save in so far as they were varied or substituted by conditions contained in the 2013 permission. Note 1 attached to the 2013 permission (but not forming a part of the consent) contained a statement to that effect:-

> "This permission relates to a variation of conditions 3 and 7 of planning permission reference 11/0978 only in so far as they relate to the specification for the access to Cley Road and the number of dwellings served off Cley Road, and all outstanding conditions imposed on that planning permission reference 11/0978 shall continue to apply."

35. However, the 2013 permission did not make any mention of the 2012 s.106 agreement or the various requirements which it had imposed in connection with the 2012 permission. The Court was not shown any contemporaneous documentation dealing with that issue.

36. NNDC granted a second s.73 permission on 2 September 2015, this time for "development" described as:-

> "Removal of conditions 19 and 20 of planning permission ref: 11/0978 to remove the requirement of Code Level 3 and to provide at least 10% of the development's energy supply from decentralised and renewable or low-carbon sources"

This decision substituted a new condition for conditions 19 and 20 of the 2012 permission, in the following terms:-

> "Prior to the commencement of development, details of how the dwellings shall be constructed to reduce the energy demand of the site by at least 10 percent (from a baseline figure equating to the Building Regulations standards at the time of first approval of the outline application reference 11/0978 on 26 June 2012) have been submitted to and approved in writing by the Local Planning Authority. The development shall then be implemented in full accordance with the approved details."

37. There is no dispute that the 2015 permission should be interpreted as if all the conditions on the 2012 permission applied, save as amended by the 2013 permission and by the substitution of the condition in the 2015 permission for conditions 19 and 20 of the 2012 permission. There is also no dispute that the nature of the development, the

erection of up to 85 dwellings, was essentially the same in all three permissions, the only significant difference being the access arrangements via Cley Road.

38. Like the 2013 permission, the 2015 permission did not make any mention of the 2012 agreement or the various requirements it had imposed. The Court was not shown any contemporaneous material dealing with that subject.

39. NHL submitted that in making their decisions to grant the 2013 and 2015 permissions NNDC chose not to require fresh s.106 obligations to be executed linked to each of those consents. For its part NNDC relied on a written statement from Mr. Geoff Lyon, the Council's Major Projects Manager, to the effect that there was no indication at the times when the decisions to grant the 2013 and the 2015 permissions were being considered, that NHL or NNDC intended the 2012 s.106 agreement "to fall away" or thought "it was necessary to vary the obligation to take account" of the s.73 permissions. Leaving to one side the lack of any evidence as to which persons were actually involved at the relevant times, whether they did or did not address their minds to these issues and, in so far as they did, what they actually thought, these assertions by both sides are in any event irrelevant.

40. The construction of an agreement, or an instrument such as a s.106 obligation, is an objective question of law. Applying well-established, standard principles, it is irrelevant to ask what the intentions of the parties were at the time the agreement was made (see Lewison: The Interpretation of Contracts (6th ed.) paragraph 1.05). Their subsequent conduct is also irrelevant (Lewison paragraph 3.19). Neither party has suggested that any of the recognised exceptions to those principles identified in Lewison could apply in the present case. Furthermore, no application has been made for the rectification of the 2012 agreement and no reliance has been placed upon the doctrine of estoppel by convention.

41. Given that subsequent conduct, such as the decisions to grant the s.73 permissions and the non-execution of any further s.106 obligation or deed of variation, is irrelevant to the construction of the 2012 agreement, any intention or thinking on either side accompanying those acts or omissions must also be irrelevant to that exercise. As I explain below, NNDC's submission that the decision in Lambeth has altered standard principles of interpretation in this area is unsustainable.

42. Applying these same standard principles, evidence that in 2017 NHL made certain payments referable to the 2012 agreement, albeit said to be "without prejudice" or goodwill payments, is simply irrelevant, post-contract conduct. Although mentioned in its skeleton, NNDC's oral submissions rightly did not rely upon this material. Both parties emphasised the importance of interpreting s.106 obligations, like planning permissions, as public documents which are comprehensible to the public, landowners and developers alike. In my judgment this strongly militates against admitting evidence on the construction of such documents of subsequent conduct, for example, any payments made, or of the subsequent intentions of the parties at different stages.

43. On 19 August 2016 NNDC granted an approval for all reserved matters "following" the outline planning permission, PO/11/0978, and the 2013 and 2015 s.73 permissions, PF/13/0854 and PF/15/0774 (see Note 2). Note 3 stated that the site was subject to a s.106 obligation, which could only have been a reference to the 2012 agreement. The note did not purport to say that the 2013 and 2015 permissions could not be

implemented without complying with that agreement. The note is apparently consistent with the legal possibility at that stage that development might be begun under the 2012 permission rather than one of the subsequent s.73 permissions. All three permissions remained extant in August 2016 and there is no suggestion in the material before the court that development had physically been commenced by then.

44. It will also be recalled that clause 1.1 of the Third Schedule to the 2012 agreement required the owner to submit to NNDC an affordable housing scheme for approval before submitting any application for approval of reserved matters. There has been no suggestion that that requirement was satisfied in this case, or that NNDC raised the issue before dealing with the application for approval of reserved matters. But, like the other examples of post-contract conduct, this does not matter. Even if there was no compliance with clause 1.1 of the 2012 agreement, applying standard principles of interpretation, that subsequent omission is irrelevant to the issues which the court has to determine. It cannot support any claim that the agreement did not apply to the 2013 or 2015 s.73 permissions.

45. On 30 May 2018 NNDC granted approval to all the matters covered by pre-commencement conditions (other than reserved matters). This decision notice referred to a range of conditions in consent PF/15/0774, the 2015 permission.

46. There was no dispute at the hearing about the following matters:-

(i) The development had to begin by no later than 18 August 2018 under condition 1 as originally imposed in the 2012 permission;

(ii) The development authorised was begun in June 2018 by the digging of foundations;

(iii) The permission which was so implemented was the 2015 s.73 permission;

(iv) Neither the 2012 permission nor the 2013 permission was implemented by 18 August 2018 and so both permissions have lapsed;

(v) The development may now only be carried out under the 2015 permission (PF/15/0774).

The statutory framework

Planning obligations

47. Section 106 of TCPA 1990 provides in so far as relevant:-

> "(1) Any person interested in land in the area of a local planning authority may, by agreement or otherwise, enter into an obligation (referred to in this section and [sections 106A to 106C] as *"a planning obligation"*), enforceable to the extent mentioned in subsection (3)—
>
> (a) restricting the development or use of the land in any specified way;

(b) requiring specified operations or activities to be carried out in, on, under or over the land;

(c) requiring the land to be used in any specified way; or

(d) requiring a sum or sums to be paid to the authority [(or, in a case where section 2E applies, to the Greater London Authority)] on a specified date or dates or periodically.

(1A) ……

(2) A planning obligation may—

(a) be unconditional or subject to conditions;

(b) impose any restriction or requirement mentioned in subsection (1)(a) to (c) either indefinitely or for such period or periods as may be specified; and

(c) if it requires a sum or sums to be paid, require the payment of a specified amount or an amount determined in accordance with the instrument by which the obligation is entered into and, if it requires the payment of periodical sums, require them to be paid indefinitely or for a specified period.

(3) Subject to subsection (4) a planning obligation is enforceable by the authority identified in accordance with subsection (9)(d)—

(a) against the person entering into the obligation; and

(b) against any person deriving title from that person.

(4) The instrument by which a planning obligation is entered into may provide that a person shall not be bound by the obligation in respect of any period during which he no longer has an interest in the land.

[…]

(9) A planning obligation may not be entered into except by an instrument executed as a deed which—

(a) states that the obligation is a planning obligation for the purposes of this section;

[(aa) if the obligation is a development consent obligation, contains a statement to that effect;]

(b) identifies the land in which the person entering into the obligation is interested;

> (c) identifies the person entering into the obligation and states what his interest in the land is; and
>
> (d) identifies the local planning authority by whom the obligation is enforceable [and, in a case where section 2E applies, identifies the Mayor of London as an authority by whom the obligation is also enforceable]
>
> […]
>
> (11) A planning obligation shall be a local land charge and for the purposes of the Local Land Charges Act 1975 the authority by whom the obligation is enforceable shall be treated as the originating authority as respects such a charge."

48. It is plain from the terms of s.106 that a planning obligation does not have to be linked to, or entered into in connection with, the grant of a planning permission. For example, obligations entered into under s.106 and its statutory predecessors have sometimes been created by landowners for the purposes of land management.

49. Section 106 obligations are frequently required by planning authorities as an important adjunct to the exercise of their development control functions. For example, in order to make a proposal for development acceptable, and thus to enable planning permission to be granted, an authority may require a financial contribution to be made. The authority may impose a requirement not only for the erection of affordable housing, but also its provision or transfer to a "registered provider". Matters such as these are dealt with through s.106 obligations rather than conditions. However, by definition, a s.106 obligation is a freestanding legal instrument. It does not form part of the planning permission and, in this sense, is not analogous to conditions imposed under ss.70(1) and 72 of TCPA 1990 on the grant of a permission. Consequently, the committee of a local planning authority will resolve to grant planning permission subject to the execution of a s.106 obligation covering defined requirements. Such a resolution does not itself constitute the grant of planning permission. Instead, it is the formal decision notice to the applicant which constitutes the permission (R v West Oxfordshire District Council ex parte Pearce Homes Limited [1986] JPL 523).

50. For these reasons it is long-established practice for a planning authority (including the Secretary of State or an Inspector) to ensure that any necessary s.106 obligation is executed before issuing the decision granting permission. Because a s.106 obligation does not form part of a permission, it is also long-established practice for a party or parties to state in a s.106 agreement or unilateral undertaking whether the performance of the obligations it contains is conditional upon the carrying out of development under a specific planning permission and, if so, to identify that permission. Generally, drafting of this kind is important and deliberate, and not accidental. The parties agree language to define the circumstances in which the obligations will be triggered. Clarity on this point is important not only to landowners, their successors in title and the planning authorities involved, but also for readers of a s. 106 obligation as a public document, public agencies and the general public.

51. Section 106A(1) provides that a s.106 obligation may not be modified or discharged except (a) with the agreement of the planning authority by which the obligation is

enforceable and the person or persons against whom it is enforceable or (b) in accordance with ss.106A and B or ss.106BA and 106 BC. An agreement to modify or discharge an obligation may be made at any time. However, an application to the relevant planning authority to modify or discharge an obligation may only be made after 5 years has elapsed from the date of the obligation. An appeal against the determination of the authority of that application then lies to the Secretary of State under s.106B. Sections 106BA to BC are parallel provisions dealing with applications and appeals to modify or discharge an affordable housing requirement contained in a planning obligation.

