LEGITIMATE EXPECTATION, CONSULTATION & FAIRNESS IN PLANNING LAW

Paul Brown QC[1]

Legitimate expectation

1. Instinctively, few people would quarrel with the idea that public bodies should act consistently, and should not break "promises" they have made. At a political level, the ballot box has always existed as a means of holding to account authorities which go back on their word. However, the circumstances in which the courts have been willing to hold that public bodies are *legally* bound by the expectations they have created have always been more complex, not least because authorities (or their officers) sometimes promise things they have no legal power to deliver, or – for entirely legitimate reasons - decide they wish to change the policy they have previously applied.

2. In public law, these issues are normally dealt with under the heading "legitimate expectation". In one of the leading modern cases on LE, ***R (Bhatt Murphy) v Independent Assessor*** [2008] EWCA Civ 755, Laws LJ drew a distinction between procedural legitimate expectations and substantive legitimate expectations.[2]

   (1) The "paradigm" case of a procedural legitimate expectation arises where the public authority has provided an unequivocal assurance (whether by express promise or established practice) that it will give notice or embark upon consultation before changing policy (or reaching a decision). In these cases the court will not allow the decision-maker to effect the proposed change without notice or consultation, unless there is some

[1] This paper draws very heavily on an earlier paper presented by Gwion Lewis, with assistance from Andrew Parkinson.

[2] Para 28.

overriding legal duty or countervailing public interest which requires this. In such cases, Laws LJ doubted whether it mattered that the claimant had known of or relied on the promise, because the issue was not simply the impact on the individual, but also the fact that good administration requires public bodies to deal straightforwardly and consistently with the public;

(2) Substantive legitimate expectations arise where the court allows a claim to enforce the continued enjoyment of the content or substance of an existing practice or policy. However, as Laws LJ explained, such an expectation could not logically exist simply because a public body had adopted a particular policy without defining an end-date: if that were the case, authorities would never be able to change any policy they adopted. For a substantive legitimate expectation to result in a situation where the authority was not able to depart from it, there would generally need to be a "specific undertaking, directed at a particular individual or group, but which the relevant policy's continuance is assured."[3] And even in such cases, a substantive promise cannot be binding if it is *ultra vires* or inconsistent with the statutory duties imposed on the authority.

3. To these two categories, Laws LJ added a third, which he called the "secondary case of procedural expectation". These were situations where, without any express promise, the public authority has established a policy substantially affecting a specific person or persons who, in the circumstances, reasonably relied on its continuance. In such cases, legitimate expectation did not operate to prevent changes to the policy, but could operate to "provide a cushion against the change" or prevent the change being made abruptly, by imposing a requirement to notify and consult on the proposed change.

[3] ***Ex p. Coughlan*** **was an example of this. In that case, disabled residents of a care home had been promised by the health authority that it would be their home for life. This was an express and unqualified promise made to a small group of people on a number of occasions in precise terms**

4. The last year and a half has seen a number of important cases addressing the topic of legitimate expectations in the planning context. It is helpful to look at them in the context of Laws LJ's tripartite division.

A. Consultation/Procedural promises

5. In the sphere of planning law, it has been clear for some time that a LPA's Statement of Community Involvement can give rise to a procedural expectation which falls within Laws LJ's "paradigm example":

   (1) In ***R (Majed) v London Borough of Camden*** **[2009] EWCA Civ 1029** the claimants had not been notified of a planning application, even though Camden's SCI indicated that they should have been. Sullivan LJ was unimpressed by the Council's argument that this did not matter, because the SCI went further than the statutory duty under the GDPO. As he put it "legitimate expectation comes into play when there is a promise or practice to do more than that which is required by statute";

   (2) In ***R (Kelly) v. London Borough of Hounslow*** **[2010] EWHC Civ 1256** the Court quashed a decision where, contrary to the LPA's SCI, the claimant had not been informed of the date of the Committee meeting in time to address it.

6. This principle has been reinforced and extended in two recent cases. The first is ***R. (on the application of Vieira) v Camden LBC*** [2012] EWHC 287 (Admin), which confirms the need for a planning authority which has adopted a Statement of Community Involvement to adhere to it, and applies the same reasoning to other published procedures and planning protocols.

