Case No: AC-2024-LDS-000251

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
PLANNING COURT
[2025] EWHC 2256 (Admin)

Leeds Combined Court Centre,
1, Oxford Row, Leeds LS1 3BG

Date: 4 September 2025

Before :

THE HON MR JUSTICE KERR

Between :

THE KING on the application of CHIDSWELL ACTION GROUP — **Claimant**

- and -

KIRKLEES COUNCIL — **Defendant**

- and -

(1) CC PROJECTS (an unlimited company)
(2) HARWORTH ESTATES (AGRICULTURAL LAND) LIMITED — **Interested Parties**

Noémi Byrd (instructed by **Direct Access**) for the **Claimant**
Martin Carter (instructed by **Ward Hadaway LLP Solicitors**) for the **Defendant**
Alexander Booth KC and **Jonathan Welch** instructed by **Charles Russell Speechlys LLP** for the **First Interested Party**
The **Second Interested Party** did not appear and was not represented

Hearing date: 24 June 2025

- -

Approved Judgment

This judgment was handed down remotely at 10am on 4 September 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....
MR JUSTICE KERR

The Hon Mr Justice Kerr:

Introduction

1. This judicial review, brought by the claimant action group against the defendant local planning authority, proceeds by leave of Ms Karen Ridge, sitting as a deputy High Court judge. Ms Ridge is a former planning inspector with extensive experience in this field. I gratefully summarise the nature of the claim from her order of 11 February 2025, granting limited permission:

> "1. The challenge relates to a grant of outline planning permission (OPP) on 23 October 2024 for residential development of up to 181 dwellings on a 7-hectare site at Heybeck Lane, Dewsbury. The site forms part of a larger 120-hectare parcel of land (MXS7) which was allocated for residential development in the Defendant's Local Plan adopted in 2019. The remainder of the allocation, being by far the larger site, is known as the Leeds Road site and was subject to a contemporaneous application for OPP.
>
> 2. Applications relating to OPP in relation to both sites were determined by the Defendant's Strategic Planning Committee (SPC) at a meeting on 8 December 2022. Both applications were the subject of resolutions to approve the proposals (subject to the SSHCLG not calling them in) and subject to the delegation of the issue of the decision notice to the Head of Planning on completion of a set of conditions and execution of a section 106 agreement.
>
> 3. The Officer's Report in relation to the Heybeck Lane application cross refers to the Leeds Road report given that both sites dealt with similar issues and were being considered at the same meeting. The final list of conditions was completed and the section 106 agreement executed in relation to the claim site and OPP granted in relation to Heybeck Lane in October 2024. The OPP in relation to the Leeds Road site has not been issued but the claimant has indicated its intention to judicially review that grant of OPP as well."

2. Ms Ridge granted permission on the third and fourth of four grounds of challenge. The third is, in her summary, that "the Defendant erred by taking future ecological surveys into account without sight of the relevant condition or that the ecology conditions which were imposed were ineffective". The fourth is that "that when it made the decision the Defendant took into account an inaccurate Biodiversity Net Gain (BNG) assessment and/or it issued a decision notice without legally adequate provision to secure BNG".

3. The claimant now seeks permission to add a fifth ground of challenge, admittedly out of time, by application made on 28 April 2025. The proposed

fifth ground is: "[f]ailure to publish the section 106 agreement[1] in accordance with Article 40(3)(b) of the Town and Country Planning (Development Management Procedure) (England) Order 2015 [(**the 2015 DMP Order**)], rendering the grant of planning permission invalid."

4. The defendant (**the LPA**) and the first interested party (**the developer**) oppose permission to rely on the fifth ground. It is for me to determine the application and I heard submissions on that issue at the hearing, as well as submissions on the third and fourth grounds of challenge. I shall address all three grounds of challenge in this judgment, I need say no more about the first and second grounds, for which the deputy judge refused permission.

The Facts

5. The LPA in its 2019 Local Plan allocated the whole 120 hectares of the "MXS7" land for residential development. The Strategic Planning Committee of the LPA (**the committee**) met on 8 December 2022 to consider applications made in July 2020 in respect of the two linked sites, the smaller Heybeck Lane site (the subject of this claim) and the larger Leeds Road site. The officer's report relating to the Heybeck Lane site included references to the corresponding report relating to the Leeds Road site.

6. The proposals were controversial and divided local opinion. Needless to say, the court takes no view regarding the merits of the proposals. The applicant for outline planning permission was the developer. The agenda item was, as stated at the start of the officer's report:

> "Planning Application 2020/92350 Outline application for residential development (Use Class C3) of up to 181 dwellings, engineering and site works, demolition of existing property, landscaping, drainage and other associated infrastructure (amended and further information received) Land south of, Heybeck Lane, Chidswell, Shaw Cross, Dewsbury."

7. The officer's report recommended that approval be delegated to the LPA's head of planning and development to complete "the list of conditions

[1] For anyone not familiar with planning procedures, this is shorthand for a binding agreement between an applicant for planning permission and the local planning authority, under section 106 of the Town and Country Planning Act 1990, whereby the applicant undertakes planning obligations enforceable by the local planning authority.

including those contained within this report and to secure a Section 106 agreement" within three months. All matters apart from access to the site were "Reserved Matters". The section 106 agreement was to cover a list of 12 matters, including, seventh on the list:

> "Biodiversity
>
> a) Contribution (amount to be confirmed) or off-site measures to achieve biodiversity net gain (only applicable if 10% can't be achieved on-site
>
> b) Securing other off-site measures (including buffers to ancient woodlands, and provision of skylark plots)."

8. The officer's report pointed out the following. Most of the application site was greenfield land in arable agricultural use. Only one significant building is on the site (paragraph 2.3). The overall MX7 site was allocated for mixed use (housing and employment) in the Local Plan (2.8). The many representations in opposition to the development, from the claimant among others, were summarised (7.1 to 7.8). Among the many grounds for objecting was (at 7.6):

> "Claimed biodiversity net gain not accepted. Earlier independent assessment identified a 14% net loss."

9. The position of various statutory and non-statutory consultees was summarised in section 8. At 8.23, the author explained that "KC Trees", an entity within the LPA, supported the "[g]eneral principle" of the proposal but identified one hedgerow on the site as "important". The impact on it would need "mitigating", possibly by "translocation", i.e. moving it elsewhere. More detail would be required at "Reserved Matters" stage.

10. The proposed development, on its own, was not "EIA development", i.e. it was not a development requiring a prior environmental impact assessment; but the impacts were taken into account in the EIA for the much larger Leeds Road site. Section 10 of the report was an assessment of the "[m]ain [i]ssues". They were many, among them "[e]cological considerations" (10.64-10.69):

> "Ecological considerations
>
> 10.64 Chapter 15 of the NPPF and Local Plan policy LP30 apply. Of particular note, paragraph 174 of the NPPF requires the proposed development to achieve a biodiversity net gain.

10.65 Much of the commentary set out in the accompanying committee report for application ref: 2020/92331 is also relevant to the Heybeck Lane site. The same ecological surveys appended to chapter 14 of the ES submitted with application ref: 2020/92331 have also been submitted in support of the Heybeck Lane application. Similarly, a letter regarding bat surveys of lofts (dated 23/08/2022) was submitted. Of specific relevance to the Heybeck Lane site, that letter noted that the loft of 39 Heybeck Lane has previously been converted and there is therefore no accessible loft space to inspect for bat presence. A High-Level Biodiversity Net Gain Assessment (01/11/2022), including findings of a walkover survey undertaken in October 2022, was also submitted.

10.66 At the Heybeck Lane site, the applicant's biodiversity net gain calculation (using the Biodiversity Metric 3.1) confirms the proposed development would achieve the following net gains (post-intervention):

• Habitat units: 10.03%

• Hedgerow units: 10.61%

10.67 Of note, no net gain in river units is proposed, as the existing river unit baseline was found to be zero. It is also noted that the proposed 10.03% net gain in habitat units is partly reliant upon off-site interventions.

10.68 The proposed net gains are considered achievable. Delivery of the proposed off-site interventions would need to be secured via the recommended Section 106 agreement.

10.69 As with application ref: 2020/92331, the council is able to make an informed decision on the current outline application. Further surveys would be required at Reserved Matters stage (if outline permission is granted). The applicant has proposed a policy-compliant biodiversity net gain, and has met other requirements of relevant planning policies. Conditions and provisions (secured via a Section 106 agreement) can be applied to mitigate the ecological impacts of the proposed development."

11. The next part of the section concerned "[t]rees, ancient woodlands and hedgerows (10.70-10.75):

"10.70 Several Tree Preservation Orders protect trees and groups of trees within and adjacent to the application site, and an ancient woodland (Dum Wood) is designated to the east of the site. Local Plan policy LP33 states that planning permission will not be granted for developments which directly or indirectly threaten trees or woodlands of significant amenity, and proposals should normally retain any valuable or important trees where they make a contribution to public amenity or have other benefits.

10.71 The applicant's Hedgerow Assessment and Report (July 2018) at appendix 14.9 of the ES submitted with application ref: 2020/92331 states that three of the MXS7 site's hedgerows can be defined as "important" under the Hedgerow Regulations 1997, and that a further five hedgerows just fall short of being classified as "important", due to there being either one too few woody species or associated features, or by not being adjacent to a public right of way. One of the "important" hedgerows is within the Heybeck Lane site.

> 10.72 The proposed development (as illustrated indicatively) largely retains existing trees and hedgerows, and an appropriate buffer is proposed adjacent to the ancient woodland. The applicant's landscaping proposals are currently indicative, however they illustrate potential biodiversity connections across the site.
>
> 10.73 The applicant's illustrative layout and supporting arboricultural impact assessment demonstrates that the site can be developed while incorporating the existing important trees, woodlands and hedgerows into the, and avoiding adverse impact on these features. Significantly more detail would, of course, be required at Reserved Matters stage, including details of how the site's hedgerows would be retained.
>
> 10.74 Further assessment regarding impacts on Dum Wood is set out in the accompanying committee report for application ref: 2020/92331.
>
> 10.75 As noted by KC Trees, the hedgerow identified as "important" appears to be impacted by the proposals. This would need to be considered further at Reserved Matters stage when, if the hedgerow is not to be retained and worked around, mitigation would be required, possibly in the form of translocation of the hedgerow to a new site more associated with the adjacent ancient woodland."

12. At 10.82, under the sub-heading "[p]lanning obligations and financial viability", the report continued (so far as I need quote it here):

> "A development of this scale would have significant impacts requiring mitigation. The following planning obligations securing mitigation (and the benefits of the proposed development, where relevant to the balance of planning considerations) would need to be included in a Section 106 agreement:
>
> ….
>
> 7) Biodiversity
>
> a) Contribution (amount to be confirmed) or off-site measures to achieve biodiversity net gain (only applicable if 10% can't be achieved on-site);
>
> b) Securing other off-site measures (including buffers to ancient woodlands, and provision of skylark plots).
>
> ….
>
> 10) Ancient woodland – management plan (and works, if required) for public access to Dum Wood (outside application site, but within applicant's ownership)."