Section 73 permissions

52. Section 73 of the TCPA 1990 is entitled "Determination of applications to develop land without compliance with conditions previously attached". The relevant provisions are as follows:-

> "(1) This section applies, subject to subsection (4), to applications for planning permission for the development of land without complying with conditions subject to which a previous planning permission was granted.
>
> (2) On such an application the local planning authority shall consider only the question of the conditions subject to which planning permission should be granted, and—
>
> (a) if they decide that planning permission should be granted subject to conditions differing from those subject to which the previous permission was granted, or that it should be granted unconditionally, they shall grant planning permission accordingly, and
>
> (b) if they decide that planning permission should be granted subject to the same conditions as those subject to which the previous permission was granted, they shall refuse the application.
>
> [...]
>
> (4) This section does not apply if the previous planning permission was granted subject to a condition as to the time within which the development to which it related was to be begun and that time has expired without the development having been begun.
>
> (5) Planning permission must not be granted under this section for the development of land in England to the extent that it has
>
> effect to change a condition subject to which a previous planning permission was granted by extending the time within which–
>
> (a) a development must be started;

> (b) an application for approval of reserved matters (within the meaning of section 92) must be made."

53. The effect of s.73(4) is that an application may not be made in relation to a previous permission which no longer remains extant because it has lapsed. Section 73(5) prevents this section from being used to alter time limits for the approval of reserved matters or for the commencement of development, which may determine the point at which a permission lapses.

54. Subject to these constraints, s.73 may be used to apply for a planning permission for development of land without complying with one or more conditions attached to a previous planning permission (s.73(1)). The predecessor to s.73 of TCPA was s.31A, introduced by s.49 of the Housing and Planning Act 1986. Before that provision was enacted, the only remedy for a developer who was dissatisfied by a condition or conditions imposed on a planning permission, was to appeal to the Secretary of State against that *grant of permission*. Not only did this involve the costs of an appeal, but also the merits of the decision to grant the permission itself could be in issue. Because the Inspector could determine the matter as if the application had been made to him in the first instance (s.79(1) of TCPA 1990), the developer might lose his planning permission altogether, even though his appeal had only been brought to deal with a dispute with the local authority over one or more of the conditions it had imposed.

55. It was for these reasons that s.73 only allows the planning authority to consider the question of what conditions, if any, should be imposed on the grant of permission (Pye v Secretary of State for the Environment [1998] PLR 28). Section 73(2) makes it perfectly clear, even without having to resort to case law, that the authority may decide that permission should be granted subject to different conditions or to no conditions at all, in which case "they shall grant permission accordingly". Where such a decision is made, the authority must grant a fresh permission and the original permission remains intact (R v Leicester City Council ex parte Powergen UK Limited [2001] P & CR 5). If, however, the authority decides that permission should only be granted subject to the same conditions as those imposed on the previous permission, then it must refuse the application. In this event also, the earlier permission plainly continues untouched. In other words, however a s.73 application is determined, the earlier permission remains as a permission which is capable of being relied upon.

56. However, in its decision notice issuing a s.73 permission, a planning authority may not define the development being permitted in such a way as to alter the description of development authorised by the grant contained in an earlier permission, nor may they impose a condition on a s.73 permission which purports to have the effect of altering that description (Finney v Welsh Ministers [2020] PTSR 455, 464-5).

57. Although a planning authority's powers under s.73 are more limited than when dealing with an ordinary application for permission under s.62, it is nonetheless able to consider relevant planning considerations and policies as at the date of its s.73 determination and is not restricted to those pertaining at the time of the previous permission (Pye and Powergen). Material considerations include the practical consequences of discharging or amending the conditions (Pye at pp. 44B and 46B).

58. Material considerations as at the date when a s.73 application is determined also include the desirability of entering into a s.106 obligation appropriate to the terms of the new

permission. Sections 106 and 106A are freestanding powers which may be applied in addition to the powers conferred by s.73. Accordingly, s. 73(2) does not prevent the authority from considering whether any s.106 obligation linked to the previous planning permission should apply to the s.73 permission or should be varied or discharged. If that were not so, planning authorities would have to ensure that any s.106 obligation linked to the original planning permission was worded from the outset so as to apply to any subsequent s.73 permission. But on this interpretation of s.73(2), the legislation would then have the absurd effect of preventing the authority from considering any appropriate or even essential alteration of that obligation. There is no justification for interpreting s 73(2) in such an unreasonable way. Where a planning authority decides that a s. 73 permission should be granted subject to a s.106 obligation in the same terms as a previous obligation, or with alterations, it is legally entitled to insist upon such a document being executed before granting the s.73 permission.

59. It is plain that where a landowner wishes to make an application for the modification or discharge of a pre-existing s. 106 obligation, he may only do so under s. 106A (or s. 106BA) and not under s. 73. An application under s. 73 may only relate to the modification or discharge of conditions on a planning permission. Of course, he will only need to make an application under s. 106A or s. 106BA if the obligation in question applies to the development he wishes to carry out. That is the issue in the present case.

60. Section 96A of TCPA 1990 enables a person interested in land benefiting from a planning permission to apply to the local planning authority for a "non-material" variation to be made to the permission, including the imposition of a new condition or the deletion or alteration of an existing condition. Unlike the procedure under s.73, the approval of a s.96A application does not result in the grant of a fresh permission. Instead, the permission the subject of the application is simply varied and continues in its altered form.

Issue (1): the interpretation of the 2012 agreement

61. NNDC seeks to construe the definitions of "development" and "planning permission" in clause 1 of the 2012 agreement as if they bore the same meaning as the implied terms or wording for which it contends under Issue (2) (see [7] above). In other words, those words should be read as including *any* subsequent s.73 permissions arising from the 2012 permission.

General principles of interpretation

62. The modern approach has been to break down former divisions within the principles for interpreting different kinds of legal documents, whether private or public, and to apply more general rules on ascertaining the meaning of the words used. Accordingly, the process for interpreting a planning permission does not differ materially from that appropriate for other legal documents (Trump International Golf Club Limited v Scottish Ministers [2016] 1 WLR 85 at [33], [53] and [66] and Lambeth at [16]).

63. In Trump the Supreme Court was concerned with the interpretation of a consent to construct a "generating station" under s.36 of the Electricity Act 1989, but the principles there stated are also relevant to the interpretation of planning permissions. Lord Hodge JSC addressed the public nature of such documents at [33]:-

> "… Differences in the nature of documents will influence the extent to which the court may look at the factual background to assist interpretation. Thus third parties may have an interest in a public document, such as a planning permission or a consent under section 36 of the 1989 Act, in contrast with many contracts. As a result, the shared knowledge of the applicant for permission and the drafter of the condition does not have the relevance to the process of interpretation that the shared knowledge of parties to a contract, in which there may be no third party interest, has. There is only limited scope for the use of extrinsic material in the interpretation of a public document, such as a planning permission or a section 36 consent: *R v Ashford Borough Council, Ex p Shepway District Council* [1999] PLCR 12, per Keene J at pp 19C—20B; *Carter Commercial Developments Ltd v Secretary of State for Transport, Local Government and the Regions* [2003] JPL 1048, per Buxton LJ at para 13 and Arden LJ at para 27. It is also relevant to the process of interpretation that a failure to comply with a condition in a public law consent may give rise to criminal liability. In section 36(6) of the 1989 Act the construction of a generating station otherwise than in accordance with the consent is a criminal offence. This calls for clarity and precision in the drafting of conditions."

64. Lord Hodge set out the main principles in [34]:-

> "When the court is concerned with the interpretation of words in a condition in a public document such as a section 36 consent, it asks itself what a reasonable reader would understand the words to mean when reading the condition in the context of the other conditions and of the consent as a whole. This is an objective exercise in which the court will have regard to the natural and ordinary meaning of the relevant words, the overall purpose of the consent, any other conditions which cast light on the purpose of the relevant words, and common sense. Whether the court may also look at other documents that are connected with the application for the consent or are referred to in the consent will depend on the circumstances of the case, in particular the wording of the document that it is interpreting. Other documents may be relevant if they are incorporated into the consent by reference (as in condition 7 set out in para 38 below) or there is an ambiguity in the consent, which can be resolved, for example, by considering the application for consent."

65. Lord Carnwath JSC adopted the same approach at [66]:-

> "As will have become apparent, however, and in agreement also with Lord Hodge JSC, I do not think it is right to regard the process of interpreting a planning permission as differing materially from that appropriate to other legal documents. As has been seen, that was not how it was regarded by Lord Denning in

> the *Fawcett* case [1961] AC 636. Any such document of course must be interpreted in its particular legal and factual context. One aspect of that context is that a planning permission is a public document which may be relied on by parties unrelated to those originally involved. (Similar considerations may apply to other forms of legal document, for example leases which may need to be interpreted many years, or decades, after the original parties have disappeared or ceased to have any interest.) It must also be borne in mind that planning conditions may be used to support criminal proceedings. Those are good reasons for a relatively cautious approach, for example in the well established rules limiting the categories of documents which may be used in interpreting a planning permission (helpfully summarised in the judgment of Keene J in the *Shepway* case [1999] PLCR 12, 19—20). But such considerations arise from the legal framework within which planning permissions are granted. They do not require the adoption of a completely different approach to their interpretation."

66. The same principles were reiterated in Lambeth at [16] to [18]. At [19] Lord Carnwath added:-

> "In summary, whatever the legal character of the document in question, the starting point – and usually the end point – is to find "the natural and ordinary meaning" of the words there used, viewed in their particular context (statutory or otherwise) and in the light of common sense."

67. There is no reason why these statements in Trump and Lambeth should not also apply to s.106 obligations, whether in the form of a unilateral undertaking or, as in the present case, an agreement between two or more parties.

68. Paragraph 17 of NNDC's skeleton poses as a central question:-

> "Whether a section 106 agreement should be construed in accordance with its ordinary and natural meaning, the statutory and planning context, including subsequent section 73 permissions, or whether it should it be construed according to the principles of contractual interpretation (ie that the contract should be construed according to the facts and circumstances at the time of the contract)"

69. The reason why NNDC seeks to distinguish principles of contractual interpretation from the interpretation of planning documents is revealed in the latter part of the paragraph 19 of its skeleton:-

> "The Council's submission is that it is inapt to apply pure principles of contractual interpretation to section 106 agreements, given the public nature of those agreements; the fact that they run with the land and the fact that they often intend to secure mitigations for the impact of development which are

> necessary to make the development acceptable. In those circumstances it is not apposite for the document to be construed by reference only to the contracting parties' intentions and according to the facts and circumstances at the time of the contract. Rather, the approach adopted by the Supreme Court in *Lambeth* as regards planning conditions should be applied."

It became clear that NNDC's argument critically depends upon its attempt to rely upon Lambeth.

70. But before turning to Lambeth, it should be noted that the decision in Trump makes it plain that the suggested distinction between principles of interpretation applied to contractual documents and planning documents is fallacious. The Supreme Court has stated that there is no such division. Instead, the public nature of planning documents operates so as to *restrict* the operation of general principles in two respects: (i) the extent to which the court may take into account the factual background as regards "the shared knowledge" of the contracting parties (or, indeed, the knowledge of the covenantor in relation to a unilateral undertaking), and (ii) the limited scope for the use of extrinsic material, given the constraints on public access to such material. There is nothing in the decision in Trump to indicate that the public nature of planning documents justifies a broader, or more "liberal", approach to interpretation than is applied generally, or in relation to agreements. In particular, there is nothing in Trump to suggest that it is permissible to have regard to post-contract conduct or an omission, for example in the present case an omission to require a fresh s.106 obligation or a deed of variation to be entered into before granting a s. 73 permission. The main question on Issue (1) is whether Lambeth provides any support for NNDC's approach, even if only in relation to s. 73 permissions.