7. In ***Vieira***, the Claimants applied for judicial review of the local authority's decision to grant retrospective planning permission for a conservatory and trellis screen built without planning permission on neighbouring property. The local authority consulted the Claimants, who objected through their

planning consultants to the proposals on the basis of the harm to outlook and the character of the conservation area by the trellis, and the loss of privacy caused by the siting of the conservatory.

8. The application was then sent to a members briefing panel to determine whether it should be dealt with by officers under delegated powers or by members through the Council's development control committee. The panel decided to defer the decision, pending further negotiations with the Claimants. A planning officer wrote to the Claimants incorrectly stating that the application had been approved, subject to the trellis being reduced in height to 1.8 metres. The Claimants objected to this, and asked if any revised plans had been submitted. The neighbour submitted an amended drawing reducing the height of the trellis. Neither this, nor an officer's report commenting favourably on the amended plan, were placed on the Council's website or sent to the Claimants. Permission was granted by officers, without the matter having gone back to the panel.

9. The Claimants argued that the local authority was in breach of three legitimate expectations:

   (1) That it would consult the Claimants on the revised drawing, as indicated in its Statement of Community Involvement;

   (2) That application documents and reports would be made available on its website for comment before panel meetings, as stated in its published procedure for members briefings, and the Statement;

   (3) That a "members' briefing panel" would be consulted on whether the application should be referred to committee, as indicated in its planning protocol, the procedure for members briefings and its website.

10. It was held by Lang J that the Claimants did have a legitimate expectation derived from the Statement of Community Involvement that, following the

revision of the planning application, the revised plans would be re-consulted upon. It was found that the revision in this case was particularly significant:

> *"In the present case the effect of the revision was not apparent until the amended drawing was submitted. The extent of the reductions in the size of the trellis and the location of those changes was not known until that point. The extent to which that would permit greater overlooking or reduce impacts on outlook could not be assessed until the drawing was produced…Substantial and important representations would have been made on the report and revised drawing if they had been published in accordance with the Defendant's policies."*

11. It had been practicable to consult on the amendment, and the local authority had made no attempt to do so. It had breached the Claimants' legitimate expectation and had given no valid explanation.

12. Further, it was held that, whilst there was no evidence of a sufficiently clear representation that amended plans would be put on the website, the planning protocol and the website included clear representations that officers' reports would be available online in advance of members briefing meetings:

> *"As well as fulfilling the need for openness, this practice is intended to enable interested parties to consider the report and make any additional comments in advance of the meeting. By failing to make the officer's report available, the Defendant breached the Claimants' legitimate expectation that they would be able to see, and comment on, the officer's report before the meeting.*
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> *Of course, there may be instances where the report is not available online for good reason. Or where the case officer makes the report available to objectors by some other means, such as email or post. Unfortunately, in this case no good reason has been put forward to explain the omission. Although the Claimants' consultants emailed the planning officer on 20 May and 1 June asking for information, the planning officer did not respond."*

13. Finally, it was held that where a decision on mode of determination had been deferred, the local authority had plainly anticipated that the application would be referred back to the panel for a decision to be made later. There was a legitimate expectation that the panel would be consulted over whether the application would be decided by officers or referred to committee. Objectors were entitled to the benefit of that, since part of the members' role

at panel meetings was to consider objections and the way officers intended to deal with them.

14. The local authority justified its departure from its representations on the basis of a recent election and said that the panel could not have been reconstituted earlier than it had been. This was not accepted as a matter of fact, but in any event, it was held that the proper course would have been to postpone reconsideration, since there was no particular urgency about the application.

15. Lang J also rejected the local authority's submission that even if it had acted unlawfully, relief should be refused on the basis of the Claimants' low prospects of success in objecting to the planning permission.

> *116 A quashing order should only be refused if it is inevitable that the outcome would have been the same had the correct procedures been followed see R(Copeland) v London Borough of Tower Hamlets [2011] J.P.L. 40 at para 36, 37 citing Smith v North Derbyshire Primary Care Trust [2006] EWCA Civ 1291 , per May LJ at [10]:*
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> > *"…Probability is not enough. The defendants would have to show that the decision would inevitably have been the same and the court must not unconsciously stray from its proper province of reviewing the propriety of the decision making process into the forbidden territory of evaluating the substantial merits of the decision … "*
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> *117 In the present case the Interested Party built the new conservatory without planning permission and made the application under the threat of enforcement action. The planning concerns are recognised in the Members' initial request for amendments to the scheme. There remains the question whether those amendments make the scheme acceptable, or whether there is an alternative solution.*
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> *118 In my judgment, this not a case in which it would be proper to refuse relief. I order that the grant of planning permission should be quashed, and re-considered according to law.*

16. In this case, the representations made by the local authority in the Statement of Community Involvement, its website, and its planning protocol were sufficiently unambiguous to create a legitimate expectation.