13. Under the sub-heading "[r]epresentations, reference to the claimant's position was made, as follows (10.89):

> "The request made by the Chidswell Action Group to delay determination of the application is noted, but is not supported. As part of the recent reconsultation, letters and emails were sent to everyone who had previously been consulted and everyone who had previously commented on the application, and four new site

> notices were posted on 02/11/2022. This greatly exceeds the consultation effort required by the relevant legislation, and would have ensured a good level of local awareness regarding the application and the reconsultation."

14. The report recommended 26 conditions for the outline planning permission, at 11.1, among them conditions 13 and 24:

> "13) Ecological mitigation and enhancement details (including an Ecological Design Strategy, measures to address impacts on birds including ground-nesting farmland birds), and details of mitigation and delivery measures to be submitted.
>
> …
>
> 24) Construction (Environmental) Management Plan to be submitted."

Objections to the proposals

15. The claimant objected to both planning applications concerning the MXS7 land, i.e. the Leeds Road and Heybeck Lane sites. Its 19 page document is not dated but was prepared in advance of the meeting on 8 December 2022. I need only mention a few points from it. It began by voicing strong objections to both applications, supported by several of the LPA's elected members, two MPs, the Yorkshire Wildlife Trust, the Council for the Protection of Rural England, the Woodland Trust and the LPA's ecology officers.

16. The claimant advocated deferring the applications, not for further public consultation but to obtain up to date Agricultural Land Classification (ALC) assessment, up to date ecological surveys and an up to date biodiversity net gain (BNG) assessment, which would be dependent on the provision of up to date ecological surveys. Essentially the claimant was saying the LPA did not have adequate and reliable environmental information and that it was wrong and perhaps unlawful to leave the gaps to be filled as "Reserved Matters".

17. The document addressed ecological impacts. The claimant observed that the developer had engaged ecological consultants, called Brooks Ecological, to conduct surveys in 2018. This had noted an adverse effect on the "red listed" yellowhammer and skylark birds, which would be "negative at District scale", "major" and "largely irreversible". The developer's wildlife surveys dated back to 2018; the wildlife profile had changed since then.

18. A design strategy document dating from 2021 based on observations in 2020 had failed, said the claimant, to mention yellowhammers and skylarks. The claimant had also pointed to other adverse impacts on wildlife, but its communications had been ignored or dismissed by Brooks Ecological, without justification. An outdated ornithological survey report had wrongly stated that there were no protected "Schedule 1" species on the site. The position of bats had also been misrepresented, the claimant contended.

19. The claimant argued that the further survey evidence would not be ready in time for the committee meeting on 8 December 2022. More attention needed to be given to protected species and that would not be possible in time for the meeting. That would lead to disregard of a mandatory relevant consideration, according to the claimant. The authors of the document then went on to consider the issue of biodiversity.

20. The claimant referred to objections to both developments from "Kirklees Ecology", the LPA's ecology officers, and the Yorkshire Wildlife Trust, going back to 2020, on the ground that there was insufficient up to date detail on protection of wildlife and achieving a "measurable net gain for biodiversity" (**BNG**), which must be "secured at the early stages of design" (paragraph 58). The Yorkshire Wildlife Trust had also identified "flaws in the 2020 Biodiversity Net Gain (BNG) metrics supplied by the [developer]" (59).

21. Brooks Ecological had, the claimant objected, assumed the headwater streams on the sites in October 2022, following a prolonged drought, as "in poor condition" and "choked with scrub vegetation and supporting invasive weeds" (60). Heavy rain followed and those same streams were now "flowing freely with crystal clear water throughout the site and into Hey Beck" (65).

22. The watercourses were therefore unjustly downgraded when measuring BNG. Further, the claimed BNG of plus 10 per cent had initially been said to be "achievable on-site", which had proved to be false; subsequent calculations had incorporated off-site gains, with the on-site achievable gain now said to be only 3.53 per cent (68-69). The LPA itself recognised that local residents had

"expressed disbelief that a [BNG] would be achieved by the proposed development".

23. The decision should be deferred "given the bias and flaws with the Brooks Ecological reporting)" (71-72), the claimant contended. The conclusion in relation to BNG was (73):

> "material considerations are being left to be dealt with as Reserved Matters. Without an accurate baseline survey, the [committee] will not be able to determine whether 10% BNG is actually achievable, because the BNG achievable onsite is uncertain – leaving a grant of Outline Planning permission vulnerable to a legal challenge."

24. The claimant's overall conclusions (84-87) included the complaint that the developer should not be allowed to "mark their own homework" with the LPA allowing them to do so unchallenged and supporting the developer's unsound approach, ignoring or downplaying legitimate grounds of objection. The decision should be deferred so that "Material Considerations are given proper scrutiny and proper mitigation can be put in place".

25. It was not enough that the site land was designated for mixed use development in the Local Plan. The claimant asked rhetorically (at 86): "[w]ithout accurate baseline information, how can the [committee] determine whether the proposal will avoid/mitigate significant loss or harm to biodiversity? Or what compensatory measures will be appropriate?" The section 106 agreement should be made before, not after, the grant of outline planning permission.

The 8 December 2022 committee meeting

26. At the public meeting of the committee on 8 December 2022, its seven members were present, as were numerous objectors and other members of the public. The debate must have been lively, but the transcript records only the members' contributions. The chair and two other councillors spoke in favour of the proposals; three other councillors spoke against them.

27. The LPA's head of planning and development, Mr Matthias Franklin, spoke near the end in favour of the proposals, insisted that biodiversity was "a matter very close to my heart" and expressed a commitment "to ensuring we get 10%

net gain on all development sites". The reserved matters scheme would "ensure that there are planning conditions that deliver this". The developer had been "very clear that their intention is to secure that on-site".

28. Councillor Pinnock was among the three who had spoken against accepting the recommendations in the report. He responded that the proposal should be deferred until relevant questions had been answered: "[o]ne of the problems with having the list of conditions like this is that it summarises the conditions doesn't tell you what's in them". He cited the example of condition 19 on ecological mitigation; they did not appear to be up to date enough, he said.

29. Mr Victor Grayson, the LPA's development management masterplanner, responded at the chair's invitation, arguing that in relation to "ecological mitigation and enhancement, those details really should come forward at reserved matters stage when we know more about the layout and other aspects of the proposals". It would not be appropriate to specify "where bat and bird boxes go until we know where the buildings would precisely go…".

30. He accepted that some of the survey information was out of date but not that the vote should be delayed on that account:

> "… yes the applicant surveys ecological survey information is now fairly old it's over four years old it has been supplemented by a walkover survey carried out in October of this year which is of some use but, officers and the applicants as well do accept that full detailed surveys would need to be redone to inform the proposals brought forward at reserved matters stage and that would be an appropriate point to do it, you would then have bang up-to-date information that will take into account all the information that we have so far - new on-site observations, if need be the council's biodiversity officer can accompany the applicant's consultants on site, if there's any disagreement as to how certain ecological features need to be categorised in as an input into the biodiversity net gain calculations, if that needs to happen that can be done. And of course, reference can be made to the significant volumes of information that local residents have gathered regarding sightings of it was mentioned Kingfishers and Red Kites and other species that have been seen on site that there is evidence of."

31. The vote was to adopt the officers' recommendations, by four votes to three. Broadly, the majority accepted the arguments in the report, while the minority accepted the arguments of the objectors, were dissatisfied with the absence of up to date information or believed the site should remain as a working farm. The resulting resolutions relating to both sites were lengthy. The head of

planning and development was given delegated power to complete the list of reserved matters conditions and secure an appropriate section 106 agreement.

Events after the meeting of 8 December 2022

32. The claimant did not cease its opposition to the development. The Secretary of State decided on 5 May 2023 not to call in the application. Mr Grayson was in contact with the claimant in 2023. He sent an email on 15 May but I do not have a copy of it. In response, the claimant emailed back on 18 June 2023:

> "… we request details of all outstanding agreements being drafted and discussed prior to the decision date on Chidswell & Heybeck.
>
> Specifically, the S106 / S278 / Reserved Matters - and any other details which need to be agreed prior to determination.
>
> It's our understanding these draft documents should already be published on the Planning Portal so we'd appreciate a timely response to this request.
>
> We would also ask if you have a target completion date for these outstanding matters."

33. The next day Mr Grayson replied:

> "Thanks for your email.
>
> To clarify – it is only the Section 106 agreements (one for each application: 2020/92350 and 2020/92331) that need completing prior to the council's decisions (on the two applications) being released. Section 278 agreements relate to works to the highway. Reserved matters would be addressed in later applications which would be put to public consultation.
>
> Section 106 agreements are being drafted. Their provisions will secure the Heads of Terms set out in the committee reports for the two applications. No drafts of the agreements are in the public domain (nor are they required to be). The completed agreements will be posted online along with the council's decisions, when issued. As to when that will happen, I can't confirm precisely, however later this summer is likely."

34. But by March 2024, no section 106 agreements or drafts thereof had been published on the LPA's planning portal; nor the delegated officer's decision. On 13 March 2024, Ms Sally Naylor on behalf of the claimant left a voice message for Mr Grayson and then followed up with an email the same day:

> "Further to my voice message left on your Kirklees' extension today, we would be grateful to know why applications 2020/92350 and 2020/92331 are no longer present on Kirklees' planning portal. We would be grateful to know:

> The target date for completion of the S106 agreements and the release of the Council's decision; If you will be updating Kirklees' planning portal immediately at the point of completion of S106 agreements and release of the Council's decision?
>
> We would request you to please notify ourselves to the CAG email as soon as the S106 agreements are completed and the Council's decision is going to be released."

35. Mr Grayson responded the same day:

> "Thanks for your messages.
>
> Yes – there has been a problem with the council's website today, affecting access to several applications. The council's IT people are trying to resolve the matter.
>
> As regards the Section 106 agreements, we had hoped to complete these by the end of this month. Whether or not that happens depends on various factors, including progress with National Highways.
>
> Once the Section 106 agreements are completed, planning permissions are usually issued within a few days. For both applications, the decision letter and the Section 106 agreement should appear online at the same time (the day after the decision is issued, as the council's website updates overnight)."

36. Extensive exchanges (as they were described in a later LPA officer's note) took place between the LPA and the developer on the subject of the pre-commencement conditions. These were not made public. A final list of conditions was submitted to the developer by the LPA on 5 July 2024.