71. The general principles on interpretation of legal documents were set out in Investors Compensation Scheme Limited v West Bromwich Building Society [1998] 1 WLR 896 at 912H – 913E:-

> "(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
>
> (2) The background was famously referred to by Lord Wilberforce as the "matrix of fact," but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
>
> (3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of

> practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.
>
> (4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see *Mannai Investments Co. Ltd.* v. *Eagle Star Life Assurance Co. Ltd.* [1997] A.C. 749.
>
> (5) The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *Antaios Compania Naviera S.A. v. Salen Rederierna A.B.* [1985] A.C. 191, 201:
>
> > "if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense."”

72. In Bank of Credit and Commerce International SA v Ali [2002] 1 AC 251 the House of Lords reaffirmed those general principles. Lord Bingham stated at [8]:-

> “To ascertain the intention of the parties the court reads the terms of the contract as a whole, giving the words used their natural and ordinary meaning in the context of the agreement, the parties' relationship and all the relevant facts surrounding the transaction so far as known to the parties. To ascertain the parties' intentions the court does not of course inquire into the parties' subjective states of mind but makes an objective judgment based on the materials already identified.”

Lord Clyde added at [78] that the knowledge reasonably available to the parties includes matters of law as well as fact.

73. Subsequent authorities were reviewed by Lord Clarke in Rainy Sky SA v Kookmin Bank [2011] 1 WLR 2900 at [21] to [30]. Dealing with the situation in which the

language in an agreement used by the parties has more than one potential meaning, Lord Clarke said at [21]:-

> "…the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other."

He added at [28] that the resolution of an issue of interpretation where the language used is open to more than one meaning is:-

> "an iterative process, involving checking each of the rival meanings against other provisions of the document and investigating its commercial consequences."

(see also Wood v Capita Insurance Services Limited [2017] AC 1173 at [12]). On the other hand, where the parties have used unambiguous language the court must apply it, even if that produces an improbable result [23].

74. In Arnold v Britton [2015] AC 1619 Lord Neuberger PSC, having referred to those earlier authorities, went on to emphasise seven factors at [16] to [23] of which it is relevant here to refer to the first five:-

> "17 First, the reliance placed in some cases on commercial common sense and surrounding circumstances (e g in *Chartbrook* [2009] AC 1101, paras 16—26) should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision.
>
> 18 Secondly, when it comes to considering the centrally relevant words to be interpreted, I accept that the less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. That is simply the obverse of the sensible proposition that the clearer the natural meaning the more di–cult it is to justify departing

> from it. However, that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning. If there is a specific error in the drafting, it may often have no relevance to the issue of interpretation which the court has to resolve.
>
> 19 The third point I should mention is that commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made. Judicial observations such as those of Lord Reid in *Wickman Machine Tools Sales Ltd v L Schuler* AG [1974] AC 235, 251 and Lord Diplock in *Antaios Cia Naviera SA v Salen Rederierna* AB (*The Antaios*) [1985] AC 191, 201, quoted by Lord Carnwath JSC at para 110, have to be read and applied bearing that important point in mind.
>
> 20 Fourthly, while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Experience shows that it is by no means unknown for people to enter into arrangements which are ill-advised, even ignoring the benefit of wisdom of hindsight, and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party.
>
> 21 The fifth point concerns the facts known to the parties. When interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to both parties. Given that a contract is a bilateral, or synallagmatic, arrangement involving both parties, it cannot be right, when interpreting a contractual provision, to take into account a fact or circumstance known only to one of the parties"

75. In R (Robert Hitchins Limited) v Worcestershire County Council [2015] EWCA Civ 1060 the Court of Appeal confirmed at [29] that essentially the same principles as those set out above are applicable to section 106 obligations, whether a bilateral agreement or a unilateral undertaking.

The Lambeth case

76. In 1985 planning permission was granted for the erection of a retail unit subject to a condition which restricted the range of goods that could be sold to DIY goods, garden improvements, car maintenance and building materials, but for no other purpose. So, the condition excluded, for example, the sale of food. The DIY retail store was built pursuant to that permission. In 2010 the local authority granted a s.73 planning permission expressed to be a variation of that condition, so as to allow the sale of a wider range of goods but still excluding food sales. That was set out as "condition 1" and two further conditions were added dealing with other matters. In 2014 the Council granted a further s.73 permission which expressly approved an application for "variation" of the conditions restricting the range of goods that could be sold under the 1985 and 2010 permissions to allow the sale of a wider range of goods, but still excluding the sale of food. However, the decision notice failed to contain a condition giving effect to that proposed restriction, as previous permissions had done. On appeal an Inspector granted a lawful development certificate under s.192 of the TCPA 1990 that the premises could be used within Use Class A1 of the Town and Country Planning (Use Classes) Order 1987 (SI 1987 No. 764) without any restriction on the goods allowed to be sold. The Supreme Court decided that on a true construction, the 2014 permission had not granted consent for an unrestricted A1 use of the premises and so the s.192 certificate should be quashed.

77. As already stated above, in construing a public document, such as a planning permission or a s.106 obligation, it is necessary to have regard to the statutory context. Lord Carnwath (with whom the other members of the Court agreed) addressed this at [7] to [14] of his judgment. The Court endorsed the analysis of s.73 in Pye and Powergen ([9] to [11]).

78. Lord Carnwath held that a s.73 permission may apply not only to development which is yet to be carried out but also retrospectively to development which has already been undertaken. In Lambeth the construction of the retail store, and its initial operation, had occurred many years before either of the two s.73 applications were granted, and had been authorised solely by the 1985 permission. The applications to extend the categories of goods that could be sold did not relate to the carrying out of development requiring permission, but simply to the terms of the conditions restricting the use of that development ([7] and [12] to [13]). Furthermore, the 1985 permission had not lapsed. Its conditions continued to apply, in so far as they had not been varied or discharged, together with the conditions of the subsequent s. 73 permissions ([37]-[41]).

79. On the interpretation of the 2014 permission, the Supreme Court held that the wording of the operative part of the grant was "clear and unambiguous" ([29]). It was unnecessary to look beyond the terms of the decision notice itself ([30]). The Council had approved the application for the variation of the "range of goods" condition as described in the decision notice, by reference to both the "original wording" (in fact that contained in the 2010 permission) and the proposed wording. The obvious, and only natural, interpretation of the operative parts of the document was that the Council approved that which had been applied for, that is the substitution of the proposed range of goods condition for the existing condition. The decision notice had made no reference to deleting that condition altogether, or in particular to the removal of the prohibition on selling food ([29]).

80. The Court held that effect could be given to the normal and accepted usage of describing s.73 as a power to "vary" or "amend" a condition *in the manner authorised by the section*, that is, as the grant of a new permission subject to the condition as varied ([33]).

Discussion

81. There is nothing in the Lambeth decision which alters the standard principles of construction for public documents as set out above.

82. Lambeth was simply concerned with the construction of a fresh permission granted under s.73, the 2014 permission, the language of which was clear and unambiguous. It did not involve the interpretation of an earlier document, to see whether the language used in that document could be treated as referring to subsequent grants of permission or other documents. The Supreme Court's decision on the meaning of the 2014 permission had no implications for the meaning of any earlier document. The issue which is critical to NNDC's argument in the present case did not arise for decision in Lambeth.

83. Similarly, Lambeth did not decide whether the 2014 permission should be interpreted as incorporating or applying provisions in an earlier legal document such as the 1985 permission (see e.g. [37] to [41]).

84. Lambeth did not involve any issue about the relationship between, and the interpretation of, the 2014 permission and any earlier s. 106 obligation (if in fact one had been entered into). Of course, section 73 could only have been used for an application to modify or discharge a condition, not a s. 106 obligation.

85. Accordingly, Lambeth does not lend any support to Ms. Dehon's argument that the 2015 permission is capable of triggering obligations in the 2012 agreement under either of the two approaches she advanced, namely looking through the lens of the 2012 agreement or through the lens of the 2015 permission.

86. The statutory context of ss.62, 70, 73 and 106 of TCPA 1990 as explained above, does not assist NNDC's case on the construction of those documents. The entering into of a s.106 obligation does not form an intrinsic part of a *grant* of permission under s 70. It is a freestanding legal instrument. The fact that a planning authority may decide to grant permission subject to the execution of a section 106 obligation does not alter that position. Such a decision reflects not only the authority's assessment of the merits of a planning application, including whether a s.106 obligation is required, but the practical legal position that permission should not be granted *until* the obligation has been created. By contrast, once a permission has been granted the landowner or developer is under no compulsion to enter in such an obligation.

87. The statutory framework is not materially different when we consider the relationship between ss.73 and 106. While s.73(2) does not prevent a planning authority from considering the need for a s.106 obligation to govern the carrying out of development under a s.73 permission, the creation of a fresh s.106 obligation (or indeed the application of an existing s.106 obligation to a subsequent s.73 permission) does not form an intrinsic part of a grant of a permission under s.73. Section 106 obligations remain freestanding legal instruments in this context, just as much as when permission is granted under s.70. Section 73 requires the authority to consider whether existing

conditions on a planning permission should remain exactly the same, or should be varied or substituted or entirely discharged. But if a s.73 permission is granted, there is no assumption in the legislation that any pre-existing planning obligation will apply to that permission, or to development carried out under that permission. Instead, that is a matter left to be addressed by the parties before the s. 73 permission is granted, and, if there is an issue, then potentially by an Inspector dealing with an appeal.

88. NNDC places great emphasis upon the fact that s.106 obligations are often used to secure mitigation for the impact of development which is necessary to make a proposed scheme acceptable (see [69] above]). But this usage does not make it necessary for the normal legal approach to the interpretation of agreements to be altered when a planning authority is determining a s. 73 application. The authority has the means available to it to secure any appropriate planning obligation, whether in the same terms as a previous agreement or in some varied form; it can determine that a fresh agreement or undertaking be executed before granting the s. 73 permission. The omission of that step in the present case is not a sound reason for modifying, or indeed distorting, sound principles for the interpretation of legal documents.

89. Lord Carnwath mentioned at [20] a reference in the decision of the Court of Appeal to a suggestion that s. 73 posed a "technical trap" for a local authority, in that the approval of an application nominally for the variation or discharge of a condition required the grant of a fresh permission. However, that notion of a "technical trap" played no part at all in the reasoning of the Supreme Court. They certainly did not suggest that planning documents should be interpreted so as to avoid or overcome the possible effects of a planning authority falling into any supposed trap.