17. A similar approach was taken in ***R. (on the application of Halebank PC) v Halton BC*** [2012] EWHC 1889 (Admin) the claimant parish council applied for judicial review of a decision of the borough council granting planning permission for the building of a rail-served storage and distribution warehouse and related development at a site owned by the borough council. The borough council consulted the parish council, supplied it with an environmental statement, and gave 21 days notice of the development control committee meeting at which the application would be determined. This was shortly before the August holidays. The parish council sought an extension of the consultation period on the grounds that the development was large and complex, that there were no Parish Council meetings scheduled for August and that the holiday commitments of members made it impossible for the PC to arrange a special meeting. This request was refused and the development control committee delegated authority to one of the Council's officers to approve the application.

18. The Parish Council argued that it had been deprived of the opportunity to participate effectively in consultation. In part, this argument was based on art. 6 of Directive 85/337 (see below). However, the PC also argued that it had a legitimate expectation that it would be given a fair opportunity to participate in the planning process. In particular, it relied on a Cabinet office Code of Practice on Consultation, which stated:

> *"If a consultation exercise is to take place over a period when consultees are less able to respond, e.g. over summer or Christmas break, or if the policy under consideration is particularly complex, consideration should be given to the feasibility of allowing a longer period for the consultation."*

19. This Code of Practice was expressly referred to in the Council's SCI, which said "where possible [the Council] will use this guidance for their consultation."

20. In the High Court, HHJ Gilbart QC held that the borough council had acted contrary to the legitimate expectation which the parish council had as to the conduct of the consultation process. He said

65..It is plain that if the Cabinet Office document is incorporated, then HBC was holding out as its policy that

> *" If a consultation exercise is to take place over a period when consultees are less able to respond, e.g. over the summer or Christmas break, or if the policy under consideration is particularly complex, consideration should be given to the feasibility of allowing a longer period for the consultation."*

66 I can see no reason for including the reference to the Cabinet Office document unless it was being incorporated. It follows that HBC policy was that if consultees were less able to respond (NB not unable), or if the proposal under consideration were particularly complex, consideration would be given to the feasibility of allowing a longer period. I accept that it does not follow that it must be granted, but there is a clear policy held out that such circumstances will be regarded as potentially justifying an extension, and will be considered. The PC put forward arguments that it needed advice from Planning Consultants, and that members of the Council were or would be on holiday. However there is nothing whatever in the papers which shows that the Committee ever addressed the questions raised in its own adopted policy. That was a breach of a legitimate expectation.

67 But that is not the end of the matter. Mr Fraser contends that as a matter of fact

(a) The members of the Parish Council could have met;

(b) The proposal was well known;

(c) The point on the interpretation of the UDP was a straightforward one requiring little time being spent on drawing representations.

He submits that therefore no prejudice was caused, and the time permitted was adequate.

68 I do not accept his point about the meeting. While I am prepared to accept that members could have met, had some returned from holidays to do so (although whether it would be reasonable to expect that to occur is another matter), the unchallenged fact that some were on holiday must mean that the ability of the Council members to be able to consider the application was constrained. Getting to grips with an Environmental Statement of almost 1000 pages and achieving an understanding of a scheme of this size and scale is not a matter for holiday reading. The public consultation by the developer would have assisted the PC, as would the newsletter, but no-one could fairly claim that that meant that the full Environmental Statement and any supporting material did not have to be read and considered. It is true that, in the event, points are not being taken in the judicial review proceedings on matters of environmental impact, but that does not overcome the difficulty that the material had to be considered in the period in question.

71 I am therefore of the view that this consultation was not conducted fairly or effectively. Those who disagreed with the proposal were put at a considerable disadvantage, and (knowingly or otherwise) not informed that they had even less time to have their comments made than they had anticipated. When they asked for more time, their requests were dismissed without authorised consideration, and when put to the Committee were rejected without any known consideration, let alone reasons, despite the terms of HBC's own adopted policy. It …was in any event contrary to the legitimate expectation the PC had as to the conduct of the consultation process."