The Greenfields *case at first instance*

37. On 23 August 2024, His Honour Judge Jarman KC gave judgment in *R (Greenfields (IOW) Ltd. v. Isle of Wight Council* [2024] EWHC 2107 (Admin). He refused permission to bring a judicial review claim insofar as it was based on failure to publish a section 106 agreement, contrary to article 40(3)(b) of the 2015 DMB Order. He reasoned that it was highly likely the outcome would not have been substantially different had the failure to publish not occurred; and that permission must therefore be refused.

The section 106 agreement

38. On 14 October 2024, the final list of conditions was agreed. On 17 October, the section 106 agreement was entered into between the LPA and the developer. As is usual, it was lengthy and, rightly, not all of it was before the

court. Schedule 3 dealt with public open space, drainage and masterplanning, including arrangements for access to and management of the ancient woodlands known as Dum Wood, which forms part of the Heybeck Lane site.

39. Schedule 5 on biodiversity imposed a "Biodiversity Net Gain Requirement": to achieve "a 10% gain in the number of Biodiversity Units based on the values set out in the Biodiversity Assessment". The "Biodiversity Assessment" was defined as "an assessment (including Biodiversity Metric calculations) which sets out details of the pre-development diversity value of the Site". A "Biodiversity Metric" is "the DEFRA biodiversity metric as applicable at the time of the Biodiversity Assessment".

40. There would need to be a "BEMP", i.e.:

> "a biodiversity management and enhancement plan detailing:
>
> (a) details of the biodiversity habitat creation and/or enhancement proposed; and
>
> (b) a detailed management and maintenance regime to secure such biodiversity habitat for a period of 30 years … ."

41. There would also be an "Offsite BEMP", namely:

> "a biodiversity management and enhancement plan detailing the biodiversity habitat creation or enhancement proposed on all or part of the Offsite BNG Land [*i.e. the ancient woodland*] (as identified in the Offsite BEMP by reference to a plan) such plan to include a detailed management and maintenance regime to secure such biodiversity habitat for a period of not less than 30 years... ."

42. The development of the site could not begin until the LPA had approved the Biodiversity Assessment (Schedule 5, paragraph 2.1). Construction could not commence until the LPA had approved the BEMP and the Offsite BEMP which, together, would have to satisfy the Biodiversity Net Gain Requirement (paragraph 3.1). The following provisions would then apply:

> "**4. On-Site Biodiversity Net Gain**
>
> 4.1. The Owner shall not Occupy more than 90% of the Dwellings (or comply with such other requirement for timing of provision as may be contained in the BEMP) until the Owner has completed the works of habitat creation and/or enhancement set out in the BEMP and has served notice on the Council confirming completion of such works.

> 4.2. From the date of notice served pursuant to paragraph 4.1, the Owner covenants to comply with the requirements of the BEMP (or any amended BEMP submitted by the Owner to the Council and approved by the Council) for a period of 30 years.
>
> **5. Off-Site Biodiversity Net Gain**
>
> 5.1. Where an Offsite BEMP applies, the Owner shall not Occupy more than 90% of the Dwellings (or comply with such other requirement for timing of provision as may be contained in the Offsite BEMP) until the Owner has completed the works of habitat creation and/or enhancement set out in the Offsite BEMP and has served notice on the Council confirming completion of such works.
>
> 5.2. From the date of notice served pursuant to paragraph 5.1, the Owner covenants so as to bind the relevant part of the Offsite BNG Land identified in the relevant Offsite BEMP only to comply with the requirements of the Offsite BEMP (or any amended Offsite BEMP submitted by the owner of the relevant Offsite BNG Land from time to time to the Council and approved by the Council) for a period of 30 years."

The decision challenged

43. Then on 23 October 2024 the LPA granted outline planning permission for the development of the Heybeck Lane site, under the delegated powers conferred by the committee at the meeting in December 2022. This is the decision challenged in this claim, recorded in two documents that left certain matters to be resolved later. The first was entitled "Outline Planning Permission"; the second, "Delegated Decision to Determine Planning Applications".

44. It is necessary to set out some extracts from these decision documents. The Outline Planning Permission was said to be subject to a section 106 agreement. The permission is for "residential development … of up to 181 dwellings, engineering and site works, demolition of existing property, landscaping, drainage and other associated infrastructure." It was granted subject to 26 conditions, of which I need to mention a few.

45. Condition 1 states in part as follows:

> "1. Prior to the commencement of development (save for enabling works which for the purposes of this condition shall comprise site preparation, remediation works, provision of construction and temporary access roads, diversion and/or laying of strategic site-wide utilities, and works associated with archaeological surveys) of any phase or sub phase of the development hereby approved, details of appearance, landscaping, layout and scale (hereinafter called the "Reserved

> Matters") of that phase or sub phase shall be submitted to and approved in writing by the Local Planning Authority … ."

46. There was a definition of "site preparation" which in turn is part of the definition of "enabling works" in condition 1:

> "*Site preparation* comprises the installation of temporary facilities, installation of Heras or other fencing, installation of temporary construction compounds, and removal of existing structures and vegetation. Site preparation does not include ground works which are defined as excavation, remediation, grading and other activities related to the modification of the ground surface or subsurface."

47. Thus, the developer could make a start by doing "enabling works" before obtaining approval for "Reserved Matters", i.e. for "details of appearance, landscaping, layout and scale" of a phase or sub-phase of the development. It could remove existing structures and vegetation and instal temporary facilities, fencing and construction compounds. It could do "remediation works", build access roads and divert utilities; though it could not do "ground works" involving "modification of the ground surface or subsurface"; unless, perhaps, these were "works associated with archaeological surveys".

48. Condition 6 concerned plans for construction work. In part, it provides, with the explanatory "reason" following:

> "6. Prior to the commencement of development (including ground works) of any phase or sub phase of the development hereby approved, a Construction (Environmental) Management Plan (C(E)MP) for that phase or sub phase shall be submitted to and approved in writing by the Local Planning Authority. The C(E)MP shall include a timetable of all works, and details of:
>
> - Hours of works (including times of deliveries);
> - Point(s) of access and routes for construction traffic (which shall avoid Chidswell Lane);
> - Construction vehicle sizes;
> - …..
> - Measures to control and monitor the emission of dust and dirt during construction;
> - Site waste management, including details of recycling/disposing of waste resulting from construction works;
> - Mitigation of noise and vibration arising from all construction-related activities;

- Artificial lighting used in connection with all construction-related activities and security of the construction site;

- Site manager and resident liaison officer contacts, including details of their remit and responsibilities;

- Engagement with local residents and occupants or their representatives; and

- Engagement with the developers of nearby sites to agree any additional measures required in relation to cumulative impacts (should construction be carried out at nearby sites during the same period).

The development hereby approved shall be carried out strictly in accordance with the C(E)MP so approved throughout the period of construction and no change therefrom shall take place without the prior written consent of the Local Planning Authority.

Reason: In the interests of amenity, to ensure the highway is not obstructed, in the interests of highway safety, to ensure harm to biodiversity is avoided, and to accord with Policies LP21, LP24, LP30 and LP52 of the Kirklees Local Plan.

This pre-commencement condition is necessary to ensure measures to avoid obstruction to the wider highway network, to avoid increased risks to highway safety, and to prevent or minimise amenity and biodiversity impacts are devised and agreed at an appropriate stage of the development process."

49. Conditions 9 and 10 required the developer before starting any enabling works to obtain the LPA's approval of a "Tree Protection Plan" (condition 9) and an "Ancient Woodland Protection Plan" (condition 10). Conditions 24, 25 and 26, and the stated reasons for them, then provide as follows:

"24. Each application for the approval of Reserved Matters shall include details of faunal enhancement measures (together with arrangements for their maintenance and management) informed by up-to-date and comprehensive ecological surveys (including surveys of protected species) prepared and submitted by the developer. Following approval in writing by the Local Planning Authority, the measures (which may include the provision of bird and boxes, and provisions relating to hedgehogs and badgers) shall be implemented on a phase-by-phase basis in accordance with the details so approved. No phase or sub phase of the development hereby approved shall be first occupied prior to the implementation of the faunal enhancement measures so approved for that phase or sub phase, unless the approved details include alternative proposals for the timing of installation of the measures (in which case those alternative proposals shall be complied with). The measures shall be maintained and managed in accordance with the approved details for a minimum period of 30 years thereafter.

Reason: To secure mitigation, enhancement and compensation for the ecological effects resulting from loss of habitat and to accord with policy LP30 of the Kirklees Local Plan and chapter 15 of the National Planning Policy Framework.

> 25. No removal of hedgerows, trees or shrubs shall take place between 1st March and 31st August inclusive, unless authorised in writing by the Local Planning Authority in response to evidence to be submitted in writing to the Local Planning Authority demonstrating that no birds will be harmed and/or that there are appropriate measures in place to protect nesting bird interest on site.
>
> **Reason:** To prevent significant ecological harm to birds, their eggs, nests and young and to accord with Policy LP30 of the Kirklees Local Plan and chapter 15 of the National Planning Policy Framework.
>
> 26. Each application for the approval of Reserved Matters relating to residential use shall include floor plans (providing details of internal layouts of the residential accommodation) and a schedule of accommodation (providing unit size mix information and gross internal floorspace figures in sqm) for all residential units.
>
> **Reason:** To enable the quality, amenities and housing mix of the residential accommodation to be assessed in accordance with policies LP11 and LP24 of the Kirklees Local Plan and chapter 5 of the National Planning Policy Framework."

50. In the second document, the "Delegated Decision to Determine Planning Applications", the LPA's authorised officer recorded that she authorised approval of the application for the reasons set out in the report to the committee in December 2022 and "the Committee Decision Authorisation annexed below", which was the December 2022 resolution.

51. There followed an explanatory section called "Officer Notes" which dealt in tabulated form with "Section 106 matters". The issue numbered 13 was:

> "Ecological mitigation and enhancement details (including an Ecological Design Strategy, measures to address impacts on birds including ground-nesting farmland birds), and details of mitigation and delivery measures to be submitted."

That was said, in the right hand column (dealing with capture in the final list of conditions or in the section 106 agreement) to be secured by condition 24 and in Schedule 5 to the section 106 agreement, "including measures that would achieve what an Ecological Design Strategy would".

52. The issue of biodiversity and the need for a "[c]ontribution (amount to be confirmed) or off-site measures to achieve biodiversity net gain (only applicable if 10% gain can't be achieved on-site) was addressed in the right hand column thus: "Section 106 Schedule 5 (with net gain to be achieved not via a contribution". The need to secure "other off-site measures (including

buffers to ancient woodlands, and provision of skylark plots", was addressed by "Section 106 Schedules 3 and 5".

Publication of the section 106 agreement

53. Ms Naylor had been checking the LPA's planning portal each morning to see when any decision and other relevant information would be published. It is common ground that the outline planning permission and the section 106 agreement were both published on the portal on 24 October 2024.