90. I do not accept in any event that s. 73 creates a technical trap for planning authorities. It is plain from the language of the legislation that (1) although the original permission remains intact whatever the outcome of the application, (2) if the authority decides to impose different conditions from those originally imposed, or no conditions at all, then a fresh permission must be granted. It is also obvious that a s. 106 obligation is a freestanding legal instrument, which does not form part of any s. 70 permission or s. 73 permission, even though it may impose obligations in relation to development carried out under such a permission.

91. The Supreme Court did not lay down any interpretative principle that planning documents, whether a s.106 agreement or a subsequent s.73 permission, should be read so as to prevent landowners and developers from avoiding or side-stepping obligations which they have previously entered into. Ms. Dehon did not point to any authority which supports any anti-avoidance principle or presumption in the construction of planning documents.

92. In my judgment the language of the 2012 agreement is unambiguous and clear. It does not suffer from poor drafting. To the contrary, it has been carefully drafted by lawyers well versed in the preparation of such documents.

93. The parties might have chosen to make the triggering of the obligations dependent upon the carrying out of development defined in terms which were not tied to the application PO/11/0978 or to the permission granted on that application, for example, by a description of the site and the key components of a scheme. If they had done that, and had also expressed the term "dwelling" by reference to that broader definition of

development, then plainly the 2012 agreement would have applied to the carrying out of development so defined, whether pursuant to the 2012 permission or any subsequent grant of permission conforming to that description. But the parties did not do that. Instead, they expressly defined the key terms "development" and "dwelling", upon which liability to perform the owner's obligations depends, by reference to application PO/11/0978 and the 2012 permission. Those terms have the clear effect of limiting the triggering of obligations under the 2012 agreement to the carrying out of development under the 2012 permission, and not some other permission, however similar it may be to the 2012 consent.

94. The parties could have chosen to use language in the 2012 agreement which extended the definitions of "development" and "dwelling" so that they applied to development, whether carried out pursuant to the 2012 permission or a subsequent s.73 permission. A s.73 permission can only relate to the same definition of development (Finney). That form of language would have been essentially the same as that used by NNDC to describe the implied terms for which it contends under Issue (2). But the parties did not make their agreement in those terms.

95. The language which the parties decided to use in the 2012 agreement prevented the owner's obligations from being triggered by development carried out otherwise than pursuant to the 2012 permission, for example a development for 90 or 100 dwellings. It should not be assumed that the drafting of a s.106 obligation in this way is accidental. It protected all parties to the agreement from being held to the obligations it contains if the development of the site were to be materially different from that authorised by the 2012 permission, or if the conditions were altered materially. That was accepted by Ms. Dehon. But then the problem for NNDC is that the language used by the parties does not enable any distinction to be drawn between development carried out pursuant to a s.73 application modifying the conditions of the 2012 permission and any other permission falling outside s. 73.

Clauses 7.7 of the 2012 agreement

96. NNDC relies upon clause 7.7 of the 2012 agreement (see [30] above) as defining exhaustively all the circumstances in which *it ceases to have effect* and as showing, therefore, that *it continues to apply* where, as here, the 2012 permission remains intact and has not been modified by "any statutory procedure". There is no merit in this contention. Firstly, the issue in this case is not whether the 2012 agreement has ceased to have effect. Rather, it is whether the obligations it contains have been triggered (i.e. whether in that sense they have come into effect), by virtue of the carrying out of development under the 2015 permission. Secondly, and in any event, clause 7.7 only provides for the 2012 agreement to cease to have effect if "the Planning Permission" (that is permission PO/11/0978) is quashed, revoked or otherwise withdrawn or is modified without the owner's consent (under s.97 of TCPA 1990). The explicit reference here to the 2012 permission strongly indicates that the obligations under the 2012 agreement are only triggered by development carried out under that permission. Thirdly, it makes no sense for clause 7.7 expressly to provide for the cessation of the 2012 agreement solely in the event of *the 2012 permission* ceasing to have effect, unless that agreement can only be triggered by development carried out under that permission. It would be absurd if the development to which the 2012 agreement applied and the scope of clause 7.7 were not aligned. Accordingly, clause 7.7 cannot lend any support to NNDC's argument.

Clause 7.10 of the 2012 agreement

97. Clause 7.10 (see [30] above) is a standard provision often included in s.106 obligations so as to make it plain that the obligation is not to have the effect of preventing the carrying out of development under a different permission. However, the protection given by a provision such as clause 7.10 only applies, indeed it only needs to apply, where the operation of a s.106 obligation would be incompatible with the carrying out of a subsequent planning permission (Peel Land and Property Investments plc v Hyndburn Borough Council [2013] EWCA Civ 1680 at [135] and [145]). Absent any such incompatibility, there is no interference with a "right to develop" granted by a subsequent planning permission, the two can co-exist compatibly and clause 7.10 is not engaged.

98. In Peel Land the developer had entered into planning obligations which restricted the range of goods which could be sold from retail units on a retail park. It does not appear that those restrictions were linked to the grant of a particular permission, or had been triggered by the carrying out of particular development. In any event, they had come into effect and so the issue in the present case did not arise for determination in Peel Land. The Court of Appeal held that subsequent grants of planning permission for operational development involving relatively modest physical alterations of the retail units did not engage a clause in the s. 106 obligations equivalent to clause 7.10. The carrying out of those alterations was compatible with the continued subsistence of the user restrictions in those obligations on the goods permitted to be sold. The user restrictions did not interfere with the right to develop given by the subsequent permissions for operational development. Those permissions did not purport to determine the range of goods that might be sold.

99. In Peel Land there was no dispute that the landowner had been liable to comply with the s. 106 obligations. The issue was whether those obligations had ceased to apply by virtue of a provision equivalent to clause 7.10, because they were incompatible with the carrying out of development under subsequent grants of permission. In the present case, no such incompatibility issue arises for determination. Instead, the issue for the Court is whether the owner's obligations in the 2012 agreement have been triggered in the first place by the carrying out of development under the 2015 permission, it being common ground that neither the 2012 nor the 2013 permissions have been implemented. In Peel Land there was no issue as to whether the term "planning permission" in the s. 106 obligations did or did not include subsequent s. 73 permissions, which is a critical matter here.

100. Even if it were possible to say in the present case that *no* s. 73 permission could be granted which would be incompatible with the performance of the owner's obligations in the 2012 agreement (as to which I am doubtful), that would amount to saying no more than that clause 7.10 will not be engaged in future by the carrying out of any such permission. But that has nothing to do with the true interpretation of the terms "development", "permission" and "dwelling" in the 2012 agreement, in order to determine in the first place whether the owner's obligations apply if development is carried out under a s. 73 permission. The same applies to the point that there is no incompatibility between carrying out the 2015 permission and the obligations in the 2012 agreement. That tells us nothing to help answer the legal questions raised by Issue (1).

101. Accordingly, the court cannot gain any assistance from the attempts by both parties to rely upon clause 7.10. I would only add that this provision is not expressed so as to be *restricted* in its effect to planning permissions for "different schemes" to that authorised by the 2012 permission, as paragraph 37 of NNDC's skeleton sought to suggest. Clause 7.10 has not been worded so as to exclude all section 73 permissions from the protection given to the landowner.

Conclusion on Issue (1)

102. For the above reasons, on a true construction of the language used in the 2012 agreement, the obligations it contains are not triggered by the carrying out of development under the 2015 permission.

Issue (2): whether additional words should be implied in the 2012 agreement

103. I have set out in [7(2)] above the additional words which NNDC asks the Court to imply in the 2012 agreement.

Legal principles

104. In this part of the case it is common ground between NHL and NNDC that the general principles on the implication of terms or language into contractual documents are applicable.

105. In Trump Lord Hodge stated that there was no bar on implying terms into the conditions in a planning permission, but the court would "exercise great restraint" in implying terms into public documents which have criminal sanctions ([33] and [35]). Lord Carnwath said at [60]:-

> "There is no reason in my view to exclude implication as a technique of interpretation, where justified in accordance with the familiar, albeit restrictive, principles applied to other legal documents. In this respect planning permissions are not in a special category."

But that must also be read in conjunction with his observations at [66] quoted at [65] above. Lord Carnwath agreed with the judgment of Lord Hodge and there is no real difference between the two judgments on the approach to be taken to implying language in planning documents.

106. In the present case we are concerned with a s.106 obligation rather than the conditions in a permission. But the breach of a s.106 obligation may give rise to injunctive relief, and thereby to criminal sanctions for any contempt of court. Furthermore, a s.106 obligation runs with the land and may affect the interests of parties who were not originally involved many years later, as well as the general public and other public authorities and agencies ([66]).

107. Dealing with general principles, Lord Hodge stated that whether words are to be implied into a document depends on the interpretation of the words which the authors have already used ([33]). At [35] he stated:-

> "Interpretation is not the same as the implication of terms. Interpretation of the words of a document is the precursor of implication. It forms the context in which the law may have to imply terms into a document, where the court concludes from its interpretation of the words used in the document that it must have been intended that the document would have a certain effect, although the words to give it that effect are absent. See the decision of the Privy Council in *Attorney General of Belize v Belize Telecom Ltd* [2009] 1 WLR 1988 per Lord Hoffmann, at paras 16—24 as explained by this court in *Marks and Spencer plc v BNP Paribas Securities Trust Co (Jersey) Ltd* [2015] 3 WLR 1843, per Lord Neuberger of Abbotsbury PSC, at paras 22—30. While the court will, understandably, exercise great restraint in implying terms into public documents which have criminal sanctions, I see no principled reason for excluding implication altogether."

108. In BP Refinery (Westernport) Proprietary Limited v Shire of Hastings (1997) 180 CLR 266 the Privy Council laid down the following principles:-

> "…for a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that " it goes without saying"; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract.
>
> It is because the implication of a term rests on the presumed intention of the parties that the primary condition must be satisfied that the term sought to be implied must be reasonable and equitable. It is not to be imputed to a party that he is assenting to an unexpressed term which will operate unreasonably and inequitably against himself."

109. The Privy Council drew upon two earlier authorities; firstly, The Moorcock (1889) 14 PD 64, 68:-

> "Now, an implied warranty, or, as it is called, a covenant in law, as distinguished from an express contract or express warranty, really is in all cases founded on the presumed intention of the parties, and upon reason. The implication which the law draws from what must obviously have been the intention of the parties, the law draws with the object of giving efficacy to the transaction and preventing such a failure of consideration as cannot have been within the contemplation of either side; and I believe if one were to take all the cases, and they are many, of implied warranties or covenants in law, it will be found that in all of them the law is raising an implication from the presumed intention of the parties with the object of giving, to the transaction such efficacy as both parties must have intended that at all events it

> should have. In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are business men; not to impose on one side all the perils of the transaction, or to emancipate one side from all the chances of failure, but to make each party promise in law as much, at all events, as it must have been in the contemplation of both parties that he should be responsible for in respect of those perils or chances."

and secondly, Reigate v Union Manufacturing Company [1918] 1 KB 592, 605:-

> "These principles, however, have been clearly established: The first thing is to see what the parties have expressed in the contract; and then an implied term is not to be added because the Court thinks it would have been reasonable to have inserted it in the contract. A term can only be implied if it is necessary in the business sense to give efficacy to the contract; that is, if it is such a term that it can confidently be said that if at the time the contract was being negotiated some one had said to the parties, "What will happen in such a case," they would both have replied, "Of course, so and so will happen ; we did not trouble to say that; it is too clear." Unless the Court conies to some such conclusion as that, it ought not to imply a term which the parties themselves have not expressed."

