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Neutral Citation Number: [2022] EWHC 347 (Admin)

Claim No: CO/1698/2021

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
PLANNING COURT

Date of judgment: 18 February 2022

Before :
THE HONOURABLE MR JUSTICE FRASER

- -

Between :
The Queen on the application of
ROBERT SPEDDING
Claimant

- and –

WILTSHIRE COUNCIL
Defendant

- and –

SCHEPENS INTERNATIONAL LIMITED
Interested Party

- -

JUDGMENT

- -

Matthew Henderson (instructed by Ellis Jones Solicitors) for the Claimant
James Neill (instructed by the Defendant's Legal Services Department) for the Defendant
The Interested Party did not appear and was not represented

Hearing date: 14 January 2022
Draft distributed to parties: 14 February 2022

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Mr Justice Fraser:

Introduction

1. In these proceedings, the Claimant, a close neighbour of the Interested Party and landowner adjacent to the property in question, seeks judicial review of a decision by the Planning Department of Wiltshire Council ("the Council") in relation to change of use by the Interested Party. The change of use is from Agricultural Building and Land to Flexible Commercial Use.

2. The decision by the Council was dated 30 March 2021 ("the Decision") and was that prior approval by the Council was *not* required for the change of use of land at Nursery Farm, Stock Lane, Landford SP5 2ER ("the Farm") by Schepens International Ltd, the Interested Party ("Schepens"), pursuant to Class R of Part 3 of Schedule 2 to the Town and Country Planning (General Permitted Development) (England) Order 2015 ("Class R", "GPDO"). The position of the Claimant is that prior approval of the Council was required for the change of use, and that the Decision was unlawful and should be quashed.

3. Permission to bring judicial review and proceed with the claim on three separate grounds was granted by Mr Neil Cameron QC (sitting as a Deputy High Court Judge) on 15 July 2021. These grounds are identified below, numbered 1, 2 and 3.

4. A further ground, which the parties at the hearing referred to as Ground 1A (a description which I shall also adopt) does not have permission, as it was added by the Claimant by amendment, that amendment being consented to. The Claimant does, however, still need permission from the court to advance this ground. There are therefore, if this new ground is given permission to proceed, four grounds, although Ground 1A is closely connected with Ground 1.

5. The need for the permission of the court to bring judicial review on this additional ground was addressed at the commencement of the hearing on 14 January 2022, and both parties asked me to deal with this ground on a so-called "rolled up" basis, dealing both with permission and the substantive ground (if permission were given) in the judgment. I was content to adopt that course and have done so.

6. The case was initially set down for hearing on 23 November 2021. However, very shortly before that hearing, counsel for the Council became unavailable due to reasons connected to the Covid-19 pandemic. That hearing had to be vacated, which was accomplished by an Order made by Steyn J on 23 November 2021.

7. Schepens lodged Summary Grounds of Resistance inviting the court to refuse permission on the basis that the claim was not arguable. Witness evidence was also lodged on its behalf. However, it did not lodge a skeleton argument, make substantive submissions, appear at or participate in the substantive hearing. It adopted the position of the Council. Both the Claimant and the Council lodged evidence and appeared by counsel at the hearing seeking judicial review.

The facts

8. The Farm is situated in Wiltshire some distance south of Salisbury and on the edge of the New Forest. The site lies within the Special Landscape Area and Flood Zone 1 for the River Test catchment area. Until 2018 the Farm had been used by Schepens'

predecessor in title, Faccenda Property Ltd, ("Faccenda") as a poultry farm. The Farm measures 15.77 acres (6.382 hectares) in area. A number of plans were submitted as part of the evidence, and also handed up in larger copies at the substantive hearing. I do not append any of them to this judgment but I have considered them all; they were submitted by Schepens as part of its notification and application to the Council. The Farm formerly consisted of four poultry houses and other buildings. The poultry houses were arranged in pairs, with two poultry houses adjacent to each other on the western side of the Farm and the other two poultry houses adjacent to each other on the eastern side of the Farm. The two poultry houses on the eastern side of the Farm were approximately 16 metres apart. All the poultry houses were long rectangles. The most easterly of these poultry houses was demolished before Schepens purchased the Farm and all that remains is the concrete base of that building. This claim concerns that concrete base and the adjacent poultry house ("the Building") which is now the most easterly of the three remaining poultry houses. The concrete base of the one that has been removed is what is sometimes called a hardstanding. The internal floor area of the Building is approximately 1595 m^2.

9. A private lane ("the Lane") links the Farm to Stock Lane and thereafter the A36. The Lane is also a public footpath. The A36 is a fairly major A road. The Claimant lives in a house immediately adjacent to a tight bend at one of the narrowest parts of the lane. That house is owned by the Claimant and his wife. As part of the evidence submitted for the proceedings, certain photographs were provided both of the Farm, the Building and also the Lane. The Lane could be described simply as a rather small country lane. It is narrow, with high hedges on either side. The photographs show the extreme narrowness of the Lane, including the effect of the very sizeable HGVs used by Schepens in the course of its business at the Farm.

10. Schepens informed the Council in 2020 that it had acquired the farm. On 4 November 2020 at 12:19, one of the directors of Schepens, Mr Christopher Schepens, sent an email to Ms Becky Jones, a Senior Planning Officer at the Council, stating the following:

'So we are now the legal owners of Nursery Farm and I'm emailing to notify you officially that as of today 4th November 2020 we will be using up to 150 square meters of the building circled in the below drawing in blue and the curtilage under class R permitted development.'

11. On 9 November 2020 at 11:55, Ms Jones replied to Mr Schepens by email which said:

'You have kindly provided a plan and the date you wished to commence, however please could you also confirm in writing the precise nature of the uses/s that will take place within the 150sqm, for completeness and the file?'

12. Mr Schepens replied to Ms Jones on the same day at 12:27 by email which stated:

'My previous email has the plan indicating the building we are going to be using up to 150 square meters and the date is also on the email, the only detail I omitted was the use which will be, storage.

I have attached the drawing again just in case you didn't get it last time, you will see a blue circle around the lower poultry house and this is where the 150 square meters

will be, it will likely be spread on pallet bases in any part of that building occupying not more than 150 square meters so it is impossible to stipulate exactly where it will be so I circled the whole building."

13. The plan which was then provided is relevant to Ground 3 because the Claimant maintains that Schepens failed properly to comply with the prior notification requirement in paragraph R.3(1)(a)(iii) of Part 3 of Schedule 2 to the GPDO. This failure arises from the plan, and the way that it failed to identify the precise area or location. It simply had a blue circle drawn around the Building. This is a point to which I shall return under Ground 3.

14. The Claimant did not know about this exchange and obtained copies of these communications later in 2021. Regardless of that, from about mid-November 2020 Schepens commenced using the Farm for mixed commercial use. It is not known if any part of the Building was used for storage, but Schepens commenced storing a number of what are called elevated shipping containers on the hardstanding outside of the Building. These shipping containers can only be carried on the very large HGVs to which I have already referred, and these access the Farm by using the Lane. They were kept outside the Building, and therefore outside of the area circled in blue on the plan. The increased amount of traffic and the new use of the Farm by Schepens led to a number of complaints and some concern amongst those affected in the locality, and the local Member of Parliament also became involved. It is not necessary to go into that in any detail but it forms part of the background.

15. Thereafter, on 25 January 2021, Schepens applied to the Council for a determination of whether the Council's prior approval was required for the Proposed Use, more specifically for the change of use of a further 350 m^2 of the Building and land within the Farm (but outside of the Building) pursuant to Class R. In the application form in answer to the instruction 'Please describe the proposed development', Schepens stated:

'We intend to use the poultry house, to the far east of the 'agricultural unit' (please see the site plan) for storage and distribution for up to 500 square meters. We will use the smallest part of the curtilage on the east side of said poultry house, not exceeding the area of the building."