Pre-action correspondence

54. Solicitors for the claimant wrote a pre-action protocol letter to the LPA, dated 1 November 2024. The four proposed grounds of challenge mirror those subsequently pleaded in this judicial review. No point was taken that the LPA had failed to publish a copy of any planning obligation proposed or entered into in connection with the application, in breach of article 40(3)(b) of the 2015 DMP Order.

55. The LPA's solicitors replied on 15 November 2024. They complained that the claimant was wrongly treating the Heybeck Lane and Leeds Road sites as if they were one and the same. They confidently explained – correctly, as the deputy judge later found – that the first two grounds had "no merit". The LPA did not accept that there was any merit in the third ground but added that:

> "any potential for dispute about the scope of the ecology and biodiversity conditions could easily be remedied by the [developer] entering into a simple supplementary planning obligation to undertake to conduct surveys prior to any work that could potentially adversely affect any features of ecological interest on the site".

56. Similarly, in relation to the fourth proposed ground of challenge, the LPA's solicitors asserted that while there was no merit in that ground, any potential dispute about the effect of Schedule 5 to the section 106 agreement could be remedied by a supplementary planning obligation on the developer:

> "to carry out, submit and have approved the Biodiversity Assessment prior to any work that could … adversely [sic] the relevant habitats within the site".

The present challenge

57. This challenge, apart from the proposed new fifth ground, was then brought on about 25 November 2024. Ms Noémi Byrd of counsel had by then been instructed and settled the four grounds of challenge, in line with the pre-action protocol letter. Supporting evidence included a statement of the financial resources available to the claimant, this being an Aarhus Convention claim.

58. On 19 and 20 December 2024, the LPA and the developer filed their acknowledgement of service and summary grounds of resistance. These largely reiterated the position of the LPA in its response to the pre-action protocol letter, adding that the developer had entered into a supplementary planning obligation along the lines suggested in the LPA's response.

The first supplementary planning obligation

59. That first supplementary planning obligation is dated 19 December 2024 (**SPO (1)**). It is a further section 106 agreement. Clause 3 contains supplemental covenants of the developer, as follows:

> "3.1. The Owner [*developer*] covenants with the Council [*LPA*] that notwithstanding Clause 3.2 of the Original Agreement the Owner shall not begin the Development (within the meaning of Section 56 of the 1990 Act) or otherwise commence clearance of hedgerows, trees and shrubs, or any other features of potential ecological importance within the Site, until:
>
> 3.1.1. up to date and comprehensive ecological surveys (including surveys of protected species) as required by condition 24 of the Planning Permission have been carried out and submitted to the Council; and
>
> 3.1.2. details of measures to protect any habitats to be retained within the Site during construction works (including site clearance and enabling works) have been submitted to and approved in writing by the Council; and
>
> 3.1.3. the Biodiversity Assessment required by paragraph 2.1 of Schedule 5 of the Original Agreement has been undertaken and submitted to the Council and approved by the Council in writing.
>
> 3.2. The Owner covenants with the Council to comply with the measures approved pursuant to paragraph 3.1.2 of this Deed."

The order granting permission on the third and fourth grounds

60. Such was the state of the papers when the matter came before Ms Ridge who as I have explained, on 12 February 2025 granted partial permission, on the

third and fourth grounds only. She did not accept that SPO (1) overcame the difficulties the LPA and the developer faced, commenting at paragraph 21:

> "… Condition 1 defines the enabling works for the purposes of this condition as site preparation, remediation works, provision of construction and temporary access roads, diversion and/or laying of strategic site-wide utilities, and works associated with archaeological surveys. The covenants in the supplemental planning obligation are not to begin development or otherwise commence clearance of hedgerows, trees and shrubs, or any other features of potential ecological importance within the Site until the updating ecological surveys and other measures have been completed. The covenant does not promise that the Owner will not commence the enabling works carved out in condition 1 prior to the submission of matters set out in clause 3. For these reasons ground 3 is arguable."

61. In relation to the fourth ground, Ms Ridge found it arguable that the LPA had taken into account an inaccurate BNG assessment or issued a decision notice without legally adequate provision to secure BNG; adding, however, at paragraph 23:

> "I am not convinced that the BNG figures were inaccurate. The officer's statement that an updating assessment would be required was effectively an update to the baseline assessment. However, for similar reasons to those set out under ground 3, it is arguable that the BNG requirements were not properly secured by condition or otherwise and I am not convinced that the supplementary planning agreement saves the Defendant."

The second supplementary planning obligation

62. The LPA and the developer responded to those observations by entering into a second supplementary planning obligation on 27 February 2025 (**SPO (2)**) and relying on it in their detailed grounds of resistance. Again, it is itself a further section 106 agreement. Clause 3 of SPO (2) provides as follows:

> "3.1 The Owner [*developer*] and the Council [*LPA*] agree that the first paragraph of clause 3.1 of the Supplemental Deed [*SPO (1)*] shall be deleted and replaced with the following paragraph:
>
> *'The Owner covenants with the Council that notwithstanding Clause 3.2 of the Original Agreement the Owner shall not begin the Development (within the meaning of Section 56 of the 1990 Act) or otherwise undertake any works associated with the Development including the works identified as "enabling works" in Condition 1 of the Planning Permission or otherwise commence clearance of hedgerows, trees and shrubs, or any other features of potential ecological importance within the Site, until:'*
>
> 3.2. The Owner and the Council agree that a new Clause 3.3 shall be inserted into the Supplemental Deed as follows:

> *'3.3 For the avoidance of any doubt the Owner and the Council agree that the reference to "the pre-development biodiversity value" in the definition of "Biodiversity Assessment" in paragraph 1.1 of Schedule 5 of the Original Agreement is and shall be interpreted as a reference to the biodiversity value of the Site prior to the earlier of i) the beginning of the Development (within the meaning of Section 56 of the 1990 Act), ii) the undertaking of any works associated with the Development including the works identified as "enabling works" in Condition 1 of the Planning Permission, and, iii) the commencement of the clearance of hedgerows, trees and shrubs, or any other features of potential ecological importance within the Site.*"

The combined provisions of SPO (1) and SPO (2)

63. From 27 February 2025 onwards, therefore, the combined effect of SPO (1) and SPO (2) is to provide as follows:

> "3.1 The Owner covenants with the Council that notwithstanding Clause 3.2 of the Original Agreement the Owner shall not begin the Development (within the meaning of Section 56 of the 1990 Act) or otherwise undertake any works associated with the Development including the works identified as 'enabling works' in Condition 1 of the Planning Permission or otherwise commence clearance of hedgerows, trees and shrubs, or any other features of potential ecological importance within the Site, until:
>
> 3.1.1 up to date and comprehensive ecological surveys (including surveys of protected species) as required by condition 24 of the Planning Permission have been carried out and submitted to the Council; and
>
> 3.1.2 details of measures to protect any habitats to be retained within the Site during construction works (including site clearance and enabling works) have been submitted to and approved in writing by the Council; and
>
> 3.1.3 the Biodiversity Assessment required by paragraph 2.1 of Schedule 5 of the Original Agreement has been undertaken and submitted to the Council and approved by the Council in writing.
>
> 3.2 The Owner covenants with the Council to comply with the measures approved pursuant to paragraph 3.1.2 of this Deed.
>
> 3.3 For the avoidance of any doubt the Owner and the Council agree that the reference to 'the pre-development biodiversity value' in the definition of 'Biodiversity Assessment' in paragraph 1.1 of Schedule 5 of the Original Agreement is and shall be interpreted as a reference to the biodiversity value of the Site prior to the earlier of i) the beginning of the Development (within the meaning of Section 56 of the 1990 Act), ii) the undertaking of any works associated with the Development including the works identified as 'enabling works' in Condition 1 of the Planning Permission, and, iii) the commencement of the clearance of hedgerows, trees and shrubs, or any other features of potential ecological importance within the Site."

The Greenfields *case in the Court of Appeal*

64. On 16 April 2025, the Court of Appeal gave its judgment reversing the decision of HHJ Jarman KC in *R (Greenfields (IOW) Ltd. v. Isle of Wight Council*: see [2025] EWCA Civ 488. Lewis LJ gave the leading judgment (Singh LJ concurring), allowing the appeal on the first ground, namely that "the judge was wrong to refuse permission on the ground that the grant of planning permission was unlawful because of the failure to publish the section 106 agreement" (see at [6(1)]).

65. Lewis LJ dealt with this ground at [53] ff. At [58] he said:

> "The purpose of article 40(3)(b) of the Order appears from its wording and statutory context. Certain documents must be placed on the planning register in the period before an application for planning permission is finally disposed of. They include a copy of a planning obligation (or a highways agreement) which it is proposed to enter into or which has been entered into. The purpose of publication is to enable members of the public to know the terms of a proposed or agreed planning obligation, and to enable them to comment on the proposed or agreed planning obligation if they choose to do so. The article envisages that members of the public may comment on the subject matter of the planning obligation. Publication of the section 106 agreement is not intended to provide an opportunity to make comments on wider issues to do with the desirability or otherwise of the grant of planning permission. Those matters will have been dealt with by the planning committee which resolved to grant the planning permission."

66. And at [63], considering the question whether the admitted failure to comply with article 40(3)(b) meant that the relevant subsequent decision was invalid, he held:

> "This is not a case where the intention underlying article 40(3) of the Order was that any failure to comply would result in the invalidity of a decision taken following such a failure. A breach of article 40(3) could occur in a wide range of factual circumstances, from situations where the content of a proposed section 106 agreement was not known to situations where, even though the agreement was not placed on the planning register, the content may in fact be in the public domain. The impact of the failure on the ability of members of the public to comment on the subject matter of a proposed section 106 agreement will, likewise, vary depending on the facts of a particular case. In those circumstances, I do not consider that the intention, or the purpose, underlying article 40(3) requires that any failure to comply renders a subsequent decision invalid. It is necessary to evaluate the consequences of non-compliance on the facts of the case."

67. In *Greenfields*, the omission to publish did result in invalidity of the subsequent decision to grant planning permission. The consequence of non-compliance was (see at [66]) "to deprive the appellant of the opportunity to

comment upon the contribution", i.e. the financial contribution of the developer which was not known until after the grant of planning permission and which fell short of what was required to carry out relevant highway works. It was obvious that the appellant "might well have wanted to comment on the amount of the financial contribution".

68. The Court of Appeal rejected the proposition that it was highly likely that the outcome would not have been substantially different if the section 106 agreement had been published, as it should have been. It was not possible to predict what the outcome would have been. Lewis LJ was therefore provisionally of the view (subject to hearing further argument on remedy) that the court should quash the unlawfully issued planning permission.