110. In Philips Electronique Grand Public SA v British Sky Broadcasting Limited [1995] EMLR 472 Lord Bingham MR stated at pp. 481-2:-

> "The courts' usual role in contractual interpretation is, by resolving ambiguities or reconciling apparent inconsistencies, to attribute the true meaning to the language in which the parties themselves have expressed their contract. The implication of contract terms involves a different and altogether more ambitious undertaking: the interpolation of terms to deal with matters for which, ex hypothesi, the parties themselves have made no provision. It is because the implication of terms is so potentially intrusive that the law imposes strict constraints on the exercise of this extraordinary power.
>
> …
>
> It is much more difficult to infer with confidence what the parties must have intended when they have entered into a lengthy and carefully-drafted contract but have omitted to make provision for the matter in issue. Given the rules which restrict evidence of the parties' intention when negotiating a contract. it may well be doubtful whether the omission was the result of the parties' oversight or of their deliberate decision; if the parties appreciate that they are unlikely to agree on what is to happen in a certain not impossible eventuality, they may well choose to leave the

> matter uncovered in their contract in the hope that the eventuality will not occur.
>
> The question of whether a term should be implied, and if so what, almost inevitably arises after a crisis has been reached in the performance of the contract. So the court comes to the task of implication with the benefit of hindsight, and it is tempting for the court then to fashion a term which will reflect the merits of the situation as they then appear. Tempting, but wrong.
>
> …
>
> In the familiar cases already mentioned there could be little room for doubt what the parties' joint answer would have been had the question been raised at the outset. There would, almost literally, have been only one possible answer. But this may not be so where a contract is novel, known to involve more than ordinary risk and known to be more than ordinarily uncertain in its outcome. And it is not enough to show that had the parties foreseen the eventuality which in fact occurred they would have wished to make provision for it, unless it can also be shown either that there was only one contractual solution or that one of several possible solutions would without doubt have been preferred: *Trollope & Colls Limited v North West Metropolitan Regional Hospital Board* [1973] 2 All ER 260, [1973]1 WLR 601 at 609-10, 613-14"

111. In Marks and Spencer plc v BNP Paribas Securities Services [2016] AC 742 Lord Neuberger (with whom the other members of the Court agreed) reaffirmed these principles at [16] to [19] and at [21] added six further comments:-

> "First, in *Equitable Life Assurance Society v Hyman* [2002] 1 AC 408, 459, Lord Steyn rightly observed that the implication of a term was "not critically dependent on proof of an actual intention of the parties" when negotiating the contract. If one approaches the question by reference to what the parties would have agreed, one is not strictly concerned with the hypothetical answer of the actual parties, but with that of notional reasonable people in the position of the parties at the time at which they were contracting. Secondly, a term should not be implied into a detailed commercial contract merely because it appears fair or merely because one considers that the parties would have agreed it if it had been suggested to them. Those are necessary but not sufficient grounds for including a term. However, and thirdly, it is questionable whether Lord Simon's first requirement, reasonableness and equitableness, will usually, if ever, add anything: if a term satisfies the other requirements, it is hard to think that it would not be reasonable and equitable. Fourthly, as Lord Hoffmann I think suggested in *Attorney General of Belize v Belize Telecom Ltd* [2009] 1 WLR 1988, para 27, although Lord Simon's requirements are otherwise cumulative, I would

> accept that business necessity and obviousness, his second and third requirements, can be alternatives in the sense that only one of them needs to be satisfied, although I suspect that in practice it would be a rare case where only one of those two requirements would be satisfied. Fifthly, if one approaches the issue by reference to the officious bystander, it is "vital to formulate the question to be posed by [him] with the utmost care", to quote from *Lewison, The Interpretation of Contracts* 5th ed (2011), p 300, para 6.09. Sixthly, necessity for business efficacy involves a value judgment. It is rightly common ground on this appeal that the test is not one of "absolute necessity", not least because the necessity is judged by reference to business efficacy. It may well be that a more helpful way of putting Lord Simon's second requirement is, as suggested by Lord Sumption JSC in argument, that a term can only be implied if, without the term, the contract would lack commercial or practical coherence."

112. At [23] Lord Neuberger clarified two points. First, the question whether a term should be implied is to be judged as at the date when the contract is made. Second, the tests that a term must be "so obvious as to go without saying" or "necessary for business efficacy" are important to avoid any suggestion that "reasonableness" is a sufficient ground for the implication of a term.

Discussion

113. Having regard to the conclusions I have reached above under Issue (1) on clauses 7.7 and 7.10, the implied wording for which NNDC contends would not contradict any express term of the contract. Both clause 7.7 and clause 7.10 could operate coherently if "permission" were to be treated as including a subsequent s. 73 permission arising from the 2012 permission. The Claimant has not suggested that there would be conflict with any other provisions of the 2012 agreement. Furthermore, there is no dispute between the parties about the clarity of the wording proposed or its effect. Thus, the fourth and fifth of Lord Simon's principles in the BP case are satisfied. The real question is whether the first three principles, which to some extent overlap, are met.

114. Ms Dehon pointed out that provision of affordable housing by market sector housing schemes is a key policy objective of local development plan policies. Any s. 73 permission for the same residential scheme as that permitted in 2012 would be expected to be granted subject to a s. 106 obligation imposing essentially the same requirements as were originally set down in the 2012 agreement. Mr Lockhart-Mummery QC did not contend otherwise. Indeed, paragraph 31 of his skeleton carried that implication.

115. There was therefore a tendency for some of NNDC's arguments to focus on the events which have or have not happened since 2012 and the consequences for the Defendant local authorities if NNDC's arguments were to be rejected by the Court. If NHL carries out development under the 2015 permission, and does not seek any further s. 73 permission, the two authorities will lose the valuable and important contributions stipulated by the 2012 agreement. But the Court must not fashion and impose an implied term to reflect the merits of the situation as they now appear, with the benefit of hindsight, that is the knowledge that NNDC could have insisted upon a fresh s. 106 obligation being entered into before granting the 2015 permission but did not do so.

Instead, an important question for the Court is whether, viewed as at the time of the 2012 agreement, just before the grant of the 2012 permission, reasonable parties would have agreed to NNDC's implied terms as the sole contractual solution for dealing with the subsequent grant of *any* s.73 permission at *any* time thereafter (Lord Simon's second and third principles in the BP case).

116. Ms. Dehon also relied on the statutory context that a s.73 permission may only be granted for essentially the same development as was permitted originally and may not alter the definition of that development (Finney). Accordingly, she submits that it is reasonable and fair to impute to the original parties an intention that the 2012 agreement would apply to *any* s.73 permission subsequently granted.

117. Although the Council's arguments were presented forcefully and attractively, they face a series of insuperable problems.

118. Firstly, it cannot be said that without the implied language suggested by NNDC the 2012 agreement lacked "practical coherence", or coherence for giving effect to development plan polices and planning control. If development had been carried out under the 2012 permission, the owner and his successors in title would have had to comply with their obligations under the 2012 agreement. There was no gap or defect in the agreement needing to be addressed by implied language in order to give effect to the objective purpose of the agreement. If NNDC were to grant subsequently a fresh permission on an ordinary application under s. 62 for a different residential scheme, for example one involving 90 or 100 dwellings, then NNDC would have needed to insist upon a fresh s. 106 agreement aligned with that development. It had the same legal ability to require a fresh s. 106 permission before agreeing to grant a s. 73 permission. Indeed, if policy had changed materially in the meantime, for example, by requiring a higher proportion of housing to be provided as affordable, it would not have been in the public interest for the local planning authority to be tied to the obligations in the 2012 agreement by the implied terms upon which it now relies. They have been advanced in order to deal with the particular difficulty which the First Defendant now finds itself in because it did not insist upon the landowner executing a further s 106 obligation (or a deed making the 2012 agreement applicable to that permission) before it granted the 2015 permission, as it was well able to do. I cannot accept that the implied language for which NNDC contends is necessary to give efficacy to the 2012 agreement or that the implication is so obvious that it went without saying.

119. Accordingly, NNDC's argument fails at this first hurdle. It also follows from the principles set out above, that the Council's suggestion that it would be *reasonable* to imply the language it relies upon is insufficient to justify that implication.

120. Secondly, and in any event, I do not accept that the reasonableness criterion is satisfied for a number of reasons.

121. The effect of NNDC's submission is that even if the parties to an agreement have expressed their obligations so as to apply solely to development under a contemporaneous permission, without any reference to a subsequent s.73 permission, they are to be treated as if they have agreed that the obligation should apply to development under all such consents. In other words, it does not matter whether NNDC's additional wording was expressly included or not.

122. NNDC's argument potentially has much wider implications for the many s.106 agreements cast in the same form as the 2012 agreement in this case. If NNDC is correct it would be necessary for parties who agree that performance of a s.106 obligation should be conditional upon the carrying out of a particular permission solely, to exclude s.73 permissions expressly in order to avoid the implication of NNDC's additional wording. For example, there may be cases where it is in the interests of the planning authority to confine any covenants which they are to perform to the carrying out of one particular permission, or to reserve their position as to what requirements would be appropriate if a further planning permission were to be granted at a later date. For example, there might be a change of policy before the original grant of permission is due to expire. The illusory "technical trap" upon which NNDC has sought to rely in this case could actually become a real trap for other authorities, and indeed parties generally. As was stated in Trump, the Court should exercise great restraint and proceed cautiously.

123. Although, as I have noted, Ms Dehon sought to base part of her argument on the Finney principle, Mr Lockhart-Mummery QC pointed out that it had become common practice, for example when an original permission is granted for a large mixed use scheme, to use very broad language in the "grant" section of the consent to describe the project and to confine its detailed description to a condition requiring the development to be carried out in accordance with a list of approved drawings. In that way the drawings may be modified quite substantially by a subsequent permission under s. 73, and there may be large changes in, for example, quantum of floorspace, without infringing the Finney principle. This undermines NNDC's argument that the proposed implied language is reasonable because a s. 73 permission cannot involve substantial changes to the development permitted. Even if in the present case the 2013 and 2015 permissions granted did not in fact involve substantial changes, it has not been shown that, viewing the position as at the time of the 2012 agreement, the development authorised under the 2012 permission could not have changed quite significantly by the use of the s. 73 procedure. As Mr Lockhart-Mummery QC submitted, the Council's implied terms would operate so as to apply the 2012 agreement automatically to *any* subsequent s. 73 permission.

124. It is also relevant to compare the pros and cons of the competing positions as they would appear to reasonable persons in the position of the actual parties at the time of the 2012 agreement.