16. The application form also sought an answer to the instruction 'Please provide details of any transport and highway impacts and how these will be mitigated', Schepens stated the following:

'The former use of the site was a commercial poultry farm with <u>many heavy goods vehicle movements. Having conducted a fact-finding exercise on a poultry farm of the same size, Schepens create fewer movements reducing the transport and highways impact on the area.</u> Please see the supporting attachments.'

(emphasis added)

17. Schepens also stated on the application form that it would be 'storing household personal effects' at the Farm. The Claimant draws attention to the fact that Schepens' business is in fact as a removal company, and maintains that this description of what

would be taking place at the Farm is incorrect, but for present purposes that can be put to one side.

18. A number of plans were also provided by Schepens. It is fair to describe these plans as somewhat vague, if not contradictory so far as Plans 3 and 4 are concerned. Altogether four plans were submitted to the Council as part of the Application: the first with the Application itself on 2 February 2021 (one week later than the application of 25 January 2021); the second on 5 March 2021; the third on 9 March 2021; and the fourth on 30 March 2021. That latter date is taken from the witness evidence of Mr Richardson for the Council, and although some documents – including the Officer's Report itself on its final page - suggest the fourth plan was received on 26 March 2021, nothing turns on that slight difference in dates. Mr Richardson was the case officer within the Council who considered under delegated powers the application in issue. The plans are all variations of each other, showing the same layout of the Farm with different annotations, those being added to the plans by Schepens. The following matters shown on these plans are relevant:

    i) The first of these plans ("Plan 1") shows the entire Farm edged and shaded in red. The Building is shown in edged in yellow. The Building is annotated as: '*Building intended for change of use of up to 500 square meters is outlined in yellow'*. The yellow edging is around the whole of the Building (i.e. all 1595 m^2), not part of the Building. It is not possible to discern which 500 m^2 of the Building is being referred to by the annotation.

    ii) The second of these plans ("Plan 2") shows the Building edged in red, with four further internal parts of the Building edged in red. The smaller two of these four areas are annotated '*Total 150sqm currently permitted'*. The larger two of these four areas are annotated '*Total 350 sqm'*. No land outside of the Building is edged, shaded, or otherwise indicated.

    iii) The third of these plans ("Plan 3") shows the Building edged in red, with four further internal parts of the Building edged in red and annotated as in Plan 2. An area of land extending to the north, south and east of the Building is edged in red and hatched yellow. This area hatched yellow appears to include the concrete base and is annotated '*Yellow hatched 'curtilage' area to be used under class R, cumulatively not exceeding the area of land occupied by the associated agricultural building'*. The definite article appears twice by mistake in the note but that is a minor typographical error and nothing turns on that.

    iv) The fourth of these plans ("Plan 4") shows the Building edged in red, with the same internal parts and annotations as Plans 2 & 3. The yellow hatched area on Plan 3 is not replicated on Plan 4. Instead, a red rectangle on the east of the Building is now hatched in yellow. The yellow hatched area is separated from the Building by c. 5 metres and appears to cover part of the area of the concrete base. The yellow hatched area is annotated in the same manner as Plan 3: '*Yellow hatched 'curtilage' area to be used under class R, cumulatively not exceeding the area of land occupied by the associated agricultural building'.* This is the same wording as appeared on Plan 3, with the same typographical error.

19. The Council sought, as part of the consideration of the Application, to obtain clarification in terms of the Plans, and it was this that led to these different iterations of the Plan. Mr Richardson conducted a site visit on 4 March 2021 and told Schepens that the plan submitted on 2 February 2021 "did not set out the extent of the curtilage that the applicant intended to use", and I have adopted in this judgment the description of what Mr Richardson did, taken from the Council's skeleton argument. This observation by Mr Richardson was plainly correct; the plan did not. The yellow marking on that plan simply was outlined around the whole of the Building. Given the internal floor area of the Building is approximately 1595 m^2, and Schepens was seeking permitted use of no more than 500 m^2, then this smaller area had to be identified.

20. Schepens was therefore given the opportunity to provide clarification in terms of the area and curtilage for the proposed change of use, and it was this process that resulted in the number of different plans being submitted. The next plan submitted was still inaccurate, and (again to use the description from the Council's skeleton) "it still did not show with a redline where the actual curtilage associated with the agricultural use of the building was. Mr Richardson therefore asked for a further plan.".

21. This resulted in the next plan being submitted, which was initially considered by Mr Richardson to be sufficient for the application. However, Mr Richardson subsequently reconsidered, and asked for the plan to be amended to show the proposed curtilage to be no bigger than the actual unit (ie the Building itself). This is because the way that curtilage was shown on the plan was either confusing and/or ambiguous, and also showed an area larger than the Building. This fourth plan was submitted on 30 March 2021 (although as I have noted some documents suggest it was on 26 March 2021). The hatching area was different on this plan, but the note or annotation in the box in the drawing or plan remained the same. I return to these plans below at [70] to [73] below. Schepens was given more than one opportunity to submit a plan correctly identifying the subject matter of the application. Whether Schepens sought to be deliberately vague firstly in identifying the subject matter of the application, and then when asked for clarification in answering the Council's enquiries in this respect, does not matter for present purposes.

22. The Officer's Report was then issued which concluded that no prior approval was required for the change of use. Elements of the Officer's Report are relevant to the way that the challenge in these proceedings is advanced, and I do not reproduce it here. It must be read as a whole, and I have done so. Where I quote from it, I do so in order to assist a reader in understanding this judgment. It is unnecessary to reproduce the whole report, even in an appendix. After the Report was issued, the Application was determined by the Council's Director of Economic Development and Planning under delegated powers on 30 March 2021, and that is the Decision under judicial review.

The grounds

23. The grounds of challenge are as follows:

> 1. Ground 1. The Council failed to consider whether the Proposed Use was within the curtilage of the Building. Development is only within Class R if it occurs within an agricultural building or on land within that building's

curtilage. The change of use proposed by Schepens related both to the Building and land outside of that building. The Claimant maintains that the Council unlawfully failed to consider whether the land outside of that building was land within the curtilage of an agricultural building. More particularly, the Council failed to undertake the comparative exercise required by Paragraph X of Part 3 of Schedule 2 to the GPDO to determine whether the land was within the curtilage and failed to reach any conclusion following such a comparative exercise.

2. Ground 1A. Further or alternatively to Ground 1, the Council was under a duty to give reasons for that determination and failed to give adequate reasons. This is the ground advanced on a "rolled up" basis for which permission is required.

3. Ground 2. The Council took into account the traffic movements related to the previous agricultural use of the Farm, without considering whether there was a real prospect of that operation resuming. It is submitted by the Claimant that the poultry operation had already ceased at the time of the Decision and therefore its associated vehicle movements would only amount to a material consideration if there was a real prospect of the poultry operation resuming. The Council failed to consider whether there was such a real prospect and the Claimant maintains that all of the evidence indicates that there is no such prospect. Accordingly, it was an error of law to take that former use and its associated vehicle movements into account.

4. Ground 3. This is that the Council unlawfully concluded that the pre-existing B8 use at the Farm was lawful permitted development within Class R. That earlier change of use was not permitted development within Class R because the prior notification requirement in paragraph R.3(1)(a)(iii) of Part 3 of Schedule 2 to the GPDO had not been complied with by Schepens. This relates to the matter to which I have already referred at [10] to [13] above. Accordingly, the Claimant maintains that the Decision was ultra vires and/or in error of law because the Council proceeded on a material error of fact and/or took into account an immaterial consideration.

24. I shall deal with each of the grounds in turn. I shall summarise the Council's position in respect of each ground as I do so. Before I perform that exercise however, I shall address the law.

The law

25. Class R has since been amended, but the parties are sensibly agreed that it is the version that was in force at the time of the Application and the Decision that should be used. This judgment therefore proceeds on the version of Class R in force at the time.