The application to add a fifth ground of challenge

69. Encouraged by the Court of Appeal's decision, on 28 April 2025 the claimant in the present case made an avowedly out of time application to add the proposed fifth ground of challenge: failure to publish the section 106 agreement in accordance with Article 40(3)(b) of the 2015 DMP Order, rendering the grant of planning permission invalid. The claimant argued in the written application that the facts in *Greenfields* and the Court of Appeal's reasoning and decision supported the same outcome in this case.

70. The claimant relied on Ms Naylor's June 2023 request, denied by the LPA, for "all outstanding agreements being drafted or discussed prior to the decision date …", including the section 106 agreement and "any other details which need to be agreed prior to determination. Ms Naylor had said in her email that "these documents should already be published on the Planning Portal".

71. The claimant in its application complained that neither it nor the wider public had any opportunity to comment on the agreement prior to the issue of the decision notice. The gist of the argument on the fifth ground was that the claimant and others could have commented on the Biodiversity Assessment and the concern that the biodiversity baseline could be artificially lowered; the same arguments as made in this judicial review but in a timely manner on a merits basis, not a judicial review basis after the event.

72. The claimant contends that it could have drawn the attention of the LPA's attention to the defects in the section 106 agreement which the LPA and the developer have since sought to remedy after the issue of proceedings, by means of SPO (1) and SPO (2). Had the claimant or others been able to comment on the section 106 agreement as it stood prior to those amending SPOs, the claimant could have commented in the appropriate forum without recourse to judicial review. There had been no substantial compliance with article 40(3)(b) and the outcome could well have been substantially different.

73. The developer filed a preliminary response on 14 May 2025 objecting to the new fifth ground being allowed to proceed: it was well out of time, without any adequate reasons being advanced; the Court of Appeal's decision in *Greenfields* had not changed the law; it was a decision on its facts. The new ground had not arisen out of any disclosure or pleadings. The time estimate would be longer and the hearing date imperilled (it has in the event been kept). The LPA supported the developer's position in a letter of 19 May 2025.

The Issues, Reasoning and Conclusions

Applicable law, legal principles and policy

74. The relevant law set out in the parties' skeleton arguments is not controversial. By section 70(2) of the Town and Country Planning Act 1990 (**the 1990 Act**) and section 38(6) of the Planning and Compulsory Purchase Act 2004 (**the 2004 Act**) a decision on planning permission of this kind must be made having regard to the Local Plan and other mandatory material considerations including the National Planning Policy Framework (**NPPF**); which, at the relevant time and now, included paragraph 186 (now 193):

> "a) if significant harm to biodiversity resulting from a development cannot be avoided (through locating on an alternative site with less harmful impacts), adequately mitigated, or, as a last resort, compensated for, then planning permission should be refused; …"

75. Policy LP30 of the Local Plan headed "Biodiversity and geodiversity" includes provision that development proposals will be required to:

> "(i) result in no significant harm or loss to biodiversity in Kirklees through avoidance, adequate mitigation or, as a last resort, compensatory measures secured through the establishment of a legally binding agreement;
>
> (ii) minimise impact on biodiversity and provide net biodiversity gains through good design by incorporating biodiversity enhancements and habitat creation where opportunities exist;
>
> (iii) safeguard and enhance the function and connectivity of the Kirklees Wildlife Habitat Network at a local and wider landscape-scale unless the loss of the site and its functional role within the network can be fully maintained or compensated for in the long term;
>
> (iv) establish additional ecological links to the Kirklees Wildlife Habitat Network where opportunities exist; and
>
> (iv) incorporate biodiversity enhancement measures to reflect the priority habitats and species identified for the relevant Kirklees Biodiversity Opportunity Zone."

76. The "Policy justification" supplementing that text, not forming part of Policy LP30 but relevant to its interpretation, includes at paragraph 13.19:

> "All development in Kirklees, as set out in national policy and the policies described in this document, will be expected to not result in significant loss or harm to biodiversity through avoidance, mitigation and compensatory measures and seek opportunities to enhance biodiversity value and ecological links. … In order to safeguard and enhance the function and connectivity of the Kirklees Wildlife Habitat Network, the council will also seek to ensure that development proposals do not result in the fragmentation of the network and provide improved ecological links, particularly to the Kirklees Wildlife Habitat Network, where opportunities exist."

77. Section 72(1) of the 1990 Act provides for conditions to be imposed on a planning permission:

> "(a) for regulating the development or use of any land under the control of the applicant (whether or not it is land in respect of which the application was made) or requiring the carrying out of works on any such land, so far as appears to the local planning authority to be expedient for the purposes of or in connection with the development authorised by the permission; … ."

78. Clear and precise reasons for each condition imposed must be given in the decision notice where permission is given for planning permission or approval of reserved matters: article 35(1)(a) of the 2015 DMP Order.

79. The Planning Court must not indulge in excessive legalism. Reports are written for councillors with local knowledge and must be read without undue rigour. The question is whether officers materially misled members on a

relevant matter that is more than minor or insignificant and the error has gone uncorrected before the decision is made. Lack of advice on a material issue may be an error of law: *R. (Mansell) v. Tonbridge and Malling Borough Council* [2019] PTSR 1452 per Lindblom LJ at [41], [42(2)] and [42(3)].

80. Decisions on planning permission should not be subjected to "hypercritical scrutiny" or "laboriously dissected in an effort to find fault": per Lindblom LJ in *St Modwen Developments Ltd v. Secretary of State for Communities and Local Government* [2017] EWCA Civ 1643 at [7]. The requirement to treat advice with benevolence applies with even greater force to such advice given orally at a committee meeting: *Lisle-Mainwaring v. Royal Borough of Kensington and Chelsea* [2024] EWHC 440 (Admin) per Neil Cameron KC (sitting as a deputy High Court judge) at [27].

81. When assessing an officer's report, the court should "focus on the substance" of the report to see if it has sufficiently drawn councillors' attention to relevant matters "rather than to insist upon an elaborate citation of underlying background materials": *Maxwell v. Wiltshire DC* [2011] EWHC 1840 (Admin) at [43] per Sales J, as he then was.

82. As for interpretation of planning conditions, Lord Hodge DPSC observed in *DB Symmetry Ltd v. Swindon BC* [2023] 1 WLR 198, SC, at [66]:

> "…. [t]here are no special rules for the interpretation of planning conditions. They are to be interpreted in a manner similar to the interpretation of other public documents. The court 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. … . As a planning permission is a document created within the legal framework of planning law, the reasonable reader is to be treated as being equipped with some knowledge of planning law and practice … ."

83. While people may reasonably differ about what amounts to common sense, references to common sense such as those of Lord Hodge DPSC in *DB Symmetry Ltd* "are really pointing to the planning purpose of the permission or condition" per Lieven J in *UBB Waste Essex Ltd v. Essex County Council* [2019] EWHC 1924 (Admin), at [53].

84. A planning obligation can put right a defect in conditions originally imposed; see the *obiter* observations of Lindblom J, as he then was, in *R. (TWS) v. Manchester City Council* [2013] EWHC 55 (Admin) at [86]; and of HHJ Jarman KC in *R. (Whiteside) v. Croydon LBC* [2022] EWHC 3318 (Admin) at [24]-[26].

85. The courts will not determine academic or hypothetical disputes, absent exceptional circumstances (*R. v. Secretary of State for the Home Department ex p. Salem* [1999] 1 AC 450, HL, per Lord Slynn at 457A-B, and *R. (Zoolife International Ltd) v. Secretary of State for Environment, Food and Rural Affairs* [2007] EWHC 2995 per Silber J at [36]).

Third ground: taking future ecological surveys into account without sight of the relevant condition; or that the ecology conditions which were imposed were ineffective

86. The two existing grounds (the third and fourth) and the proposed new fifth ground are interlinked. A high level summary of the claimant's case overall is stated thus in its skeleton argument:

> "the [committee], even if not actively or deliberately misled, were given material advice in the [officer's report] and orally which transpired to be incomplete or inaccurate to a significant degree when the decision notice was issued and the section 106 agreement published. That error of law is compounded by the Defendant's failure to publish the section 106 agreement in time for public comment, prior to issuing the decision (additional Ground 5).
>
> … paragraph 10.69 of the [officer's report] … states that the 'council is able to make an informed decision' (i.e. without deferral for updated ecological reports or BNG assessment) because 'Further surveys would be required at Reserved Matters stage […] the applicant has proposed a policy-compliant biodiversity net gain […] Conditions and provisions (secured via a Section 106 agreement) can be applied to mitigate the ecological impacts of the proposed development'. …That statement should be read as advice to members that conditions will be applied, and an agreement will be finalised, which mitigates ecological impacts as far as possible and achieves at least 10% biodiversity net gain. For the reasons set out in the Grounds 3 and 4, this did not happen.
>
> …. The consequences of the [committee]'s reliance on officer advice is that outline planning permission was issued without the effective ecological conditions and ''policy compliant' biodiversity net gain provision which the SPC took into account as material when resolving to grant it. Due to the timing of publication of the section 106 agreement, and the supplemental deeds, the SPC were deprived of expert comment on the agreement's implications for the ecological protection of the site."

87. In the third ground, the claimant says the committee was told the appropriate time for further ecological surveys was at reserved matters stage; but was not told that significant works would be "carved out" of reserved matters with significant preceding works, a material consideration the committee could not take into account. The exclusion in condition 1 of "enabling works" from the definition of reserved matters permitted ecologically damaging works before any further ecological survey evidence would be obtained.

88. The deputy judge had rightly agreed and had noted that SPO (1) does not cure the defect because the developer could still "commence the enabling works … prior to the submission of reserved matters set out in clause 3". The claimant accepts that SPO (1) and (2) together do prohibit "enabling works" until up to date ecological surveys, details of protection for habitats to be retained during construction works, and the Biodiversity Assessment, have been carried out; but says this does not meet the point that "the required output from the surveys does not fulfil the stated purpose of Conditions 6 (CEMP) and 24."

89. Conditions 6 and 24, the claimant submits, do not mitigate the ecological harm from the development as far as possible. Those conditions do not require avoidance or mitigation measures to be informed by the updated ecological surveys now required by SPO (1) and (2) to be done before enabling works are started. This issue, says the claimant, is properly pleaded in the grounds (paragraphs 72-82, predating the permission decision) and is within the scope of the unrestricted permission to advance the third ground.

90. Further, says the claimant, no measures are required to protect habitats outside the site, such as the adjacent ancient woodland at Dum Wood; nor are any measures required to protect species despite their acknowledged presence on the site. Any ecological surveys will therefore be largely "performative", the claimant says; they will not feed into avoidance, mitigation or compensation measures, besides "faunal enhancement measures".