21. ***Vieira*** and ***Halebank*** are in many respects simply the logical extension of principles which (as ***Majed*** and ***Kelly*** demonstrate) were already well established. A rather more optimistic attempt to extend the reach of procedural legitimate expectation still further was however rejected in ***R (Save our Parkland Appeal Limited) v. east Devon District Council*** **[2013] EWHC 22**, where the Claimant challenged the grant of panning permission for 400 homes on the ground (amongst others) that it had a legitimate expectation that any decision on the release of the land for development would be made through the LDF/development plan process, rather than by the grant of planning permission.

22. Since the Council's LDF was only at the preferred options stage (on which consultation began some 6 months after the application had been made), it is not surprising that Court rejected this argument. HHJ Sycamore observed that refusal on the basis of prematurity would have been contrary to national policy and in breach of central government guidance. Moreover, there was no specific undertaking given to any individual or group. The Council's SCI was still only at pre-submission draft stage, had not been adopted and did not in any even make any clear statement that no planning applications would be granted while the plan was emerging.

B. Substantive Expectations

23. Holding a planning authority to a procedural promise rarely ties that authority's hands as to the eventual decision it reaches. Possibly for this reason, it has always been easier to establish a procedural legitimate expectation: aside from the delay that it may cause, there is no obvious down-side to insisting that a decision-maker be in receipt of all the relevant information before making a decision. However, the Courts have always been more reluctant to hold decision-makers to substantive promises. Three

recent cases illustrate the difficulties encountered in establishing a substantive legitimate expectation.

24. In ***R. (on the application of Godfrey) v Southwark LBC*** [2012] EWCA Civ 500, the Appellant appealed against the refusal of an application for judicial review of a decision of the London Borough of Southwark to grant planning permission for the mixed use development of a site known as Downtown in East London. The site had previously included a community hall, and in 2001 and 2002 a number of meetings were held between the Council and a liaison group set up by members of the community to discuss plans for the site. The Council also prepared a project brief for the site, known as the Downtown Brief, in April 2002. This stated that a developer would be expected to carry out improvements to the community hall, or create a new infrastructure that might include building a new community hall.

25. In 2007 the Council's UDP was adopted. This stated that the uses required for the site were as a community centre and a health centre. Three applications were subsequently made for planning permission on the site. The first two provided for a stand-alone community hall of 945sq m, together with a health centre. Both were rejected. The third application reduced the floor space of the community centre to 124sq m, and provided it within the health centre, rather than as a freestanding unit. Permission was granted, and the Appellant sought to challenge this permission.

26. So far as is relevant to this paper, the Appellants claimed that the Council had (i) failed to give effect to an understanding arising from meetings with the liaison group that a new community centre would be provided at the site. It was said that these amounted to material considerations which had not been considered in granting permission and (ii) there was a substantive legitimate expectation, again arising from the engagement with the local community in 2002, that the site would contain a freestanding community hall to be at least as large as the existing hall.

27. In the High Court, Lindblom J. rejected the arguments advanced by the Appellants, stating:

> *"In simple terms, what the council's Planning Committee had to do, and what it did, was to satisfy itself that the proposal before it contained a community centre that was good enough for the purposes for which it was to be provided."*

28. It was emphasized that there was no size requirement for the community centre in the UDP. It was held that there was no substantive legitimate expectation, as there was no public commitment to contain the existing community centre provision.

29. The Appellants appealed. In dismissing their appeal, Pill L.J. emphasized both the difficulty in establishing that a legitimate expectation had been created, and the primacy of the development plan:

> *51 A **rigorous standard is to be applied when a substantive legitimate expectation is claimed on the basis of a representation or promise by a public authority.** The duty of public authorities to exercise powers in the public interest must be kept in mind. Only when, in the court's view, to fail to give effect to the promise would be so unfair as to amount to an abuse of power, should it override other considerations (Murphy). In Begbie , Laws LJ also contemplated situations in which "changes of policy, fuelled by broad conceptions of the public interest, may more readily be accepted as taking precedence over the interests of groups which enjoyed expectations generated by an earlier policy" (1131D).*
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> *52 While the approach to legitimate expectation must be fact sensitive, and the facts in Barker were quite different, that case also demonstrates that an earlier approach of the local planning authority to an issue, even if amounting to a planning policy, cannot have primacy over the statutory duty of the council to assess the current situation.*
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> *53 In determining the application for planning permission, the council was required to perform its statutory duty under section 70(2) of the 1990 Act and section 38(6) of the 2004 Act. Policy 7P of the UDP of 2007 required a community centre as a part of a development at Downtown. The policy did not include a specific requirement as to size. In deciding what provision to make, the council was required to assess current needs, assessment of such needs undoubtedly being a material consideration. With conspicuous care and thoroughness, the officer's report, at paragraphs 248 to 253 assessed those needs. Regard was paid to other community facilities in the area. The report drew attention to the community centre proposed being significantly reduced in size from that in earlier planning applications. A consultation was conducted. The representations made were adequately summarised and responses stated in the officer's report to committee.*

54 The appellant's case rests essentially on the 2002 documents and representations. Probably the appellant's best point is that the expressions "re-provision" of a community hall, and a "new community hall" appeared in 2002 and 2003 documents. The council's then proposal was for a facility substantially larger than that included in the permission now challenged. I approach the issues on an assumption that there was an intention in 2002, made known to community representatives, that a large and separate community centre be included in the development.

55 In my judgment, that falls well below constituting a substantive legitimate expectation. There was a delay of many years before the relevant planning application was considered. In considering it, the council was obliged to have regard to the current development plan which required an assessment of current needs. That was the public duty of the council to the community as a whole and it would have been wrong for the council to have been deflected from performing that duty because a different assessment of community needs had been made and communicated, before the UDP was adopted, in 2002. The 2002 assessment and project are not material considerations in the statutory sense to an assessment made in 2010.

56 The members of the committee were made aware that a larger community centre had been proposed in earlier applications. The council could not be required to carry forward that earlier assessment, even if accompanied by an understanding conveyed to representatives of the community in 2002, into a material consideration in 2010. Even if such an understanding was conveyed, it could not fetter the discretion of the council in the exercise of its statutory duty in present circumstances. There were competing needs for space in the proposed development and other interests, in addition to the need for a community centre, needed to be considered. It was far from being an abuse of power to assess current needs rather than apply an assessment of needs made many years before.

57 If the case fails, as in my judgment it does, as a substantive legitimate expectation, it cannot succeed because of the absence of fuller information about 2002 documents and discussions in the officer's report. Having regard to the current duties of the council, events many years before, if not giving rise to a substantive legitimate expectation, cannot be said to be material considerations which it was the duty of the council to take into account.

30. In short, in determining the application for planning permission, the local authority was required only to perform its statutory duties, which required consideration of the development plan as the starting point. The UDP required the provision of a community centre, but did not include a specific requirement as to size. Even if an understanding was conveyed to representatives of the community in 2002, this was not sufficient to create a substantive legitimate expectation, could not fetter the Council's statutory duty in any event, and was not a material consideration in 2010. The key

consideration was current need, and in this was assessed by the planning officer "with conspicuous care and thoroughness".

31. The "rigorous standard" to be applied when a substantive legitimate expectation is claimed can also be seen from ***Keevil v Secretary of State for Communities and Local Government*** [2012] EWHC 322 (Admin), where the Claimants appealed against the decision of an Inspector dismissing their appeal against an enforcement notice relating to their 29 hectare farm. The Claimants had obtained a certificate of lawful use ("CLU") in respect of the farm which provided that it could be lawfully used to station two residential caravans. The CLU was granted for *"all that land ...shown edged red on the attached plan"* but at the time the certificate was issued there was no plan attached.

32. A month later, the Claimants were granted a site licence under the Caravan Sites and Control of Development Act 1960 s.3 in respect of the whole farm, and stationed two caravans in fields to the south of the site. The local authority issued an enforcement notice on the basis that the land to which the CLU applied was an area restricted to the farmyard, rather than the fields to the south of the site.

33. On appeal against the notice, the Inspector found in favour of the local authority and held that the certificate of lawfulness was intended to refer to a plan which the appellant had sent to the local authority before it was issued which showed that it related only to the farmyard.