26. The GPDO is made by the Secretary of State pursuant to sections 59 and 60 of the Town and Country Planning Act 1990 ("TCPA 1990"). By article 3 of the GPDO, planning permission is granted for the classes of development described as permitted development in Schedule 2 to the GPDO, including Class R. Further, pursuant to article 3(5)(b) the permission granted for development described in Schedule 2 '*does*

not apply if - […] in the case of permission granted in connection with an existing use, that use is unlawful'. That provision is relevant in terms of how the Claimant advances Ground 3.

27. Class R provides:

> 'Development consisting of a change of use of a building and any land within its curtilage from a use as an agricultural building to a flexible use falling within Class A1 (shops), Class A2 (financial and professional services), Class A3 (restaurants and cafes), Class B1 (business), Class B8 (storage or distribution), Class C1 (hotels) or Class D2 (assembly and leisure) of the Schedule to the Use Classes Order.'

28. Limitations are imposed on Class R pursuant to paragraph R.1. This provides, so far as material:

> 'Development is not permitted by Class R if […]
>
> (b) the cumulative floor space of buildings which have changed use under class R within an established agricultural unit exceeds 500 square metres […]'

29. Pursuant to paragraph R.3, prior notification is required for a change of use pursuant to Class R for floorspace up to 150 m^2 and prior approval is required for a change of use pursuant to Class R for floorspace over 150 m^2 (and up to 500 m^2).

30. So far as material, paragraph R.3 provides:

> '(1) Before changing the use of the site under Class R, and before any subsequent change of use to another use falling within one of the use classes comprising the flexible use, the developer must—
>
> (a) where the cumulative floor space of the building or buildings which have changed use under Class R within an established agricultural unit does not exceed 150 square metres, provide the following information to the local planning authority—
>
> (i) the date the site will begin to be used for any of the flexible uses;
>
> (ii) the nature of the use or uses; and
>
> (iii) a plan indicating the site and which buildings have changed use;
>
> (b) where the cumulative floor space of the building or buildings which have changed use under Class R within an established agricultural unit exceeds 150 square metres, apply to the local planning authority for a

determination as to whether the prior approval of the authority will be required as to—

(i) transport and highways impacts of the development;

(ii) noise impacts of the development;

(iii) contamination risks on the site; and

(iv) flooding risks on the site,

and the provisions of paragraph W (prior approval) apply in relation to that application.'

31. The following provisions of the GPDO are relevant to the interpretation of Class R. Pursuant to article 2(1), 'building' is materially defined as 'includes any structure or erection and […] includes any part of a building'.

32. Secondly, pursuant to paragraph X of Part 3 of Schedule 2 to the GPDO ("Paragraph X"), '*curtilage*' means:

> '(a) the piece of land, whether enclosed or unenclosed, immediately beside or around the agricultural building, closely associated with and serving the purposes of the agricultural building, or
> (b) an area of land immediately beside or around the agricultural building no larger than the land area occupied by the agricultural building,
> whichever is the lesser'

33. Thirdly, pursuant to Paragraph X, 'site' means 'the building and any land within its curtilage'.

34. Further, pursuant to paragraph R.4, 'flexible use' means 'use of any building or land for a use falling within the list of uses set out in Class R and change of use (in accordance with Class R) between any use in that list'.

35. Paragraph X therefore applies a particular statutory definition to the meaning of the term "curtilage", rather than applying the common law meaning of the word. The common law approach to be taken to the meaning of curtilage is summarised by Supperstone J in ***Burford v SSCLG*** [2017] EWHC 1493 (Admin) at [32] – [37]). That case concerned the application of three factors to determining whether certain land formed part of the curtilage of a dwelling, as explained at [38] and [39] of the judgment. Given in the instant case the relevant provision is Class R, it is not necessary to consider anything wider than the particular statutory definition in Paragraph X.

36. So far as Class R is concerned, there are two limbs as set out in the relevant part of Paragraph X quoted at [32] above. One is the piece of land immediately beside or around the building, closely associated with the building, as explained at (a). The other is an area of land immediately beside or around the building, no larger than the area occupied by the building, as explained at (b). Because it is the lesser of these two that applies – by the use of the words "whichever is the lesser" - the effect of the

definition of curtilage in Paragraph X restricts the curtilage that can be used to an area not exceeding the land area occupied by the agricultural building itself.

37. The application by Schepens did not identify which of these two limbs it sought to use or have applied. Indeed, it could be said that if Plans 3 and 4 are considered either together or sequentially, this suggests that Schepens sought, initially, to use or have applied both limbs in Paragraph X.

38. In order to amount to permitted development pursuant to Class R, a development must '*come fully within the relevant description'* in Class R and must comply with all the conditions and limitations of that Class. This is clear from ***Keenan v Woking Borough Council*** *per* Lindblom LJ at [33] and ***Garland v Minister of Housing and Local Government*** [1969] 20 P&CR. 98 *per* Bridge J (as he then was) at 98 and Davies LJ at 108.

39. Turning to the use of the Site as a poultry farm, which comes to be considered below under Ground 2, this is described as a fallback development. A fallback development is shorthand for what might be done (whether by an applicant or otherwise) with the land without the express grant of planning permission by the local planning authority, based on the permissions that are already extant. Fallback development may be a material consideration. This is clear from cases such as ***Gambone v Secretary of State for Communities and Local Government*** [2014] EWHC 952 (Admin). In that case, the claimant Mr Gambone had long entertained an ambition to build a building lawfully on land to the rear of properties he already owned. Initially he applied for planning permission to build a bungalow in their rear gardens, but eventually that was rejected on appeal by the Inspector. A building was then constructed, and the Wolverhampton City Council embarked upon enforcement action in respect of it. That led to a further decision from an Inspector who concluded that the building was an "unauthorised erection of a detached dwelling" (his report quoted at [8] in the judgment). As part of consideration of the case, the court had to consider the so-called fallback position.

40. Ian Dove QC (sitting as a Deputy High Court Judge) (as he then was) explained the following at [25] – [27], where he stated:

> '25. The fallback argument is in truth no more or less than an approach to material considerations in circumstances where there are, or may be, the opportunity to use land in a particular way, the effects of which will need to be taken into account by the decision-maker. <u>That involves a two-stage approach. The first stage of that approach is to decide whether or not the way in which the land may be developed is a matter which amounts to a material consideration. It will amount to a material consideration on the authorities, in my view, where there is a greater than theoretical possibility that that development might take place.</u> It could be development for which there is already planning permission, or it could be development that is already in situ. It can also be development which by virtue of the operation of legal entitlements, such as the General Permitted Development Order, could take place.

> 26. Once the question of whether or not it is material to the decision has been concluded, applying that threshold of theoretical possibility, the question which then arises for the decision-maker is as to what weight should be attached to it. The weight which might be attached to it will vary materially from case to case and will be particularly fact sensitive. Issues that the decision-maker will wish no doubt to bear in mind are as set out in the authorities I have alluded to above such as the extent of the prospect that that use will occur. Allied to that will be a consideration of the scale of the harm which would arise. Those factors will all then form part of the overall judgment as to whether or not permission should be granted. It may be the case that development that has less harm than that which is being contemplated by the application is material applying the first threshold, and then needs to be taken into account and weight given to it.
>
> 27. However, the question of whether or not there is more or less harm applies at the second stage of the assessment and not at the first stage when deciding whether or not such existing land use entitlements, as may exist in the case, should be regarded as material. In short, there is nothing magical about a fallback argument, it is simply the application of sensible legal principles to a consideration of what may amount to a material consideration, and then the application of weight to that in context in order to arrive at the appropriate weight to be afforded to it as an ingredient in the planning balance.'
>
> (emphasis added)

41. I accept that reasoning by the judge in that case. The fallback argument, or consideration of fallback development, is an approach to material considerations and should be approached in the two-stage manner described. The Claimant relies upon the failure by the Council to consider the material consideration – namely the fallback development, or the prospect of it – in support of his case. He submits that the possibility of the existing lawful use, namely as a poultry farm, being resumed (whether that is phrased as being realistic or more than a theoretical possibility) was simply never considered by the Council at all. This is relevant to Ground 2. This is said to justify or underpin the submissions that the Council acted unlawfully.