91. That means the requirements of conditions 6 and 24 will fall short of the advice to members that ecological impacts would be mitigated by condition, as required under Policy LP30 and paragraph 186(a) of the NPPF. If the full

proposed conditions and draft section 106 agreement had been available to the public and the committee before its resolution, it is unlikely, the claimant submits, that the committee would have resolved to grant permission.

92. For the LPA, Mr Martin Carter submitted that the claimant's points went beyond its pleaded case and beyond what the deputy judge had permitted to proceed. For example, the advanced age of the survey evidence before the committee was the territory of the second ground for which permission had been refused. Further, the grant of permission on the third and fourth grounds should be viewed as restricted to the points raised under those grounds.

93. The LPA accepted that condition 1 allows enabling works, as defined, to be done before reserved matters are determined; and that the definition of enabling works included "site preparation", as defined; and that condition 24 does not, on its face, state when the relevant surveys must be carried out and approved. But, Mr Carter submitted, it would be "contrary to common sense" to interpret it so that the surveys could take place too late, after ecological damage had been done.

94. Conditions 1 and 24 read together meant that adverse ecological impacts could not occur before the relevant surveys were complete. It would be an "improper ruse or device if their effect was to adversely affect ecological interests", Mr Carter submitted. Alternatively, any defect was cured by SPO (1) or, in the further alternative, by SPO (1) and (2), read together so that enabling works could not start until up to date and comprehensive ecological surveys had been done and approved in compliance with condition 24.

95. As for condition 6 (providing for the Construction (Environmental) Management Plan (**CEMP**), said Mr Carter, it adds nothing to the claimant's case. If, which the LPA does not accept, reliance on it is permissible under the permission granted for the third ground, condition 6 does fulfil its stated purpose. Condition 6 does not seek to identify ecological mitigation or compensation measures. It requires specified topics to be addressed in the CEMP to avoid ecological harm among other kinds of harm.

96. Condition 6 concerning the CEMP thus specifies methods to be used, not outcomes to be achieved. Further, condition 6 does not include any "carve out" for "enabling works"; the CEMP must be approved prior to the commencement of development. If the CEMP were approved after provision of the relevant up to date ecological survey evidence, no issue under condition 6 could arise. If those up to date surveys had not yet been provided, the LPA could refuse to approve the developer's CEMP until they were provided.

97. For the developer, Mr Alexander Booth KC submitted that the third ground lacked merit but was in any case academic as it was superseded by SPO (1) and SPO (2) and any defect (none being accepted) is now cured, if not by SPO (1), then by SPO (1) and (2) read together. The developer's submissions largely chimed with those of the LPA and need not all be repeated.

98. Further, disagreeing respectfully with the deputy judge's analysis, Mr Booth submitted that the section 106 agreement as supplemented by SPO (1), i.e. as it stood at permission stage, required the developer not to carry out enabling works, including site preparation work, in advance of relevant surveys and LPA approval of appropriate measures, if such work involves "clearance of …. any … features of potential ecological importance" (SPO (1), clause 3.1).

99. That is sufficient to allay any concerns that enabling works could be carried out prematurely. Even if that was wrong, or to avoid any forensic doubt on the point, SPO (2) has put the issue beyond doubt, rendering the third ground of challenge wholly academic, Mr Booth submitted. There are no exceptional circumstances that would impel the court to determine the academic question.

100. While the claimant says that "features of potential ecological importance" is not a sufficiently clear criterion for protecting plants and weeds supporting insect and bird life, that is not pleaded and is not open to the claimant; and, even if it were, the high threshold of irrationality would have to be reached to impugn the use of that criterion and cannot arguably be surmounted. The current agricultural use of the site already permits alternations that could affect insect and bird life; the site cannot be "ecologically frozen".

101. As I have noted above, the claimant's two grounds and one potential ground are interlinked. In my judgment they are best considered and assessed together and I will therefore return to this ground when assessing the parties' submissions overall. I turn to the fourth ground of challenge next.

Fourth ground: taking into account an inaccurate Biodiversity Net Gain (BNG) assessment and/or issuing a decision notice without legally adequate provision to secure BNG

102. There was some discussion about the scope of the permission granted by the learned deputy judge in respect of the fourth ground. She was not convinced that the BNG figures presented to the committee were inaccurate. Nonetheless she granted permission to proceed on the fourth ground, without any limit. It follows that the permission is to make the case pleaded in the statement of facts and grounds (**SFG**), which is at paragraphs 88 to 100 of the SFG.

103. The gist of the case in those paragraphs is as follows. The officer's report (at 10.66) stated that the Heybeck Lane site BNG calculation by the developer using the Biodiversity Metric 3.1 "confirms the proposed development would achieve the following net gains (post-intervention)": 10.03 per cent for habitat units and 10.61 per cent for hedgerow units. However, officers conceded orally that an updated BNG assessment would be needed.

104. Despite that concession, BNG was not the subject of a condition. It was addressed in Schedule 5 to the section 106 agreement which would proceed from "the pre-development biodiversity value of the site". However, the "pre-development" value could be affected adversely by "enabling works" which could degrade the biodiversity value and thus cause it to proceed from a lower baseline than the baseline at the time the BNG figures in the officer's report were notified to the committee in December 2022.

105. The claimant's concern is that the committee was not told that the developer could degrade the biodiversity value of the site by enabling works and then measure the required 10 per cent gain in a post-enabling works Biodiversity Assessment measuring the gain from a lower baseline. The claimant says the

committee was thereby misled or erred in law by taking into account as a material consideration the prospect of achieving the stated BNG.

106. It is no answer, the claimant pleads at SFG paragraph 88, for the LPA to point to paragraph 5(a) of Schedule 7A to the 1990 Act, requiring pre-development biodiversity to be measured as at the date of the planning application and not later. While members may be expected to have some knowledge of planning law and practice, the existence of that provision cannot by itself entail that the committee members were confident the baseline would not be lowered in the updated biodiversity assessment or were aware of the issue.

107. In Ms Byrd's skeleton argument, she repeated the simple point that members were not told the developer could do significant works before the updated Biodiversity Assessment was carried out. The claimant does however accept that the definition of the "pre-development biodiversity value of the site" is now clearer in the new clause 3.3 introduced in SPO (2).

108. But, Ms Byrd submits, the developer could arguably still carry out "ground works" before complying with the covenants at clauses 3.1.1 to 3.3.3, i.e. before the updated Biodiversity Assessment. Ground works are not clearly included in "any works associated with the Development" in replacement clause 3.1. "[G]round works" are referred to in condition 6 and may not be done before approval of the CEMP. They are excluded from the definition of "[s]ite preparation" in condition 1. That excluded works are:

> "excavation, remediation, grading and other activities related to the modification of the ground surface or subsurface".

109. The claimant then says that even if the timing issue is resolved by SPO (1) and (2), three points remain under the fourth ground. First, ground cover on the site that is not a "feature of potential ecological importance" can be cleared; for instance, grassland and field margins. Second, further ecological surveys may impact on the achievement of the BNG of 10 per cent. The prediction of a 10 per cent BNG was not accurate. Third, the committee was told that the BNG would be achieved on-site or primarily on-site; while the section 106 agreement did not distinguish between on- and off-site interventions.

110. The LPA and developer say the second and third points are unpleaded and not open to the claimant and in any event devoid of merit. As to the first point, Mr Carter points out that Schedule 5 to the section 106 agreement defines the "Biodiversity Assessment" as one including Biodiversity Metric calculations and which sets out "details of the pre-development biodiversity value of the site"; and that "Biodiversity Metric" is in turn defined as: "the DEFRA biodiversity metric as applicable at the time of the Biodiversity Assessment".

111. Thus, says the LPA, the assessment must comply with the latest DEFRA metric, which itself must comply with the requirements for BNG in Schedule 7A to the 1990 Act. Paragraph 5(1) of Schedule 7A defines the pre-development biodiversity value of the onsite habitat as its biodiversity value as at the "relevant date"; which, (by paragraph 5(2)(a)) is the date of the planning application, here in July 2020. Thus, the baseline for BNG must be true to the latest DEFRA metric, which must require it to be calculated as at July 2020.

112. Further, Mr Carter submits, any relevant "ground works" would be caught by clause 3.1.3 of SPO (1), providing for the biodiversity assessment to be carried out, submitted and approved by the LPA before commencement of development and before clearance of any hedgerows, trees and shrubs or any other features of potential ecological importance within the site. Any ground works that did not affect a feature of potential ecological importance would have no ecological impact and can therefore be disregarded.

113. Furthermore, SPO (2) puts the matter further beyond any doubt because it provides in terms that the pre-development biodiversity value of the site refers to the ecological site at the earliest of three points in time, all of which must necessarily have fallen before the carrying out of any works that could affect the ecological value of the site. There is thus no prospect of the BNG baseline being artificially lowered.

114. The developer's submissions were to similar effect. In the original section 106 agreement, said Mr Booth KC, the pre-development biodiversity value ("development" not being capitalised and not caught by definitions including that word) can only mean "the value as assessed prior to any works connected

with the scheme whatsoever, be they clearance works such as the 'enabling works', or any other works." The baseline must therefore be "the …. state of the site, prior to any works connected with the scheme."

115. The developer's submissions then mainly echoed those of the LPA. The fourth ground was answered by SPO (1) and the deputy judge was wrong to grant permission in respect of it. Alternatively, the matter was put beyond any doubt by SPO (2) and the fourth ground should be dismissed. The point about "ground works" was without merit. The additional matters relied on went beyond the pleaded case and did not benefit from permission. The accuracy of the BNG forecasts in the officer's report was a matter of planning judgment which could not be impugned save on *Wednesbury* grounds.

Fifth ground (subject to permission to amend): failing to publish the section 106 agreement in accordance with article 40(3)(b) of the 2015 DMP Order, rendering the grant of planning permission invalid

116. In her skeleton argument, Ms Byrd adopted the points made in her application. She submitted that it was self-evident that the LPA had failed to comply with its obligation under article 40(3)(b) of the 2015 DMB Order to publish the draft and final section 106 agreement. Had it complied with that obligation, it is likely that expert comment on the timing of ecological surveys would have influenced the committee and it is "unlikely that the decision notice and agreement would have been issued in the same terms".

117. While the Court of Appeal's decision in *Greenfields* may not technically have changed the law, comment in the White Book (2025, vol. 1, 54.15.1) states that a proposition of law not previously open could become "maintainable" where, for example, the Court of Appeal had reversed a first instance decision. Here, permission to proceed on the issue would probably have been refused when the claim was brought, but the Court of Appeal had since clarified that breach of article 40(3)(b) may lead to the quashing of a planning permission.

118. In oral argument, Ms Byrd added that developments since the claim was brought and permission was granted justified reliance on the new fifth ground, which had not led to any procedural difficulties. The application was made

promptly after the decision of the Court of Appeal and the other parties had been able to respond to it; there was no prejudice. If necessary, Ms Byrd said, the claimant sought relief from sanctions. Applying a *Denton* approach to the issue should lead to the application being granted, she submitted.