125. If the Court rejects the implication of the language suggested by NNDC, the Council would be able to insist upon the execution of a fresh s.106 obligation before granting any further s.73 permission, just as it did when it granted the original permission in 2012. In practical terms NNDC would be the relevant authority for determining any planning applications likely to come forward in respect of the site. Whichever authority happens to be in "the driving seat", the other authority (most likely NCC) would have to rely upon the decision-maker (most likely NNDC) to ensure that an appropriate s.106 obligation was executed before the permission was issued. The practical procedure would be just the same as where the landowner applies for a planning permission which falls outside the scope of s.73, even one which is only just outside the scope of that provision.

126. However, if the Court accepts the implied terms advanced by NNDC, the result would be that the 2012 agreement would apply to *any* s.73 permission granted at any time after

the 2012 permission, irrespective of the circumstances pertaining at the time of the subsequent planning application. The applicant would need to persuade the local planning authority to vary or discharge the s.106 obligation.

127. There are other legal consequences of the implied language for which NNDC contends, including the following:-

(i) Going back to the original decision on whether or not to grant planning permission, if the local authority were to be dissatisfied with the terms of the s.106 obligation offered by a developer, they could refuse permission and the developer would be able to test the reasonableness of that stance in a planning appeal;

(ii) If, however, a s.106 obligation is treated as applying to subsequent s.73 permissions, the landowner may seek to persuade the local authority to vary or discharge the s.106 obligation in relation to a particular s.73 application. But the local authority might decide that although there is no reason to refuse to grant the s.73 permission sought, the s.106 obligation should remain unaltered. In that event, s.78 would not give any right of appeal to enable the merits of that issue to be determined independently. The landowner would not be able to apply under s.106A to modify or discharge the s.106 obligation for a period of 5 years from the date on which it was entered into. If, however, the proposed terms are not implied and there is a dispute when a s.73 application is being determined by the local authority as to whether existing s.106 obligations should be re-applied (whether at all or in some amended form) and the application is refused for that reason, the issue can be tested on appeal;

(iii) As pointed out above, similar problems would apply to a local planning authority which has no good reason for refusing a s. 73 application, but which could justify seeking a variation in the terms of a s. 106 obligation only to find itself tied to an existing agreement by virtue of NNDC's implied terms. In these circumstances, it would be unreasonable for an authority to refuse to grant a s. 73 permission simply because the s.106 obligations treated by implication as applying to such a permission were no longer acceptable to the authority. The authority could not seek to "have it both ways". Flexibility to deal with changes of circumstance or evaluation may be just as important to a planning authority as to a landowner or developer;

(iv) The planning merits affecting what conditions if any should be imposed in the determination of a s.73 application are considered as at the date of that decision. The same approach should apply to the need for any s.106 obligation and its terms. There should be a contemporaneous decision on that point unless the parties have expressly agreed otherwise. That point should not go by default. It is a generally intrinsic feature of decision-making under the development control system;

(v) The merits of what should be imposed in a s.73 permission may be connected or intertwined with the issue of whether there should be a related s.106 obligation and, if so, on what terms.

128. Parties to a s.106 agreement (or a developer offering a unilateral undertaking) may choose to agree explicitly that the performance of the obligations created applies not only to the planning permission then being granted but also to any subsequent s.73 permission (or for that matter more broadly still). But if parties reach such an agreement, or a developer offers such an undertaking, they will have had the opportunity to take advice on the statutory framework and the legal implications of the promises they make. Applying the standard principles for the implication of language in legal documents, NNDC has not demonstrated why parties who have entered into an agreement without such explicit language should nevertheless be treated as having tied their hands in the same way in relation to the unknown content and circumstances of future s. 73 applications.

129. For these reasons I do not accept that it would be reasonable to imply the additional language for which NNDC contends.

Conclusion on Issue (2)

130. For the above reasons I conclude that the implication of the additional wording contended for by NNDC would not be justified.

Conclusion

131. For all the reasons set out above the Claimant is entitled to the relief sought. It is common ground that in these circumstances the s. 106 agreement dated 22 June 2012 has ceased to have effect pursuant to clause 7.7 thereof (see [6] above).

HERBERT SMITH FREEHILLS

APPENDIX 2

Durham County Council & Anor v Secretary of State for Levelling Up, Housing and Communities [2023] EWHC 1394 (Admin)

Neutral Citation Number: [2023] EWHC 1394 (Admin)

Case No: CO/4780/2022

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/06/2023

Before :

MR JUSTICE CHAMBERLAIN

- -

Between :

(1) DURHAM COUNTY COUNCIL **(2) HARTLEPOOL BOROUGH COUNCIL**	**Claimants**
- and -	
SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES	**Defendant**
- and -	
(1) LIGHTSOURCE SPV 206 LIMITED **(2) LIGHTSOURCE DEVELOPMENT SERVICES LIMITED**	**Interested Parties**

- -
- -

John Barrett (instructed by **Legal Services, Durham County Council**) for **Claimant (1)**
John Hunter (instructed by **Legal Services, Hartlepool Borough Council**) for **Claimant (2)**
Ryan Kohli (instructed by the **Government Legal Department**) for the **Secretary of State**
Michael Humphries KC (instructed by **Cameron McKenna Nabarro**) for the **Interested Parties.**

Hearing dates: **23 and 24 May 2023**

- -

Approved Judgment

Mr Justice Chamberlain:

Introduction

1 The claimants are Durham County Council ("Durham") and Hartlepool Borough Council ("Hartlepool"). On 17 June 2020, Durham granted an application by a special purpose company related to Lightsource bp, which specialises in the development and management of solar energy projects. The application was for planning permission for a solar farm with a generating capacity of 49.9 MW, associated infrastructure and an electricity substation at Hulam Farm ("Hulam"). The permission has yet to be implemented.

2 In 2021, a further five applications were made by two further special purpose companies related to Lightsource bp. I shall refer to the applicants together as "Lightsource". These were for planning permission for:

(A) a proposed solar farm with a generating capacity of 49.9 MW at Sheraton Farm occupying an area of approximately 77 ha ("Sheraton");

(B) the construction of underground electricity cables and associated infrastructure;

(C) the construction of underground electricity cables and associated infrastructure to connect the Sheraton solar farm to the primary proposed substation. This proposal is intended to link the substation at Hulam into Sheraton;

(D) the erection of a substation and the installation of a physical cable connection to Hulam and the existing substation to the south of the A179 trunk road. The substation is intended to link into Sheraton; and

(E) the construction of underground electricity cables and associated infrastructure to connect Hulam to the existing substation near Hart.

3 Applications (A) and (B) were made to Durham. Applications (C), (D) and (E) were made to Hartlepool. All were accepted as valid but refused. All were appealed to the Secretary of State under s. 78 of the Town and Country Planning Act 1990 ("TCPA 1990") and referred to the Planning Inspectorate ("PINS"). The appeals are referred to as Appeals A, B, C, D and E.

4 The Inquiry was due to commence on 15 November 2022. On 9 November 2022, PINS wrote to the claimants and Lightsource inviting legal submissions on the following questions:

a) whether any of the five appeals could be considered to be an extension to Hulam by reason of being functionally linked;

b) whether development consent would be required in accordance with the Planning Act 2008 ("the PA 2008") for the resultant generation capacity;

c) whether there were implications related to these issues for any grant of planning permission for these appeals and the Inquiry.

5 The parties provided written submissions on these questions and the Inquiry opened on 15 November 2022. Lightsource's position was that the projects were not a nationally significant infrastructure project ("NSIP"), so development consent under the PA 2008 was not required. Durham and Hartlepool disagreed. In their view, the projects taken together were an NSIP. The Inspector adjourned the Inquiry for reasons she later reduced to writing. In a letter of 17 November 2022, she said that:

a) she had adjourned the Inquiry for a limited period on the understanding that the claimants would issue the present claim for judicial review within a period of two weeks of the receipt of her letter;

b) it was not within her power to make a "definitive ruling" on whether or not the proposed developments comprised an NSIP – this was a matter for the courts;

c) she believed that she had jurisdiction to determine the appeals before her.

6 Durham and Hartlepool filed the present claim, seeking three declarations. The third is not now pursued. The first two are:

> "Declaration One: A declaration that the subject matter of the appeal applications comprise a Nationally Significant Infrastructure Project within the meaning of the Planning Act 2008.
>
> Declaration Two: A declaration that the Defendant does not have jurisdiction or is otherwise entitled to determine the appeal applications made under the Town and Country Planning Act 1990."

7 Permission was granted on the papers by Lang J on 22 February 2023. The hearing took place over two days on 23 and 24 May. John Barrett appeared for Durham, John Hunter for Hartlepool, Ryan Kohli for the Secretary of State and Michael Humphries KC for Lightsource. I am grateful to all counsel for their helpful submissions.

8 There are three issues for me to determine today:

a) *Can and should the court determine whether development consent under the PA 2008 would be required for the projects taken together?* Messrs Humphries, Barrett and Hunter submit that I should. Mr Kohli submits that I should not, because that question is allocated by the PA 2008 to the Secretary of State in the first instance and he has not yet determined it.

b) *Are the projects an NSIP?* Messrs Barrett and Hunter say "Yes". Mr Humphries says "No". Mr Kohli says that, although the Secretary of State has not formed a concluded view, his preliminary view is "No".

c) *If the projects are an NSIP, does the Inspector have jurisdiction to consider the appeals?* Messrs Barrett and Hunter say "No", because the regimes under the TCPA 1990 and the PA 2008 are mutually exclusive. Mr Kohli and Mr Humphries submit that the Inspector's jurisdiction to hear the appeals does not depend on whether the projects are an NSIP.

9 The claimants originally invited me to determine another issue: whether, having accepted the planning applications as valid, they were estopped from asserting that the

Inspector lacked jurisdiction to hear the appeals. The third declaration sought (not now pursued) related to this issue. However, both Mr Kohli and Mr Humphries confirmed that they were not suggesting that the claimants were estopped, so the issue does not arise.

The facts

10 Lightsource emphasises the following facts, which are not in dispute.

11 The proposed Sheraton site is over a mile from the proposed Hulam site. From inception the two sites were considered, developed and managed as separate projects. The planning applications were submitted by different special purpose companies. The electricity generated at each site will be transmitted by 33kV underground cables to the proposed Hart Moor substation, which will in fact consist of two side-by-side substations and switch houses, one for each solar farm. The electrical output from the two farms will be separately metered. The proposed Hart Moor substations will then connect via 66kV underground cables to the existing Hartmoor substation, operated by Northern Powergrid ("NPg"), the Distribution Network Operator ("DNO"), and then on to the wider distribution network. It is anticipated that NPg will adopt the proposed Hart Moor substations as part of its DNO network.

12 The claimants, for their part, point out that Lightsource had provided a Technical Note clarifying the inter-relationship between the cable proposals and the solar farms at Sheraton and Hulam. This Note sets out a range of benefits from the location of the proposed shared or "common" substation at Hart Moor and the consequent need for the proposed cable, which had been described as a "necessary piece of related infrastructure". The solar farm at Sheraton consists of four non-contiguous fields each containing an array of photovoltaic panels.

The law

The TCPA 1990

13 Part III of the TCPA 1990 concerns control over "development", which means "the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land", except where the context otherwise requires and subject to ss. 55(2)-(5): s. 55(1).