42. In ***R (Mansell) v Tonbridge and Malling Borough Council*** [2017] EWCA Civ 1314, [2019] PTSR 1452 Lindblom LJ summarised three principles regarding fallback development at [27]:

> "The status of a fallback development as a material consideration in a planning decision is not a novel concept. It is very familiar. Three things can be said about it:
>
> (1) Here, as in other aspects of the law of planning, the court must resist a prescriptive or formulaic approach, and must keep in mind the scope for a lawful exercise of planning judgment by a decision-maker.

(2) The relevant law as to a "real prospect" of a fallback development being implemented was applied by this court in the ***Samuel Smith Old Brewery*** case: see, in particular, paras 17–30 of Sullivan LJ's judgment, with which Sir Anthony Clarke MR and Toulson LJ agreed; and the judgment of Supperstone J in ***Kverndal v Hounslow London Borough Council*** [2016] PTSR 330, paras 17 and 42–53. As Sullivan LJ said in the ***Samuel Smith Old Brewery*** case [2009] JPL 1326, in this context a "real" prospect is the antithesis of one that is "merely theoretical": para 20. The basic principle is that "for a prospect to be a real prospect, it does not have to be probable or likely: a possibility will suffice": para 21. Previous decisions at first instance, including ***Ex p PF Ahern (London) Ltd*** [1998] Env LR 189 and ***Brentwood Borough Council v Secretary of State for the Environment*** (1996) 72 P & CR 61 must be read with care in the light of that statement of the law and bearing in mind, as Sullivan LJ emphasised, "'fallback' cases tend to be very fact-specific": para 21. The role of planning judgment is vital. And, at [2009] JPL 1326, para 22:

"[it] is important … not to constrain what is, or should be, in each case the exercise of a broad planning discretion, based on the individual circumstances of that case, by seeking to constrain appeal decisions within judicial formulations that are not enactments of general application but are themselves simply the judge's response to the facts of the case before the court."

(3) Therefore, when the court is considering whether a decision-maker has properly identified a "real prospect" of a fallback development being carried out should planning permission for the proposed development be refused, there is no rule of law that, in every case, the "real prospect" will depend, for example, on the site having been allocated for the alternative development in the development plan or planning permission having been granted for that development, or on there being a firm design for the alternative scheme, or on the landowner or developer having said precisely how he would make use of any permitted development rights available to him under the GPDO. In some cases that degree of clarity and commitment may be necessary; in others, not. This will always be a matter for the decision-maker's planning judgment in the particular circumstances of the case in hand.'

43. A further relevant passage is found in ***Samuel Smith Old Brewery (Tadcaster) v Secretary of State for Communities and Local Government*** [2009] EWCA Civ 333, [2009] JPL 1326 per Sullivan LJ at [21]: 'In order for a prospect to be a real prospect, it does not have to be probable or likely: a possibility will suffice. It is important to bear in mind that "fall back" cases tend to be very fact-specific.' This is referred to by Lindblom LJ at [27(2)] of ***Mansell*** above.

44. Turning to reasons, absent a statutory requirement, there is no general common law duty on public authorities to give reasons for their decisions. However, it is also well established that in some circumstances the common law may impose a duty to give reasons, including on the basis of fairness; and/or because there is something aberrant in the particular decision which required explanation. In the planning field, important cases on this subject are those such as ***R (CPRE Kent) v Dover District Council*** [2017] UKSC 79 *per* Lord Carnwath JSC at [50] – [60] and ***R (Oakley) v South Cambridgeshire District Council*** [2017] EWCA Civ 71 *per* Elias LJ at [14] (approved generally in ***CPRE*** *per* Lord Carnwath JSC at [54]). These are well known cases in the planning field.

45. Under Regulation 7 of the Openness of Local Government Regulations 2014 ("2014 Regulations"), in some circumstances when exercising a delegated power, an officer must make a written record of their decision which must include reasons. Regulation 7 provides:

> (1) The decision-making officer must produce a written record of any decision which falls within paragraph (2).
>
> (2) A decision falls within this paragraph if it would otherwise have been taken by the relevant local government body, or a committee, sub-committee of that body or a joint committee in which that body participates, but it has been delegated to an officer of that body either—
>
> (a) under a specific express authorisation; or
>
> (b) under a general authorisation to officers to take such decisions and, the effect of the decision is to—
>
> (i) grant a permission or licence;
>
> (ii) affect the rights of an individual; or
>
> (iii) award a contract or incur expenditure which, in either case, materially affects that relevant local government body's financial position.
>
> (3) The written record must be produced as soon as reasonably practicable after the decision making officer has made the decision and must contain the following information […]
>
> (b) a record of the decision taken along with reasons for the decision […]'

46. For the purposes of Regulation 7(2)(b)(ii) of the 2014 Regulations, a claimant does not need to show that their rights were breached, only that their rights are engaged: this is explained in ***R (Newey) v South Hams District Council*** [2018] EWHC 1872 (Admin) *per* Garnham J at [37]. In ***Newey***, the judge found that the claimant's rights were affected for the purposes of Regulation 7(2)(b)(ii) by noise and dust from construction outside her home, engaging both the right to quiet enjoyment of one's own property and under Article 1 of Protocol 1 of the ECHR. I accept the ratio of that

case as correct, in terms both of its reasoning and conclusion. Here, the Claimant submits that his rights are affected, in particular by noise, dust and the other impacts of the very heavy traffic down the Lane adjacent to his house, as explained in his evidence.

47. Where a duty to give reasons arises, those reasons must satisfy the standard articulated in ***South Bucks v Porter (No. 2)*** [2004] UKHL 33 *per* Lord Brown at [36]. Even if there is no duty to give reasons, those reasons must be adequate and once some reasons are given, their adequacy falls to be tested by the same criteria as if they were obligatory reasons: this is effectively trite law and is established and explained in cases such as ***R v Criminal Injuries Compensation Board, Ex parte Cummins*** (1992) 4 Admin LR 747 and ***R v Criminal Injuries Compensation Board, Ex parte Moore*** [1999] 2 All ER 90.

48. Further, and turning to evidence, generally a defendant cannot rely on *ex post facto* evidence by way of explanation to remedy failures in what was available at the time of the decision in question, and to give different reasons to those available. At [41] in ***Secretary of State for Communities and Local Government v Ioannu*** [2014] EWCA Civ 1432, Sullivan LJ (sitting with Rafferty LJ and Lloyd Jones LJ as he then was) said, in respect of a submission that Ouseley J ought to have admitted *ex post facto* evidence from the Inspector:

> [41] In these circumstances it is unnecessary to consider the Secretary of State's second ground of appeal, in which Mr. Banner submitted that Ouseley J was wrong not to have admitted the Inspector's witness statement. I would merely endorse Ouseley J's observation in paragraph 51 of the judgment:
>
> > "I would strongly discourage the use of witness statements from Inspectors in the way deployed here. The statutory obligation to give a decision with reasons must be fulfilled by the decision letter, which then becomes the basis of challenge. There is no provision for a second letter or for a challenge to it. A witness statement should not be a backdoor second decision letter. It may reveal further errors of law…."
> >
> > (emphasis added)

49. The Claimant challenges the evidence advanced by the Council from Mr Richardson as explaining what he did, or demonstrating that in fact the comparative exercise required under Paragraph X *was* done, as being inadmissible.