119. On the substance of the fifth ground, Ms Byrd submitted that there had been no indication at the committee meeting in December 2022 that "enabling works" would be carved out of reserved matters. The defects in the draft and final section 106 agreement leading to SPO (1), the comments of the deputy judge and then SPO (2), were not, as they should have been, put in the public domain before the decision to issue the planning permission.

120. In consequence, objectors like the claimant, the Yorkshire Wildlife Trust and others had no opportunity to comment on the defects in the section 106 agreement, from their perspective of addressing the merits of the planning application. Instead, the claimant was reduced to commenting in court after the event, constrained by the rigorous higher judicial review standard. That was no substitute for the public debate that would have followed compliance with the obligation to publish the draft and final section 106 agreements.

121. The consequence of the breach should, Mr Byrd submitted, be invalidity of the planning permission, as it was in the *Greenfields* case, where the facts were similar. If the consequence of debate following publication would have been entering into supplemental deeds such as SPO (1) and (2) or something like them, the committee would have been asked to approve the supplemental obligations, following the reasoning in *R (Kides) v. South Cambridgeshire DC* [2003] 1 P&CR 19, CA; and may well not have approved them.

122. For the LPA, Mr Carter submitted that the claimant had unjustifiably failed to plead the fifth ground when the claim was made; and that it is, in any case, unarguable and devoid of merit. While the LPA had breached its obligation to publish under article 40(3)(b) of the 2015 DMP Order, the extent of its obligation had been clear at least since Ouseley J's decision in *Midcounties Co-Operative Ltd v. Wyre Forest DC* [2009] EWHC 964 (Admin) (dealing with the predecessor provision): see at [83]-[116].

123. Mr Carter submitted that the Court of Appeal's decision in *Greenfields* had not altered the law; it established no new principle. The practice direction PD 54A, at paragraph 12.2, requires a claimant seeking to add a new ground to do so promptly and to explain any delay in making the application. There was no justification for adding a new ground so late in the proceedings, he said. Ms Naylor of the claimant had known since March 2024 that the LPA did not intend to publish the section 106 agreement in advance of the decision.

124. Ms Naylor did not object or comment at the time. Nor did this ground feature in the pre-action protocol correspondence. The application to rely on the fifth ground had not been made promptly. Further, the LPA submitted that permission to amend should be refused because the fifth ground was devoid of arguable merit. While breach of the obligation to publish is accepted, the breach here adds nothing to the claimant's case, said Mr Carter.

125. That is because, he explained, the only point made is that the claimant did not see what approach was being taken to biodiversity issues in the section 106 agreement and the risk of premature works affecting ecological interests prior to any requirement for further surveys. That is the subject of the third and fourth grounds already; the failure to publish point does not add anything of substance to what is already contended in the two existing grounds. The fifth ground stands or falls with the other two grounds.

126. Furthermore, had the section 106 agreement been published in draft and the claimant had commented on it, that would have made no difference to the LPA's decision given that, Mr Carter submitted, the approach it adopted in the draft section 106 agreement was adequate and lawful. Permission should be refused under section 31(3C) and (3D) of the Senior Courts Act 1981 (**SCA 1981**) or, if permission is granted, the claim dismissed under section 31(2A).

127. The developer made submissions to the same effect on the Court of Appeal's decision in *Greenfields*. It had not changed the law; and, Mr Booth KC submitted, "there is no good reason why the court should entertain a ground of challenge brought significantly late and which could and should have been brought earlier". The claimant had been legally advised during the process

and had not complained in March 2024 when Mr Grayson wrote that the section 106 agreement would be published at the same time as the decision.

128. The amendment should be treated in the same way as a judicial review brought out of time. The test of arguability also applies (*R. (Wingfield) v. Canterbury CC* [2019] EWHC 1975, per Lang J at [87]-[88). The factual position in *Greenfields* is distinguishable because in that case, the section 106 agreement secured a highways contribution about £350,000 lower than suggested in the officer's report.

129. Here, Mr Booth submitted, there was no similar prejudice to the claimant. Like other objectors, it had the opportunity and took the opportunity to make very detailed representations to the LPA ahead of the committee meeting. The claimant's points about biodiversity lacked merit at the time those representations were made and still do. Even if the section 106 agreement was defective, the defects have been remedied by SPO (1) and (2).

130. Mr Booth, like the LPA, also relied on the "highly likely" test in section 31(3C) and (3D) or, if permission is granted, (2A) of the SCA 1981. The outcome would not have been substantially different for the claimant if the obligation to publish draft and final versions of the section 106 agreement had been complied with, he submitted.

Reasoning and Conclusions

131. First, I do not accept that the conditions must, as a matter of "common sense", be interpreted to mean that enabling works cannot be carried out until after the required updated ecological survey evidence has been obtained and approved. The wording of conditions 1 and 24 provides that adverse ecological impacts could occur before the relevant surveys were complete. The submission was that it would be an "improper ruse or device" (in Mr Carter's words) to carry out ecologically damaging enabling works prematurely.

132. That submission is not in accordance with the wording of conditions 1 and 24 and the definition of site preparation. The developer carrying out enabling works would be able to point to the words of the conditions to rebut any

suggestion that doing those works was premature and was an improper ruse or device. I agree with Ms Ridge, the deputy High Court judge who granted permission, that condition 1 "permits extensive site preparation works prior to submission of reserved matters approval" (paragraph 20 of her order).

133. I also agree with the deputy judge that the difficulty is not removed by the words of SPO (1), read with the section 106 agreement. I do not accept the submission of the developer that the site was adequately protected against adverse ecological impacts by the requirement that enabling works, including site preparation work, must not be done in advance of relevant surveys and LPA approval of appropriate measures, if such work involves "clearance of …. any … features of potential ecological importance" (SPO (1), clause 3.1).

134. That is not an answer to the deputy judge's point that "the covenant does not promise that the [developer] will not commence the enabling works carved out in condition 1 prior to the submission of matters set out in clause 3" (paragraph 21 of her order). Enabling works preceding the start of the development could damage the ecology of the site by doing work that is alleged not to involve "features of potential ecological importance within the [s]ite", not being hedgerows, trees and shrubs, the only examples recited of features that definitely qualify as having "potential ecological importance".

135. However, I do agree with the LPA that SPO (2) adequately addresses the issue of timing. Condition 6 is, as the LPA submits, a requirement for an approved method statement, not a document stating required ecological outcomes. I reject the claimant's proposition in argument that the required output from the ecological surveys does not fulfil the stated purpose of conditions 6 (the CEMP) and 24. That goes beyond the claimant's pleaded third ground in SFG, paragraphs 72-82, for which permission has been granted. The attack there was on the timing and the pleading has not been amended to attack the rationality of the putative CEMP requirements.

136. For those reasons, I would not have upheld the third ground if it had stood alone. I would have decided, in respectful agreement with the deputy judge's reasoning, that the decision to issue the planning permission was unlawful in

October 2024 when it was made, but that the defect had been cured by the combined effect of SPO (1) and (2) bringing the developer's obligations into line with the advice the committee was given by officers in December 2022.

137. I therefore would not have granted any substantive relief on the third ground, had it stood alone. The third ground was well-founded but is now academic. I come next to the fourth ground. I see some force in the claimant's point that the "pre-development biodiversity value of the site" could be distorted by the carrying out of enabling works before the start of the development proper.

138. But the LPA says that cannot happen because it would not be lawful: it would conflict with the mandatory regime enacted in Schedule 7A to the 1990 Act which requires the baseline to be ascertained as at July 2020, when the application was made and the site remained pristine and untouched. There is force also in that point.

139. If the mandatory baseline is the baseline calculated using the relevant DEFRA metric as at July 2020, there is no difficulty arising from the claimant's further point that the developer could carry out "ground works" – i.e. "excavation, remediation, grading and other activities related to the modification of the ground surface or subsurface" – before the updated Biodiversity Assessment which is required to confirm the 10 per cent BNG. The impact on the BNG of any such ground works would be measured from the July 2020 baseline.

140. The same reasoning applies to any other ecological damage that might be done to the site and which could affect the achievability of the 10 per cent BNG. Thus, the claimant says, ground cover on the site such as grassland and field margins that is not a feature of ecological importance could be cleared. But any damage thereby done would be factored into the measurement of the 10 per cent BNG, provided it is measured from the proper July 2020 baseline.

141. The updated Biodiversity Assessment might, as the claimant suggests, fail to support the achievability of a 10 per cent BNG. Or it could produce a requirement for substantial off-site interventions as well as on-site ones, to achieve the 10 per cent gain. But I share the concerns of the LPA and the

developer that these latter points are not embraced within the claimant's pleaded case on the fourth ground.

142. They would, in any case, be for officers and if necessary the committee to consider once the updated Biodiversity Assessment has been obtained. If the 10 per cent BNG, measured from the July 2020 baseline, were manifestly not achievable, or not without substantial off-site interventions, the LPA might well, at officer level, decline to bestow its approval of the Biodiversity Assessment, or it might decide to refer the BNG issue back to the committee.

143. None of these possibilities persuades me that the way in which the 10 per cent BNG issue was presented to members in December 2022 was misleading, provided that the proper BNG baseline was to be used. In my judgment, absent any contrary indication, the LPA should be treated as intending to comply with its legal obligation not to allow the BNG baseline to become artificially lowered by post-July 2020 enabling works or ground works.

144. I agree with the LPA and the developer that the wording of clause 3.3 of the covenant, as introduced by SPO (2), removes any residual doubt about this. The final clause 3.3 defines "pre-development biodiversity value", i.e. the BNG baseline, as the earliest of (i) the start of "development" within section 56 of the 1990 Act, or (ii) the undertaking of any works including enabling works, or (iii) the start of clearance of hedgerows, trees, shrubs or other features of potential ecological importance.

145. That is, presumably, intended to allay any concern that the BNG baseline could be artificially lowered in the manner the claimant fears. I agree that the words of clause 3.3 introduced by SPO (2) are a sufficient safeguard against that occurring. It would have been simpler and clearer to define the baseline by reference to the statutory language in Schedule 7A to the 1990 Act, but the wording of clause 3.3 introduced by SPO (2) has the same effect.

146. There is therefore no basis, in my judgment, for granting any relief on the fourth ground of challenge. I also do not think there was any basis for doing so at the time the challenged decision was taken, in October 2024. I do not think the members were given any advice in December 2022 that conflicts

with the decision as issued in October 2024. Even if they were, the difficulty is resolved by SPO (2) which clarifies that the BNG baseline will not be set at too low a level.