14 Section 57 provides as follows:

> "(1) Subject to the following provisions of this section, planning permission is required for the carrying out of any development of land.
>
> (1A) Subsection (1) is subject to section 33(1) of the Planning Act 2008 (exclusion of requirement for planning permission etc. for development for which development consent required)."

15 Section 78(1) confers on an applicant a right of appeal to the Secretary of State against *(inter alia)* a refusal of planning permission by a local planning authority. Section 79 empowers the Secretary of State to allow or dismiss the appeal, or reverse or vary any

part of the decision of the local planning authority and to deal with the application as if it had been made to him in the first instance. Section 79(6) provides as follows:

> "(6) If, before or during the determination of such an appeal in respect of an application for planning permission to develop land, the Secretary of State forms the opinion that, having regard to the provisions of sections 70 and 72(1)… planning permission for that development—
>
> (a) could not have been granted by the local planning authority; or
>
> (b) could not have been granted otherwise than subject to the conditions imposed,
>
> he may decline to determine the appeal or to proceed with the determination."

16 Section 336(1) provides that "planning permission" (except in so far as the context otherwise requires and subject to the following provisions of s. 336) "means permission under Part III of section 239 but does not include permission in principle".

The PA 2008

17 Part 3 of the PA 2008 created a new development consent regime for major projects in the fields of energy, transport, water, waste water and waste. Under this regime, "development consent" is required "to the extent that the development is or forms part of a nationally significant infrastructure project": s. 31. "Development" has the same meaning as in the TCPA 1990, subject to s. 32(2) and (3) (which are not material here): s. 32(1). An NSIP is defined in s. 14 as a project which consists of any of a list of specified kinds of development, including "(a) the construction or extension of a generating station". However, this is subject to s. 15, which provides insofar as material as follows:

> "(1) The construction or extension of a generating station is within section 14(1)(a) only if the generating station is or (when constructed or extended) is expected to be within subsection (2), (3), (3A) or (3B).
>
> (2) A generating station is within this subsection if—
>
> (a) it is in England,
>
> (aa) it does not generate electricity from wind,
>
> (b) it is not an offshore generating station, and
>
> (c) its capacity is more than 50 megawatts."
>
> (Subsections (3), (3A) and (3B) are not material.)

18 Section 235(1) (Interpretation) provides materially that:

> "'extension', in relation to a generating station, has the meaning given by section 36(9) of the Electricity Act 1989 (and 'extend' must be read accordingly);
>
> …
>
> 'generating station' has the same meaning as in Part 1 of the Electricity Act 1989 (see section 64(1) of that Act)"

19 Section 33 provides insofar as material as follows:

> "(1) To the extent that development consent is required for development, none of the following is required to be obtained for the development or given in relation to it—
>
> (a) planning permission;
>
> …
>
> (d) authorisation by an order under section 4(1) of the Gas Act 1965 (c. 36) (storage of gas in underground strata)…
>
> (2) To the extent that development consent is required for development, the development may not be authorised by any of the following—
>
> …
>
> (b) an order under section 4(1) of the Gas Act 1965 (order authorising storage of gas in underground strata);
>
> …
>
> …
>
> (4) If development consent is required for the construction, improvement or alteration of a highway, none of the following may be made or confirmed in relation to the highway or in connection with the construction, improvement or alteration of the highway…"

20 An order for development consent can only be made if an application is made to the Secretary of State: s. 37(1) and (2).

21 Section 51 empowers the Secretary of State to make regulations about the giving of advice about applying for an order for development consent or making representations about such an application.

22 Where an application purporting to be an application for development consent is made, the Secretary of State must within 28 days decide whether or not to accept it: s. 55(2). Section 55(3) provides:

> "(3) The Secretary of State may accept the application only if the Secretary of State concludes—
>
> (a) that it is an application for an order granting development consent,
>
> (c) that development consent is required for any of the development to which the application relates,
>
> (e) that the applicant has, in relation to a proposed application that has become the application, complied with Chapter 2 of Part 5 (pre-application procedure) and
>
> (f) that the application (including accompaniments) is of a standard that the Secretary of State considers satisfactory."

(Sub-paragraphs (b) and (d) were repealed by the Localism Act 2011.)

23 Section 120 provides that an order granting development consent may impose requirements in connection with the development, which include but are not limited to requirements corresponding to conditions which could have been imposed on the grant of any permission, consent or authorisation which, but for s. 33(1) would have been required for the development.

24 Section 160 makes it an offence to carry out or cause to be carried out development for which development consent is required at a time when no development consent is in force in respect of the development. Section 161 makes it an offence to carry out or cause to be carried out development in breach of the terms of an order granting development consent or otherwise fail to comply with the terms of such an order.

25 Section 171 empowers a local planning authority to apply to the High Court or a county court for an injunction "if it considers it necessary or expedient for any actual or apprehended prohibited activity to be restrained by injunction". "Prohibited activity" means activity that constitutes an offence under ss. 160 or 161 in relation to land in the area of the local planning authority.

The Electricity Act 1989

26 Section 36(1) of the Electricity Act 1989 ("the EA 1989") requires consent from the appropriate authority for the construction or extension of a generating station. However, by s. 36(1A), this is subject to s. 33(1) of the PA 2008. Section 36(9) provides:

> "In this Part 'extension', in relation to a generating station, includes the use by the person operating the station of any land or area of waters (wherever situated) for a purpose directly related to the generation of electricity by that station and 'extend' shall be construed accordingly."

27 "Generating station" is not defined save where it is "wholly or mainly driven by water". In that case, it "includes all structures and works for holding or channelling water for the generation of electricity by that station": s. 64(1).

Issue (a): Can and should this court determine whether development consent under the PA 2008 would be required?

28 Mr Kohli submits that under s. 55(3)(c) of the PA 2008 the function of deciding whether the applications, taken together, constitute an NSIP has been allocated by Parliament to the Secretary of State as primary decision-maker. The question whether the applications, taken together, constitute an extension of the already permitted Hulam generating station (rather than a separate one) is a question of mixed fact and law which turns on the exercise of planning judgment on the basis of, *inter alia,* technical evidence. He relies on *R (Hammerton) v London Underground Ltd* [2022] EWHC 2307 (Admin), [2003] JPL 984, where Ouseley J said that judicial review of London Underground's decision to refuse an undertaking not to demolish a goods yard was inappropriate, because it was for the local planning authority to decide whether to enforce against it – and the court should not usurp the local authority's planning judgment: see at [184]-[189]. In these circumstances, it would be inappropriate for the court, in the exercise of its discretion, to grant a declaration.

29 In my judgment, the *Hammerton* case does not assist. The reason why the relief sought there was inappropriate was that it would have stopped the developer from proceeding when there was no legal prohibition on it doing so. Development in breach of planning control under the TCCPA 1990 is not an offence. It is up to the local planning authority to decide, in the exercise of its planning judgment, whether to enforce. It was inappropriate for the court to grant at the suit of a private individual relief which was tantamount to an injunction to prevent the carrying out of development when the local planning authority had not decided that it was "expedient" to take enforcement action: see at [184]-[185].

30 Mr Kohli's argument depends critically on the proposition that the PA 2008 allocates the decision whether a project requires development consent exclusively to the Secretary of State. Certainly, s. 55(3)(c) of the PA 2008 requires the Secretary of State to consider that question if an application for development consent is made. It may be that the Secretary of State could give advice about it under s. 51 (though the advice would not bind the Secretary of State in the event that an application were made). But this does not mean that the statute allocates the decision about whether a project requires development consent to the Secretary of State alone.

31 If the developer does not apply for development consent, but the local planning authority considers that development consent is required, it can prosecute under s. 160. In that case, as Mr Kohli accepts, a criminal court would have to decide whether the project does or does not require development consent. I can see no reason why a criminal court (whether a magistrates' court or the Crown Court) would be better placed than this Court to reach a view about whether development consent is required. Moreover, the availability of an application for injunctive relief under s. 171 seems to me to indicate that Parliament expressly envisaged the possibility that the High Court (or a county court) might have to decide that question for itself.

32 Mr Kohli did not accept that s. 171 required or permitted the court to determine whether a proposed development required development consent if that question turned on an "evaluative planning judgment". He relied on *South Buckinghamshire District Council v Porter*, where Simon Brown LJ had said that the judge on an application for an injunction under s. 187B of the TCPA 1990 (the analogue of s. 171 of the PA 2008)

was neither required nor even entitled to reach his own independent view of the planning merits of the case: see [2001] 1 WLR 1359, [38]-[40], affirmed by the House of Lords at [2003] UKHL 26, [2003] AC 558, [38] (Lord Bingham).

33 In my judgment, however, nothing in *Porter* supports Mr Kohli's argument. Section 187B of the TCPA 1990 empowers a local planning authority to apply to a court "where they consider it necessary or expedient for any actual or apprehended breach of planning control to be restrained by injunction". In the cases under consideration in Porter, it was common ground that planning permission was required and (at the time when the injunctions were granted) had not been granted: see [6] and [7] of Lord Bingham's opinion in the House of Lords. That was the context for Simon Brown LJ's observation at [38] of his judgment in the Court of Appeal that the judge was required to take the "planning merits" (i.e. whether planning permission should have been, or should be, given) as "decided within the planning process" and "a given".

34 Neither Simon Brown LJ nor Lord Bingham was saying that the court could not or should not decide the threshold question whether the development was an actual or apprehended breach of planning control, if there was a dispute about that. If, for example, it was the respondent's case that what he was proposing to do did not require planning permission, the court could not avoid reaching its own view about that (if it were otherwise disposed to grant an injunction). *Ipswich Borough Council v Fairview Hotels (Ipswich Ltd)* [2022] EWHC 2868 (KB), [2023] JPL 630 illustrates this point well. In that case, a local planning authority sought an injunction under s. 187B of the TCPA 1990 to restrain the use of a hotel to house asylum seekers. There was a dispute about whether this involved a material change of use and so required planning permission. Holgate J considered the arguments for and against in some detail and decided that the issue was "triable": see at [103]. He went on to conclude that the balance of convenience was against the grant of relief until trial. The conclusion that the threshold issue was "triable" presupposes that that issue was, on the facts of the case, suitable for resolution by the court.

35 The same reasoning applies, *mutatis mutandis*, to s. 171 of the PA 2008. The existence of that provision shows that Parliament envisaged that the threshold question whether development consent is required might, in some circumstances, have to be determined by this court (or a county court). The present proceedings are not, of course, proceedings for an injunction under s. 171, but I do not think that matters. They are proceedings brought by parties which could have sought relief under s. 171 in this court. Their purpose is to resolve an issue which both the claimants and Lightsource consider ought to be resolved. If, as I have concluded, that issue can in principle be determined by the court, there are powerful reasons why it should be.