50. The same approach to admissibility of what are called *ex post facto* reasons also applies to Regulation 7(2)(b)(ii) of the 2014 Regulations; this is stated in ***R (Sasha) v Westminster City Council*** [2016] EWHC 3283 (Admin) at [40] - [44], which referred in particular to the case of ***R (Lanner Parish Council) v Cornwall Council*** [2013] EWCA Civ 1290. In ***Sasha,*** John Howell QC sitting as a Deputy High Court Judge had stated at [27]:

> "In my judgment regulation 7 is applicable to a decision taken under delegated powers to grant planning permission. There is no basis for holding that a decision to grant planning permission is not a decision "the effect of" which "is to... grant permission" (to which regulation 7(2)(b)(i) applies)."

51. In that case, one Ms Mackenzie, an Area Planning Officer employed by the City Council, had completed a report recommending the grant of planning permission. Evidence was adduced in the form of witness statements by the Council, the admissibility of which was challenged.

52. In relation to this point, the judge stated:

> [40] In my judgment, when a local authority is required to give a notice of its decision with reasons (as it was when it was obliged to give notice of the grant of planning permission with a statement of its summary reasons for the grant), it may not adduce evidence to contradict its stated reasons or its own "official records of what it decided and how its decisions were reached" including any relevant officer's report: see ***ex p Ermakov supra*** **and** ***R (Lanner Parish Council) v Cornwall Council*** [2013] EWCA Civ 1290 per Jackson LJ at [61]-[64].
>
> [41] It does not follow, however, that it may not adduce any evidence of any description as to the reasons for its decision. While Sullivan LJ (in ***Secretary of State for Communities and Local Government v Ioannu*** [2014] EWCA Civ 1432, [2015] 1 P&CR 185) endorsed at [41] Ouseley J's view that evidence about the reasons for a decision on a planning appeal by the Secretary of State or an Inspector should be discouraged, he neither endorsed, nor dissented from, the view that such evidence should in all cases be inadmissible. But, whatever the position may be in respect of decision on planning appeals, in my judgment such an exclusionary rule ought not to be applied in any event to local authority decisions on planning applications, whether by the authority itself or one of its committees. The nature of the decision-making processes involved is different from that on an appeal. The same is true when the decision to grant planning permission is taken under delegated powers by an officer of the authority. In such a case, where the officer has to produce a written record of the decision along with the reasons for it, in my judgment the principles enunciated in ***ex p Ermakov*** should govern the admissibility of evidence as to the reasons for the decision.
>
> [42] Those principles allow for the admission of evidence to elucidate but only exceptionally to correct, or to add to, the reasons required to be produced. The examples of the corrections which may be exceptionally be considered (which do not amount to an impermissible contradiction or alteration) include errors in transcription or expression and words inadvertently omitted. An example of an addition that may be permitted exceptionally is where the language used may be lacking in clarity in some way: see ***ex p Ermakov*** at p833. Such corrections or additions ought now to emerge in any event before any claim for judicial review is brought if the pre-action protocol is complied with.
>
> [43] Ms Mackenzie was not the decision-maker in this case. Her evidence on what she may have thought when writing the Report or intended it to mean, therefore, is not evidence as such (even if admissible) as to the reasons for the grant of planning permission by the decision-maker. The Report must be taken to mean what it appears to say, since there is no evidence (even were it to be admissible) of what the decision-maker understood it to mean. That is not to say that her statement is all necessarily inadmissible. Some parts of it state facts evidence of which is plainly admissible, for example about the relationship between the developments eventually permitted in 2013 and 2016, the content of the objections in each case and the fact that she visited

Portman Mansions in February 2013. I will consider the admissibility of her evidence on what she did and thought in 2013, and on the Report, below (where appropriate) in the light of the principles enunciated in ***ex p Ermakov***.

[44] As ***R (Lanner Parish Council) v Cornwall Council*** *supra* shows, those principles applied to the official documents including any officer's report when the City Council was under an obligation (as it was when it granted the planning permission in 2013) to give notice of its decision including a summary of its reasons for doing so. There is no reason why the test for the admissibility of material for the purpose of determining why a planning permission was granted by a local planning authority should differ in such circumstances depending on whether the decision to grant the permission is the subject of the claim for judicial review or one of relevance to it, such as in this case the planning permission granted in April 2013 (albeit recognising in that case that only summary reasons were required to be given and that they may be amplified by the officer's report recommending its grant).

(emphasis added)

53. He concluded as follows (at [56]):

[56] In my judgment what Ms Mackenzie says about her thought processes in 2013 is inadmissible. It does not elucidate or clarify any statement in her report in April 2013 or April 2016. What she says seeks to add to them. There is insufficient justification in my judgment for permitting such evidence to be adduced exceptionally. There is no evidence (admissible or otherwise) that her thoughts in 2013 were shared with, or by, the decision-makers in 2013 or 2016. No record has been produced of what she thought at the time (other than her report in March 2013).

54. In ***Lanner***, Jackson LJ giving the judgment of the court considered broadly the same point, in a case where the judge at first instance had admitted *ex post facto* evidence in judicial review where both the officer's report, and the stated reasons for the Planning Committee's decision, mis-stated the effect of Policy H20 (when it was actually in conflict with the policy due to the number of houses, a point explained at [53] of the judgment). Jackson LJ stated the following on this point of principle:

[63] There is a point of principle here, which is of some importance. Judicial review proceedings involve challenges to the actions and decisions of public bodies. Such cases generally proceed on the basis of the primary documents and records, supplemented by any necessary written evidence (for example, to establish facts relevant to a human rights claim). Oral evidence is only occasionally taken in judicial review proceedings under Part 54 of the Civil Procedure Rules: see, for example, ***R (Al-Sweady) v Secretary of State for Defence*** [2009] EWHC 2387 (Admin) at [15]-[29] per Scott Baker LJ, delivering the judgment of the court. This approach is efficacious and leads to a saving of costs. In judicial review proceedings under Part 54 the court should be cautious before entering into disputed issues of fact, whose proper resolution may require oral evidence.

64. Save in exceptional circumstances, a public authority should not be permitted to adduce evidence which directly contradicts its own official records of what it decided and how its decisions were reached. In the present case the officer's report, the minutes of the Planning Committee meeting and the stated reasons for the grant of

planning permission all indicate a misunderstanding of policy H20. These are official documents upon which members of the public are entitled to rely. Mr Findlay's submission that this is not a "reasons" case like ***Ermakov*** misses the point. The Council should not have been permitted to rely upon evidence which contradicted those official documents. Alternatively, the judge should not have accepted such evidence in preference to the Council's own official records.

55. The Claimant relies upon these principles to seek to exclude what it portrays as *ex post facto* evidence from Mr Richardson in his witness statement about how or whether he undertook the comparative exercise concerning curtilage and what was in his mind as he did so, including when he wrote emails.

56. The Council denies that his evidence is inadmissible as *ex post facto* evidence. Mr Neill submits that the Council is entitled to rely upon the principles set out in ***Sasha*** at [40] – [44], which in turn refer to the principles enunciated by Hutchison LJ in ***R v Westminster City Council ex p Ermakov*** (1995) 28 HLR 819 at pp833-834.

57. The headnote summary of that case, usually referred to as simply "***Ermakov***", state the following as the ratio, which is all that needs to be reproduced for the purposes of this judgment:

> "The court can, and in appropriate cases should, admit evidence to elucidate or, exceptionally, correct or add to the reasons given in the decision letter but should be very cautious about doing so; examples of cases where affidavit evidence would be admitted were where an error had been made in transcription or expression, or a word or words inadvertently admitted, or where the language used may be in some way lacking in clarity; the purpose of the affidavit evidence should be elucidation and not fundamental alteration – confirmation and not contradiction – of the reasons given in the decision letter."

58. Mr Neill portrays Mr Richardson's evidence in his written skeleton as "not *ex post facto* evidence. Rather, it sets out the factual background to the contemporaneous correspondence between the Council and the Applicant and, in particular, the reasons why further plans were sought. That is clearly admissible factual evidence. In any event, even if it were considered to be, it does not contradict the stated reasons, or a fundamental alteration of the stated reasons, of the kind held to be impermissible in ***ex p Ermakov***. Insofar as Mr Richardson's evidence elucidates the decision, it clearly falls within the ***Ermakov*** principles: see ***Sasha*** at [42]". He added to these submissions orally and sought to persuade me that the evidence clarified the decision and could and should be admitted.