147. I would therefore not have granted any relief on the fourth ground, if it had stood alone. The third and fourth grounds are, viewed in isolation from the proposed fifth ground, both academic and do not need to be decided. I have had to go into their merits at the time of the decision to some extent, as a necessary pre-cursor to explaining why, ultimately, they are both academic. My decision is, strictly, that both the third and fourth grounds are academic and that there are no special reasons to decide them; and I do not do so.

148. However, there remains the application to advance the new fifth ground, to which I turn next and finally. I have to decide, first, whether to allow this ground to proceed; and second, if I allow it to proceed, whether the claim should succeed on that ground, not having succeeded on either of the two existing grounds taken on their own or with each other.

149. I accept the submission of the LPA and the developer, accepted also by the claimant, that the fifth ground of challenge is brought late, i.e. more than six weeks after the decision challenged. The six week period expired on 3 December 2024. The challenge had by then already been brought, on or about 25 November 2024. The point was not raised in pre-action correspondence.

150. In seeking to rely on the fifth ground, the claimant has followed the correct procedure by making a written application, explaining the basis of the challenge and including its explanation for the lateness. The written application was made in late April 2025. The application caused the LPA to disclose the email exchange in March 2024.

151. Mr Grayson had earlier in his email of 19 June 2023 contradicted the assertion of the claimant's "understanding these draft documents [including the draft section 106 agreement] should already be published on the planning portal." Not so, Mr Grayson responded: "No drafts of the agreements are in the public domain (*nor are they required to be* [my italics])".

152. When the application to add the fifth ground was made, the LPA disclosed the March 2024 correspondence confirming that the decision letter and section 106 agreement "should appear online at the same time". When Mr Grayson made his witness statement following the application, he did not give any explanation for his earlier assertion that the draft section 106 agreement was not *required* to be published.

153. The LPA pointed out that the claimant was advised by solicitors at the time. The LPA too has access to lawyers. The hearing date was fixed to take place nearly two months after the application was made, on 24 June 2025. The one day time estimate was maintained and the hearing completed within the day. The LPA and the developer opposed the application on the ground that it was made late without good cause and was in any case not arguable.

154. Mr Carter pointed to PD 54A, at paragraph 12.2, requiring a claimant seeking to add a new ground to do so promptly and to explain any delay in making the application. The claimants have done that. I would add that paragraph 12.4 of PD 54A then provides that "[f]or the purpose of determining an application to rely on additional grounds, rules 17.1 and 17.2 shall apply".

155. Rule 17.1 is the ordinary rule applying to amendment applications in private law cases, stating at 17.1(2)(b) simply that a party may amend "with the permission of the court". The criteria for allowing amendments are set out in numerous cases, many of them conveniently grouped in the notes to the White Book, vol. 1, 2025, at 17.3.8, including in particular cases where the amendment is made late, is prejudicial to the other party, could imperil a trial date, and so forth. The considerations are too well known to need repeating.

156. In private law proceedings, the court will not normally allow an amendment unless the point has a real chance of success. Similarly, in public law proceedings such as these, the court would not grant permission to amend if the point were not properly arguable, such that permission to advance it would be refused. The court must also take into account the lateness of the application to amend, including by reference to the unusually short limitation period in judicial review proceedings, even shorter in planning challenges.

157. In my judgment, the claimant should be permitted to rely on the fifth ground of challenge. I reject the submission of the LPA and developer that the point is unarguable. That is a difficult submission given the admission that the LPA failed to comply with its obligation to publish any draft section 106 agreement at any time prior to the issue of planning permission. It is clear that the court has discretion to allow the amendment out of time.

158. I am not persuaded that I should refuse leave to rely on the new fifth ground under section 31(3C) and (3D) of the SCA 1981. I will explain a little later why I do not consider it highly unlikely the outcome would not have been substantially different for the claimant had the conduct complained of (failing to publish the draft section 106 agreement before issuing the decision under challenge) not occurred.

159. In my judgment, this is a proper case for exercising the discretion in the claimant's favour. First, the point is arguable as I have just said. Next, it is common ground that publication of a draft section 106 agreement at some point was mandatory and not done. I accept that the claimant could and should have challenged that failure earlier than it did; but I bear in mind that Ms Naylor is not a lawyer. Ms Byrd was not instructed until after the decision challenged, though solicitors were, at times, assisting the claimant.

160. Ms Naylor was conducting the correspondence herself. It did not come from solicitors. The claimant's financial position is documented as being such as to justify limiting its costs exposure to the Aarhus Convention cap and, correspondingly, its likely costs recovery to £35,000. Mr Grayson too is not a lawyer and there is no indication that he consulted lawyers. He is, though, an experienced planning officer who should have known of the obligation to publish, if he did not; a point on which the LPA is silent.

161. In my judgment, in all the circumstances here the LPA ought to held potentially accountable for its admitted breach of article 40(3)(b) of the 2015 DMP Order. It is unattractive for a public body such as this one to avoid the consequences of an unexplained flagrant breach on purely procedural grounds, without asserting that it or the developer has suffered any prejudice arising

from the lateness of the application to amend; and where the decision at issue affects such a major and controversial development.

162. It is inescapable that there was no prejudice to the LPA or developer. They were able to resist the application articulately. There were only two relevant short emails of additional evidence. The hearing date was unaffected. The time estimate was unaffected. They were able to address the fifth ground fully and intelligently in their skeleton and oral arguments. They did not suggest they were hampered in doing so by the lateness of the application.

163. Further, the application to amend was made promptly after the Court of Appeal's decision in the *Greenfields* case. The first instance decision of HHJ Jarman KC had dealt with the issue in a cursory way because the judge did not, unlike the Court of Appeal, accept that the failure made any difference to the outcome. The earlier decision of Ouseley J in *Midcounties Co-Operative v Wyre Forest DC* [2009] EWHC 964 (Admin) did not examine the obligation to publish in the same depth as Lewis LJ did in *Greenfields* on appeal.

164. Lewis LJ's approach was more expansive because he addressed the purpose of the provision and made general observations about the fact sensitive consequences of any breach of the obligation. The first instance judges had not done that. While it is true that the Court of Appeal did not say the law was being changed, its decision did develop the law and lend impetus to a factual analysis of the circumstances of a breach of the obligation.

165. Further, I bear in mind that the subject matter of ground 5 is closely related to the factual position arising from the third and fourth grounds. Though neither would independently have succeeded for reasons I have given above, the supervening SPO (1) and (2), particularly (2) lent focus to the absence of prior publication of the draft section 106 agreement which would have exposed to public scrutiny the very defects addressed in SPO (1) and (2).

166. So, while those two supplemental deeds and then the Court of Appeal's decision may not have altered the law in any technical sense, the new fifth ground of challenge acquired sharper edges than it could have had if relied on at the time the claim was brought in November 2024. It is even possible that

Ms Byrd is right when she suggests permission for the fifth ground would not have been given if it had been included at the time the claim was made; though I prefer not to speculate about that.

167. Standing back and looking at the matter in the round, I think it comes ill from the LPA and developer to complain of a moving target when they have themselves twice moved the claimant's target. While the fifth ground of challenge could have been made from the outset, so could the section 106 agreement have included the provision in SPO (1) and (2) from the outset.

168. For completeness, if the issue were relief from sanctions, applying a *Denton* approach, I would reach the same conclusions. The default, i.e. the lateness of the fifth ground, is quite minor, the reasons for it have been explained and are respectable, the limitation period is unusually short and the other parties are not prejudiced. The points already made would also lead me to the conclusion that any relief from sanctions needed should be granted.

169. Turning to the merits of the fifth ground, it is not disputed that the breach of article 40(3)(b) occurred. It was significant because a major issue at the time of the committee's resolution in December 2022 was the extent of the gaps in available information about biodiversity issues that would need to be addressed at reserved matters stage. They had not been adequately addressed, in my judgment, at the time the decision under challenge was made; hence the third ground of challenge would have succeeded, were it not for SPO (2).

170. Publication of the draft section 106 agreement would have enabled objectors, including the claimant, to comment intelligently and advocate restoring the matter to the committee for further consideration and public debate about the adequacy of the biodiversity safeguards and the achievability of the 10 per cent BNG. There is, I think, quite a strong likelihood that the issue would have gone back to the committee; cf. the reasoning in the *Kides* case, in the judgment of Jonathan Parker LJ at [125]-[126].

171. If opponents of the scheme had not been denied access to the draft section 106 agreement before the decision became effective, they could have commented on the shortcomings of that draft agreement, with their comments directed at

the merits of the proposals. They would not have been constrained by the narrow legal basis for objecting in the course of judicial review proceedings, applying the strict judicial review standard, in court after the event.

172. A draft of the section 106 agreement should have been placed on the planning portal well before 23 October 2024, leaving sufficient time for intelligent comment from interested parties such as the claimant and other objectors. A request from Ms Naylor of the kind made in June 2023 and March 2024 should not have been necessary. The obligation to publish is not conditional on a prior request to do so. Ms Naylor was checking the portal each day.

173. I accept Ms Byrd's submission that non-publication has caused real prejudice. I am not willing to withhold relief in respect of the failure to publish the draft section 106 agreement, in breach of the statutory obligation to do so. There was a serious want of transparency in the period leading to the decision challenged, while the developer and the LPA were negotiating with each other and shielding the product of their negotiations from the public.

174. I also bear in mind that those sceptical about the environmental aspects of the proposals included not just objectors but three of the seven committee members who voted against the resolution because they thought the committee lacked sufficient information about the gaps to be filled at reserved matters stage. It is likely that those three members, at least, would have wished to reconsider the proposals with the benefit of a draft section 106 agreement; especially one not including the provision later added by SPO (1) and (2).

175. By the same reasoning, I am far from persuaded that if the draft section 106 agreement had been published, it is highly likely (SCA 1981, section 31(2A)) the outcome for the claimant would not have been substantially different. The provision has been considered in many cases; see e.g. Hill J's useful summary at [161]-[168] in *R. (HPSPC Ltd) v. Secretary of State for Education* [2022] EWHC 3159 (Admin), where earlier cases are reviewed. The "outcome" includes the practical consequences, i.e. what would have actually happened.

176. It is an open question what the outcome would have been. There is, at least, a strong possibility that if the conduct complained of (non-publication) had not

occurred the outcome would have been substantially different. The section 106 obligations would probably have been improved, at least, in the way they now have been. The committee might well have asked for updated biodiversity work to be done before deciding whether to proceed.

177. For those reasons, the application for judicial review succeeds on the fifth ground. The LPA's decision, in admitted breach of article 40(3)(b) of the 2015 DMP Order, not to publish the section 106 agreement until after the decision to grant planning permission, renders the planning permission invalid. I therefore propose, subject to any further observations, to quash the decision to grant planning permission and to award the claimant its costs against the LPA, limited to £35,000, and to make no other order as to costs.