36 The alternatives are, in my view, unpalatable. Mr Kohli's suggestion that Lightsource could make an application to the Secretary of State for development consent is impractical and would not achieve the certainty required. It is impractical because applications for development consent are "front loaded" in the sense that they involve a very large amount of preparatory work, including consulting affected parties (see ss. 41-48). Why would Parliament have intended that a developer should be required to consult in relation to an application which, in its view, does not require development consent at all? How could such a consultation be carried out in circumstances where the developer considers that the project is not an NSIP without confusing or misleading those being consulted? In any event, even if a developer undertook all the necessary

preparatory work, and submitted an application for development consent, and the Secretary of State rejected the application on the ground that development consent was not required, nothing in the PA 2008 suggests that the Secretary of State's view would bind the court if the local planning authority took a different view and decided to prosecute (though it might in practice be persuasive).

37 If the developer chose not to apply for development consent, it would be open to the local planning authority to prosecute under s. 160 once the development had started. Then, as Mr Kohli accepts, the criminal court would have to determine the issue. But why should a developer have to incur the expense of beginning the development when it is clear that there is a dispute between it and the local planning authority about whether development consent is required? And why should a developer have to run the risk of a criminal conviction in order to obtain certainty on a point which both it and the local planning authority wish to have resolved?

38 Finally, even if there are cases where the question whether development consent is required turns on disputed issues of fact, that is not the position here. Even Mr Kohli did not submit that there were any material disputes of fact. He was right to submit that the question whether development consent is required involves a judgment (or, as it is sometimes put, a question of mixed fact and law). But it is not the kind of judgment which requires the court to weigh the "planning merits" (i.e. the advantages and disadvantages in planning terms of a proposed development). The judgment no doubt involves considering more than one factor, but it is the kind of judgment a court has to make whenever it asks whether a given set of facts falls within a statutory concept. I can see no constitutional or institutional reason why it would be wrong for that judgment to be made by me in circumstances where both the local planning authority and the developer invite me to resolve the issue.

Issue (b): Is development consent required?

39 Messrs Barrett and Hunter submit that Hulam and Sheraton are physically connected by a piece of "critical infrastructure". They note that – in the one situation in which "generating station" is defined, where electricity is generated from water – it includes structures and works for holding water: see s. 64(1) of the EA 1989. By analogy, the substation and cables are part of the generating station. Sheraton and Hulam are to perform as one solar farm, sharing the commercial advantages of common infrastructure. If the individual fields at Sheraton are parts of the same solar farm despite being non-contiguous (as Lightsource accepts), it is not obvious why the addition of those fields to the already permitted solar farm at Hulam is not an extension of the latter.

40 In my judgment, Messrs Humphries and Kohli are correct that the reference to s. 64(1) of the EA 1989 does not assist the claimants. In the first place, the fact that a special definition was employed for a generating station involving water suggests that, without that definition, the structure and works for holding or channelling the water would not fall within the ordinary meaning of "generating station". In any event, even if it were appropriate to draw an analogy from a generating station using water to one using solar power, the definition suggests inclusion of structures and works for containing and channelling the raw material from which the power is generated. In the case of solar, that source is sunlight. The structure and works whose function is to collect and channel the sunlight are the photovoltaic panels. There is nothing in the definition in s. 64(1) to

suggest that the apparatus needed to transmit and distribute the electricity is itself part of the "generating station".

41 On this point, the decision in *R (Redcar and Cleveland Borough Council) v Secretary of State for Business, Enterprise and Regulatory Reform* [2008] EWHC 1847 is directly relevant. There, the Secretary of State had given consent under s. 36 of the EA 1989 for the construction and operation of an offshore wind farm. The developer had applied separately under the TCPA 1990 for planning permission for an on-shore substation and underground cabling connecting the wind farm to the substation. The local planning authority's argument was that the consent for the offshore wind farm was invalid because the cables and substation were part of the "generating station" and a consent under s. 36 of the EA 1989 could only be granted for the whole of the generating station.

42 At [18], Sullivan J said this:

> "It is true that the 'whole scheme' proposed by the interested party includes both the wind farm offshore and the elements comprised in the onshore application: the cabling and the onshore substation. However, it does not follow that the wind farm comprised in the s 36 application could not properly be described as a 'generating station' for the purposes of that section. In ordinary language a 'station' is simply a place, building or structure where a particular activity occurs. Thus, we speak of police stations, polling stations, railway stations, et cetera. A non-technical description of a 'generating station' would simply be a building or structure where electricity is generated. The nature of the building or structure will depend on the means of generation: wind, water, coal, nuclear power, et cetera. An application for consent under s. 36 may include ancillary facilities, such as transformers, substations and associated cabling, and, for example, coal stockpiles and handling equipment if the generating station is coal-fired, et cetera. Whether or not such ancillary facilities are included in any s. 36 application will depend upon the facts of the individual case, including, in particular, the physical proximity of the ancillary facilities to the turbines themselves. In the case of an oil or coal-fired generating station the turbines and some or all of the ancillary facilities may well be housed in one building or structure or complex of buildings or structures. In the case of an offshore wind farm the turbines may well be separated by many kilometres of territorial waters from the ancillary facilities onshore. In the former case it will be sensible to include all of the elements of the scheme, including any ancillary facilities, in one application under s. 36. In the latter case it will not, not least since the environmental implications of the offshore turbines may well be entirely divorced from the environmental impact of the onshore facilities many kilometres distant."

43 At [27], he continued:

> "Both as a matter of ordinary language, and on any reasonable interpretation of the provisions of the 1989 Act as amended by the 2004 Act, the 'generating station' is the place, in the present case the wind

> farm offshore, where the electricity is generated. Once it has been generated there, at a 'generating station', it is transmitted ashore."

44 These passages demonstrate that the cables and substation the subject of the present applications are not part of a "generating station". They are the means by which the electricity is transmitted and distributed, not generated. It is true that the PA 2008 does not incorporate all the provisions of the EA 1989 upon which Sullivan J placed reliance. But, by s. 235(1) of the PA 2008, Parliament made a deliberate decision that "generating station" should bear the same meaning as in Part 1 of the EA 1989. This would be a bizarre drafting technique if the intention had been to give the term "generating station" a different meaning. The *Redcar* case is therefore, on the face of it, fatal to the claimants' argument that the cables and substation are part of the generating station. As the decision of a judge of co-ordinate jurisdiction, I am obliged to follow it unless convinced it was wrongly decided. I am not convinced that it was wrongly decided. On the contrary, I find the analysis of Sullivan J compelling as a matter of ordinary language.

45 This is consistent with the scheme of the PA 2008, which permits an application for development consent to include both "development for which development consent is required" and also "associated development": see s. 115(1)(a) and (b). Annex B of the Department for Communities and Local Government's *Guidance on associated development applications for major infrastructure projects* (April 2013) lists both overhead and underground cables and substations as examples of associated development related to onshore generating stations. Although not determinative as to the proper interpretation of the PA 2008, this is consistent with the analysis in the *Redcar* case.

46 That leaves the argument, upon which Messrs Barrett and Hunter placed emphasis at the hearing, that even if the cables and substation are not part of the generating station, the addition of further generating capacity at Sheraton, functionally linked to that at Hulam, counts as an extension of the latter. As to this, I accept that the addition of generating capacity, even at a site which is non-contiguous with the site of the existing generating capacity, could fall within the definition of an "extension" in s. 36(9) of the EA, if – on the facts – the two sites could properly be regarded as part of the same generating station. In this case, however, there are a number of features which point strongly against that conclusion.

47 First, the projects at Hulam and Sheraton were developed separately at different times. This would not be determinative on its own, but it points in the direction of separate stations, other things being equal. Second, they have separate distribution and connection agreements and are separately metered. A third, related point is that Sheraton and Hulam could operate independently of each other – both in contractual terms and in terms of physical infrastructure. Fourth, the common substation at Hart Moor in reality consists of two substations, one for Sheraton and one for Hulam. Fifth, in any event, this substation is part of the apparatus for transmitting and distributing electricity, not generating it – as reflected in the proposal that it will in due course be adopted by NPg. Sixth, as the Technical Note shows, the reason for the proposed common 66kV cable transmitting electricity from the common substation to the grid is that this arrangement is more efficient, not that the generating capacity of the two solar farms is interconnected.

48 These factors, taken together, make it clear that the proposed generating capacity at Sheraton is, in terms of the PA 2008, a new generating station and not an extension of the permitted solar farm at Hulam. I would therefore refuse to grant Declarations One and Two, not because the grant of declarations would be in principle inappropriate, but because the substance of the declarations is wrong in law. Mr Humphries did not ask me to grant any other declaration and I do not do so.

Issue (c): If the projects are an NSIP, does the Inspector have jurisdiction to consider the appeals?

49 Given my conclusions on issues (a) and (b), this issue does not strictly arise. However, given that I have heard argument, I will briefly express my view on it.

50 The claimants' case is that the regimes under the TCPA 1990 and the PA 2008 are mutually exclusive. They say that the position is as set out in the Planning Encyclopaedia: "where development consent is required under the Act, planning permission under the Town and Country Planning Act 1990 is neither required nor capable of being granted" (emphasis added). In my view, this is wrong, for four reasons.

51 First, it is clear that Parliament intended that development consent under the PA 2008 should not be granted unless it was required: s. 55(3)(c). There is nothing equivalent in the TCPA 1990. Section 336(1) provides that "planning permission" means "permission under Part III or section 293A but does not include permission in principle". Parliament could have provided that planning permission can only be granted for projects for which it is required in accordance with s. 57, but it did not do so.

52 Second, s. 33 of the PA 2008 does two separate things. Section 33(1) provides that, where development consent is required in relation to development, various other permissions, consents, notices and authorisations are "not required to be obtained or given" (emphasis added). These latter words reflect the fact that some of the things that are not required – e.g. planning permission granted under the General Permitted Development Order or notice under s. 35 of the Ancient Monuments and Archaeological Areas Act 1979 – are "given" rather than "obtained". Sections 33(2) and (4) provide that, to the extent that development consent is required for development, it cannot be authorised pursuant to certain specified statutory procedures. There is no prohibition on the grant of planning permission.

53 Third, it is true that, in general, Parliament is unlikely to empower a public authority to undertake a resource intensive function, such as deciding whether to grant planning permission, if the permission will have no effect. By the same token, however, it is unlikely that parties would commit the time and expense involved in making a planning application in cases where it is clear that implementing it would be unlawful under s. 160 of the PA 2008.

54 Fourth, the facts of the present case are a good example of a situation in which the planning permissions sought would be far from useless even if – contrary to my conclusion – the two solar farms, taken together, were an NSIP. In that case, parts of the permissions could be lawfully implemented, provided that the generating capacity of the whole did not exceed 50 MW.

55 I would therefore hold that the local planning authority's power to grant planning permission, and the inspector's jurisdiction to entertain the appeals, are not dependent on the projects not being an NSIP.

Conclusion

56 For these reasons I conclude as follows:

a) There is no reason why I should not determine whether the project to which these appeals relate requires development consent and good reason why I should.

b) The project does not require development consent.

c) Even if it did, that would not deprive the local planning authority of jurisdiction to grant planning permission, nor deprive the Secretary of State of jurisdiction to entertain the appeals.

57 The claim for judicial review is therefore dismissed.