59. I cannot add to these well-known and widely applied principles in the authorities that I have quoted above, and I do not seek to do so. The primary or default position is that evidence can be admitted to elucidate, or exceptionally to correct or add to the reasons given, but the court will be cautious in doing so. That this is done exceptionally is clear from ***Ermakov***, and the type of examples given in the cases make it clear when and how this will be permitted. As Jackson LJ said, "save in exceptional circumstances, a public authority should not be permitted to adduce evidence which directly contradicts its own official records of what it decided and how its decisions were reached." I bear that in mind when I consider the issue of this evidence below.

60. Having set out the relevant legal principles, each of the grounds now fall to be considered.

Discussion

61. The decision in this case is signed by Sam Fox, the Director of Economic Development and Planning. The Case Officer's Report, with reference 21/01062/PNCOU, is undated on its face but the date of it is 30 March 2021. It runs to 45 numbered paragraphs, concluding that prior approval is not required. Relevant passages within it are as follows.

62. Landford Parish Council objected and identified that the use in respect of which prior approval was sought was already extant prior to the application. The Parish Council also notified the Council that the traffic movement information that had been provided with the application was incorrect. The New Forest District Park Authority also raised concerns, again regarding the validity and comparability of the traffic information that had been provided by Schepens. The Council Public Protection made a comment that stated:

"The documents show there will not be an increase in vehicular movements compared to the previous use as a poultry farm, I understand there would likely be a decrease."

63. Wiltshire Council Highways stated:

"In respect to the use of the network managed and maintained by this Highway Authority, namely Stock Lane, concern is raised due to the substandard width along the majority of the road network in this vicinity. Due to the substandard road network, this Highway Authority would not support any increase in vehicular movement generated by these proposals. However, the previous and extant use of the site must be considered, as there is a baseline of traffic associated to the use of this site."

64. The Highways Officer made extensive comments that included:

"Further, a subsequent application on this same site (19/05060/FUL) was also granted consent for the change of use of two further agricultural buildings to B8 use, subject to the use being tied to the applicant. What is of paramount importance in the consideration of this application at Nursery Farm, is that in planning terms, it is not the exact amount of traffic generated by the previous operation of the poultry farm site, but what the potential use of the site as a poultry farm could generate in traffic terms….."

65. Accordingly, no Highways objection was raised.

66. Curtilage is referred to in paragraphs 27 and 28 of the Report, and paragraph 30 concludes that "By way of the fore-mentioned proposed site plan submitted with this application for prior approval, officers are of the opinion that the use of the poultry unit as illustrated does not exceed 500sqms of the existing floor space . Therefore, the use of the poultry unit in this way is considered to [be] permitted development in line with the requirements of Class R, Part 3 of Schedule 2 of the GPDO."

(emphasis added)

67. I shall return to the point referring to "as illustrated" below at [72].

Ground 1. The Council failed to consider whether the Proposed Use was within the curtilage of the Building

68. Mr Neill for the Council effectively accepted that unless the Council was permitted to rely upon what is portrayed by the Claimant as *ex post facto* evidence, then there was nothing in the Decision itself, or the Report, that could demonstrate that this point was considered by the decision maker.

69. The Council's position on this ground was to submit that "the short answer" is that "it is clearly wrong as a matter of fact in light of the full factual background." It is also submitted by the Council that the contemporaneous correspondence shows that the officer did consider whether the Proposed Use was within the curtilage of the Building (as defined by paragraph X of the GPDO), and expressly undertook the "comparative exercise" referred to. It is also submitted that "it was clear from the outset that [Schepens] was seeking to use a "Para. X (b) curtilage" and therefore necessarily considered that the actual curtilage was wider in extent." By "Para.X(b) curtilage" the Council means curtilage under the second limb of Paragraph X.

70. I reject those submissions. It was not clear from the outset, or at all, that Schepens was seeking to rely upon the second limb of Paragraph X. This can be seen by considering the content of Plan 3 and then Plan 4. Neither of them could be said to make it clear that the second limb was being used, either from the outset (which would suggest on the face of the plan) or subsequently, after Mr Richardson had – quite politely – invited them to try again. Not only that, but the following note appeared in a box on *both* Plans 3 and 4, as set out above at [18]. It was added for Plan 3 and had not appeared on Plan 2:

"Yellow hatched 'curtilage' area to be used under class R, cumulatively not exceeding the area of land occupied by the the (sic) associated agricultural building."

71. On Plan 3, the box containing this note was connected by an arrow to an area hatched in yellow to the East of the building, but extending along both the northern and southern edge. On Plan 4, the same box was connected by an arrow to a similar but different area hatched in yellow, this one separate from the building, which did not extend along either the northern and southern edge.

72. Further, on both Plans 3 and 4 a wholly separate box stating "Total 350 sqm" appeared in a separate box, with two arrows to areas *within* the Building. This box had appeared for the first time on Plan 2. It plainly pointed to areas that, given they were within the building, could not be described in any way as outside the Building. The submission that it was clear that the second limb was what was intended, or what was being referred to, is not accurate and cannot be correct.

73. The evidence adduced by the Council does at least explain why there are so many plans. Ordinarily one would not expect so many, each different to the last in terms of some of their pictorial details, yet retaining very substantial similarities in explanation. For example, as examined in the substantive hearing of these judicial review proceedings, the explanatory text remained unaltered between Plans 3 and 4. But the evidence upon which the Council seeks to rely goes further than explaining

why there are such a number of plans. The evidence seeks to demonstrate, by way of internal emails within the Council, that this specific point *was* expressly considered. There is no mention of any consideration of the point within the Decision letter or the Report that led to it. This point is simply missing from the Decision letter itself, and it is also missing from the Report. Curtilage is dealt with cursorily, and although Paragraph X is recited in the Report, that is all that occurs – recitation of its terms. The relevant limb of Paragraph X is not identified, nor is any comparison exercise undertaken. Further, the contradictions and ambiguities in Plan 4 (or Plans 3 and 4 together) are not addressed at all. The Report is silent on this point.

74. The only conclusion is that contained in paragraph 30 of the Officer's Report that states that '*the use of the poultry unit as illustrated does not exceed 500sqms of the existing floor space'*. Mr Henderson submits that this conclusion relates only to the area inside the Building and does not relate to the Application Land. I accept that criticism. It is an obvious one given the areas identified giving floor areas. I also accept the submission that there is no comparative exercise carried out at all.

75. I consider the Council's evidence on this about what Mr Richardson had in his mind to be inadmissible; it is *ex post facto* evidence seeking to put right the deficiencies in the Report and in the Decision. This is not a matter of elucidation or clarification. It is wholesale addition, or put another way, an attempt to demonstrate that something was expressly considered, when the Decision letter itself – and indeed the Officer's Report - is wholly silent. Nor, in my judgment, do any of the types of categories where such evidence might be admitted on an exceptional basis apply here.

76. In my judgment, this is directly analogous to the conclusion drawn by the judge in ***R (Sasha) v Westminster City Council*** [2016] EWHC 3283 (Admin) where he observed:
[56] In my judgment what Ms Mackenzie says about her thought processes in 2013 is inadmissible. It does not elucidate or clarify any statement in her report in April 2013 or April 2016. What she says seeks to add to them. There is insufficient justification in my judgment for permitting such evidence to be adduced exceptionally.

77. In my own words in this judgment, what Mr Richardson says about his thought processes when he was dealing with the application, and in particular when the different plans were submitted, is inadmissible. It does not elucidate or clarify any statement in the report or in the Decision itself. What he says seeks to add to them, and to a significant extent. There is insufficient justification in my judgment for permitting such evidence to be adduced exceptionally. Even if it were admitted, it would take some considerable explaining in terms of its accuracy, given what is shown on the face of Plan 4, but that is not necessary because it is inadmissible.

78. The issue of curtilage is not a mere technicality. It is important. Considering paragraph R.1 and R.3 together, prior notification is required for a change of use pursuant to Class R for floorspace up to 150 m^2 and prior approval is required for a change of use pursuant to Class R for floorspace over 150 m^2 (and up to 500 m^2). Unless specific consideration was given to this point, it cannot be known whether the first or second limb of Paragraph X was being considered. Plans 3 and 4 have the same reference number; the yellow hatching areas are different. It is not possible to tell which of them was the plan upon which the application was determined. They both include an area of 350 m^2 clearly identified within the Building. But on neither

of them did the Council determine whether the yellow hatched areas fell within the curtilage of the Building, applying the definition in Paragraph X. Nor, as a further point, do the plans permit the comparative exercise to be undertaken.

79. Mr Henderson submitted that it was relevant that the evidence which the Council sought to rely upon came from Mr Richardson (and/or related to what Mr Richardson was doing and thinking) rather than from the decision maker himself, Mr Fox, in addition to the other objections the Claimant maintained in respect of that evidence. I am not persuaded that is a particularly strong point for the Claimant, but given my conclusion in terms of the evidence in any event, it makes no difference.

80. Further – and in case I am wrong about my finding on inadmissibility – the Council relies upon an email sent by Mr Richardson to Schepens 26 March 2021 at 14:55 as showing the comparative exercise being undertaken. As the Claimant submits, this is quite impossible, because as a matter of logic when this was sent, Plan 4 (which the Council contends is what shows the curtilage within the second limb of Paragraph X(b)), was not available when that email was sent. Plan 4 was sent *in response* to that email from Mr Richardson. It was not possible for Mr Richardson to do a comparison exercise without having Plan 4. The Officer's Report makes no reference to this either.

81. It therefore follows that the Decision was unlawful because the Council failed to consider whether the Application Land fell within the curtilage of the Building. The Council could only reach the conclusion that its prior approval was not required if the Proposed Use fell within Class R, and if the Proposed Use did not fall within Class R, the only option available to the Council was to refuse the Application pursuant to paragraph W(3). Another way of expressing the same conclusion is that the Council had no power to determine the Application because the development was outwith Class R. On either analysis, the Council could not lawfully conclude that its prior approval was not required for the Proposed Use, and the Decision was therefore made in error of law.

82. In those circumstances, the Claimant succeeds on Ground 1.

Ground 1A. Further or alternatively to Ground 1, the Council was under a duty to give reasons and failed to give adequate reasons.

83. This ground is being dealt with on a rolled-up basis as I have explained. The Claimant submits that the only written record of the Decision, namely the Officer's Report, failed to give <u>any</u> reasons for concluding that the Proposed Use fell within the curtilage of the Building. There is no proper consideration of this issue at all. This ground is said to be "further or in the alternative" to the first ground, but it covers much of the same territory. It is the same central point but addressed from a different direction. It was added by amendment as I have already observed. I grant permission to bring judicial review on this ground.

84. The Claimant submits that there was a duty upon the Council to give reasons under Regulation 7 of the 2014 Regulations which I have set out at [45] above. This is because the Decision was taken under delegated powers, which it doubtless was, and also Regulation 7(2)(b)(i) and (ii) apply in that the Decision had the effect of "granting a permission or licence" or "affected the rights of an individual" (which are

sub-paragraphs (i) and (ii) respectively). The Claimant relies upon the reasoning of Garnham J in the case of ***Newey***, which I have referred to at [46] above.

85. The Council submits that there is no common law duty to give reasons. This may be common ground, because Mr Henderson relies in any event upon Regulation 7. Even if it is not common ground, I accept that there was no common law duty in this instance. Mr Neill also submits that the grant of prior approval is not the grant of a permission or licence. He submitted that the relevant planning permission granted here is the general permission that had effectively already been granted by a development order by the Secretary of State, namely the GPDO. He submitted that this was not an express grant of permission under the s.73 variation in issue of the type considered in ***Newey***, nor was it an approval of a Construction Method Statement as was considered there. The Council seeks to distinguish ***Newey*** on its facts.

86. I am attracted by the submission of the Council that this is not a grant of permission or licence. However, that does not matter for this reason. The rights of the Claimant are clearly affected and the relevant Regulation is 7(2)(b)(ii). The Council's response to this is that the rights of the Claimant will not be affected, and it relies upon the conclusion in the Officer's Report that the use of the site "would be unlikely to increase in a significant amount of overall traffic movements". This is a wholly circular argument for this reason. I do not see how a defendant can rely upon a conclusion in a report or decision to justify non-interference with rights, the lawfulness of which is itself challenged because it fails properly to consider (here) traffic movements. The Claimant's rights will undoubtedly be engaged (if not affected detrimentally in terms of noise, dust and affected access to his own property) by the use of the land, and regardless of its different facts that is sufficient if the decision in ***Newey*** is good law. I consider it is good law, and I adopt the reasoning of Garnham J in that case at [31] to [39] and in particular at [34]. I do not consider that this point is adequately answered by the Council relying upon the element of its own report which comes to what is potentially an unlawful conclusion on the traffic impact, to say that the unlawful conclusion makes it clear that the Claimant is no worse off and/or that the Claimant's rights have not been affected. I reject that analysis, which I consider to be circular.

87. Another line of defence to this ground by the Council is that the reasons given were clearly adequate. I accept that adequacy of reasons has to be addressed in context. However, as already observed under my consideration of Ground 1, there is simply nothing in the Officer's Report or the Decision that demonstrates any reasoning at all. The officer referred to the definition of curtilage, quoted from Paragraph X, and then came to the bare conclusion that I have already identified in paragraph 30 of the Report. It is right that there was no obligation to address in minute detail the particular plans and factors relied on by the officer in reaching that overall conclusion, but the criticisms of the Claimant are not the kind of hypercritical approach disapproved of by the court when reviewing planning decisions, for example those in the case of ***Mansell*** at [41] (which I have already referred to at [42] above). It is also correct to point out that in that paragraph, Lindblom LJ states the following at the beginning of that paragraph:

"[41] The Planning Court—and this court too—must always be vigilant against excessive legalism infecting the planning system. A planning decision is not akin to an adjudication made by a court: see paragraph 50 of my judgment in the East

Staffordshire case. The courts must keep in mind that the function of planning decision-making has been assigned by Parliament, not to judges, but—at local level—to elected councillors with the benefit of advice given to them by planning officers, most of whom are professional planners, and —on appeal—to the Secretary of State and his inspectors."

88. Later in the same paragraph he makes the following point:

"One thing, however, is certain, and ought to be stressed. Planning officers and inspectors are entitled to expect that both national and local planning policy is as simply and clearly stated as it can be, and also—however well or badly a policy is expressed—that the court's interpretation of it will be straightforward, without undue or elaborate exposition. Equally, they are entitled to expect—in every case—good sense and fairness in the court's review of a planning decision, not the hypercritical approach the court is often urged to adopt."

89. I have borne those points in mind when considering all of these different points by the Clamant. Here, the conclusion under this ground can be clearly stated. Reasons were required on this point, because they were in this instance required by Regulation 7. None whatsoever were given. This is not the court applying a hypercritical or exceptionally forensic approach to the language in the Report or Decision. It is a straightforward conclusion. I grant permission for judicial review for ground 1A and find for the Claimant on this ground.

Ground 2. The Council took into account the traffic movements related to the previous agricultural use of the Farm, without considering whether there was a real prospect of that operation resuming. This was therefore an immaterial consideration.

90. The applicant, Schepens, submitted what it said was data from a comparator poultry farm to demonstrate that the number of traffic movements from its operation would be less than if the poultry operation that had been operated by Faccenda resumed. Both the Landford District Council and the New Forest District Park Authority raised concerns that the alleged comparator, an operation in Chard, Somerset, was not a valid comparison and that the data was wrong.

91. Regardless of whether those points were right or wrong, and regardless of whether the applicant Schepens had correctly stated the figure of traffic movements that historically were associated with the poultry farm, or would be if that resumed, the conclusion in the Report (which led to the Decision) was reached that the proposed use would have lower levels of traffic movements. The Claimant submits that the Council failed to approach this correctly or lawfully, and failed to ask itself whether there was a real possibility (or more than theoretical prospect) of the poultry operation resuming. The Claimant submits that is failure to conduct the two part analysis means that the Council improperly took account of an immaterial consideration.

92. It is correct that in the report the conclusion that the Schepens' traffic use would be lower than the notional resumed use (or traffic associated with the fallback development) features large in the reasoning and conclusions. It appears in multiple places including paragraphs 16, 19 and 37 of the Report. One of the matters for the Council's prior approval was the transport and highways impacts of the proposed

change of use: this is made clear expressly in Paragraph R.3(1)(b)(i). The Council's sole reason for concluding that the transport and highways impacts were acceptable in this case was the comparison to the traffic movements related to the previous agricultural use of the Farm which Schepens maintained was the correct comparison. The Council seemed simply to assume that this was the correct approach, without asking itself whether there was a more than theoretical possibility that this use would resume. This is a wholly different point to whether the level of notional traffic movements had been inflated in any event.

93. In its Detailed Grounds of Resistance, the Council challenges that the assumed traffic generation from the agricultural use of the Farm was a fallback, and contends that it was in fact an existing state of affairs. The Claimant contends that this is in error because the Farm was not in active agricultural use, even if that was the extant use, because the poultry operations had ceased. This is accepted, effectively, by the Officer's Report itself which states at paragraph 1 that "the site is part of a former commercial poultry farm consisting of 3 large poultry houses (approx. 4,700sqm) which used to operate 24 hours a day for 7 days a week. The operations ceased in 2018." (emphasis added)

94. At [25] of ***Gambone*** the judge explains what the alternative or fallback development could be in the following terms:
"It could be development for which there is already planning permission, or it could be development that is already in situ. It can also be development which by virtue of the operation of legal entitlements, such as the General Permitted Development Order, could take place."

95. Therefore the fact that there was extant planning permission for the use of the site as a poultry farm, which is what the Council relies upon, is not sufficient to lead to the conclusion that there was no need to consider whether it would ever be used as such again.

96. The Council also submitted that ***Gambone*** and the line of authorities it considered is or are not "directly applicable to the consideration of impacts under paragraph R(3)(1)(b) of the Class R of Part 3 of the GPDO." This is because these impacts are not being considered as part of the potential grant of planning permission, rather they are being considered under the separate provisions of Paragraph R and the GPDO.

97. I reject that submission. This is for this reason. As the judge carefully explained in that judgment:
"In short, there is nothing magical about a fallback argument, it is simply the application of sensible legal principles to a consideration of what may amount to a material consideration, and then the application of weight to that in context in order to arrive at the appropriate weight to be afforded to it as an ingredient in the planning balance."

98. It cannot be said that assessing traffic impact, or considering the "ingredients in the planning balance" to adopt that term from ***Gambone***, requires one common sense application of sensible legal principles if a grant of planning permission is under consideration, but another entirely different one if the impact arises for consideration under Paragraph R. There is no magic in a fallback argument; it is a common sense and sensible approach to something that may be a material consideration. Of course,

some planning judgment is involved, and assessment of impact is part of that, but the starting point for this (and indeed almost any) such assessment is the first-stage – is there a more than theoretical possibility that this site could resume operation as a poultry farm? If the answer to that is "No", then analysis of the number of traffic movements that such a farm would require would remain in the theoretical realm, and not be a relevant or material consideration.

99. I have accepted above that the approach identified in ***Gambone*** is the correct one. I have set out at [40] and [41] above both the relevant passages from that judgment and my conclusion that it is correct, and I have explained that it cannot be distinguished because this decision was taken under Class R. I therefore consider that the two-stage approach should have been applied.

100. It was not. The Council clearly took into account a consideration that was not material, namely the number of traffic movements which Schepens maintained would be experienced for its operation as a farm. The Report therefore concluded that the number of traffic movements would be lower, and no highway objections were raised. Given the size and scale of these movements, this must have come as a considerable surprise to the Claimant. Whether it did or not, this conclusion was reached having taken into account an immaterial consideration and the Claimant therefore also succeeds on this ground.

Ground 3. The Council unlawfully concluded that the pre-existing B8 use at the Farm was lawful permitted development within Class R.

101. Schepens was already conducting B8 use at the Farm following its notification to the Council in November 2020. This use was of an area of less than 150 m^2 for the reasons already explained. The Claimant submits that this earlier change of use was not permitted development within Class R because the prior notification requirement in paragraph R.3(1)(a)(iii) of Part 3 of Schedule 2 to the GPDO had not been complied with by Schepens. This relates to the matter to which I have already referred at [10] to [13] above, and the deficiencies of the plan that had been submitted with the notification. Accordingly, the Claimant maintains that the Decision was ultra vires and/or in error of law because the Council proceeded on a material error of fact and/or took into account an immaterial consideration. Both the error of law and immaterial consideration being that the existing use by Schepens was lawful, when in reality it was not.

102. This ground therefore directly relates to what occurred in November 2020, and the inadequacies of the plan that had been submitted by Schepens. The Council submits that this amounts to a collateral attack on the lawfulness of what occurred in November, and it is therefore out of time. Mr Neill submits that for this reason, it should fail at the first hurdle.

103. It is hard to disagree with that submission. In view of my conclusions on the previous grounds, I can deal with this ground shortly. This claim for judicial review of the application that resulted in the Decision of 30 March 2021 ought not to become, or be allowed to become, a mechanism for challenging the lawfulness of something that occurred more than four months earlier than the Decision, namely in November 2020. The plan submitted with the notification in November 2020 was not adequate, and that is apparent from even a superficial examination of it. It may be that there is some

advantage available to Schepens as a result, in terms of which area(s) can be used by it. Alternatively, it may be that there is no advantage, although it is hard to see why the area should not have been precisely defined. I would simply observe that the enforcement visit in February 2021 seems to have found nothing amiss.

104. These proceedings are judicial review in respect of the Decision of 30 March 2021. There would be the potential for chaos if challenges brought in the Planning Court were used as levers to open up far earlier decisions, even if the notification of November 2020 were construed as a decision, which I doubt it could be. It is not the function of the Planning Court to come to a conclusion regarding the lawfulness of the existing use of the Site, where the Council has specifically itself concluded as a result of its own enforcement procedures that the use was lawful. Nor should these judicial review proceedings be available to be used for this purpose. In any event, this makes no difference to the outcome of these judicial review proceedings in any event because the Claimant has succeeded on the earlier three grounds.

105. The challenge on this ground fails.

Conclusion

106. The Claimant therefore succeeds on Grounds 1, 1A and 2. The Decision was therefore reached unlawfully. The relief sought by the Claimant is threefold, namely:

1. an order quashing the Decision;
2. a declaration that Schepens may not proceed with its proposed change of use of the Building and the Application Land as set out in the Application until the Council has redetermined whether its prior approval is required; and
3. an order requiring the Council to pay the Claimant's costs of the claim.

107. The Claimant is entitled the relief under both (1) and (2) above as a result of this judgment, and I therefore quash the decision and make the relevant declaration. The Claimant is also entitled to (3), and unless the Council seeks to make submissions as to why it ought not to have an order for costs against it within 7 days of receiving this judgment in draft, I will make that order too. If submissions on costs are made, then depending upon their content I will issue further directions to resolve any costs issues.