34. Two of the Claimants' grounds are relevant for this paper.

35. First, it was submitted that on granting a site licence for the entre farm, the local authority was estopped from contending that the CLU only applied to the farmyard, since it was a necessary pre-condition to the grant of the licence that there was a CLU in relation to the land in question. The way the argument was put was summed up by the Inspector as follows:

48. For the appellants, it was qualified that the form of estoppel being asserted is estoppel per rem judicatum or 'issue' estoppel; namely that the issue had already been settled and it was therefore not possible to re-open it or come to a different conclusion on the legality of the development that has taken place.

49. Reference is made to the case of Thrasyvoulou v SSE [1990] 1 All ER 65 which remains good authority that a party cannot re-open legal issues which have previously been determined when there has been no material change in circumstances. In that case all the judges agreed with the leading judgement of Lord Bridge who held that the doctrine of res judicata rested on the twin principles that it was in the interests of the State that there should be an end to litigation and that an individual should not be vexed twice for the same cause. Those principles were of such fundamental importance that they could not be confined to the private law field. In principle, they must apply to adjudications in the public field. In relation to adjudications subject to a comprehensive, self-contained statutory code the presumption must be that where the statute had created a specific jurisdiction for the determination of any issue which established a legal right, the principle of res judicata applied to give finality to the determination, unless an intention to exclude the principle could properly be inferred."

36. The Inspector distinguished ***Thrasyvoulou*** from this case on the basis that the issue of what was lawful in planning terms had not been previously settled or determined. The grant of a licence by the Council was an administrative determination under another piece of legislation.

37. This analysis was supported by Dobbs J. It was held that the decision to grant the licence was made based on an erroneous understanding of the legal position and was granted without robust investigation by the Council officer concerned. Further, the issue of the licence was an administrative rather than a judicial act and therefore an issue estoppel did not arise.

38. The second main argument made by the Claimants was that they had a legitimate expectation that the local authority would not grant a site licence in relation to a smaller area than that for which it had issued the certificate. This argument was not accepted by Dobbs J. First, the certificate was not unambiguous. Second, if the legitimate expectation was to be derived from the grant of the licence, this was in error: *"The plan submitted by the claimants, it would appear, misled the relevant officer into thinking that the certificate was without limit. In the circumstances it seems to me that*

declining to fix the Council with the consequences of its mistake cannot be said to be irrational."

39. Further, it was held that even if the Claimants did have a legitimate expectation, they would still need to demonstrate that it would be unfair for the local authority to resile from the expectation and that there was no overriding public interest justifying this. It was held that the farmland was located in the Green Belt and in an Area of Outstanding Natural Beauty and that the Inspector had been entitled to take this into account in considering the public interest.

40. The third example of the difficulties in establishing a substantive legitimate expectation is ***R. (on the application of St John's School, Northwood) v Hillingdon LBC*** [2011] EWHC 3261 (Admin). In this case, the Claimant school applied to judicially review the terms of an enforcement notice issued by the local planning authority. The school had for a number of years operated with staff and pupil numbers in breach of a condition attached to its planning permission. The school was asked by local authority to regularize the position. The planning application was refused, upheld on appeal, and a further challenge to this under s. 288 was awaiting determination at the date of the hearing. Following the unsuccessful appeal, a meeting was held between the school and the local authority. After the meeting, the school wrote to the local authority proposing a reduction in pupil numbers over a five-year period, but stating that it would be unable to function at all without retaining current staff numbers.

41. The local authority considered whether to commence enforcement action. It was recommended that the school should reduce pupil and staff numbers by 2012, and Breach of Condition Notice was issued.

42. One of the grounds of appeal was that the local authority had made representations to the school at the meeting that it would accept an extended compliance period, and that this generated a legitimate

expectation. After accepting that there was no reason why representations made in the course of without-prejudice discussions could not form an estoppel or legitimate expectation (following ***Hodgkinson & Corby Ltd v Wards Mobility Services Ltd (No.2)*** [1997] F.S.R. 178), it was held that, as a matter of fact, a clear unambiguous representation had not been made at the meeting:

> *41 In my judgment, it is clear that none of the passages which I have quoted and which form the high watermark of the claimant's argument in this regard can possibly amount to the kind of clear and unambiguous statement, devoid of relevant qualification, which would be required in order to found a legitimate expectation. At most, as it seems to me, the Council's officers were doing what one would reasonably expect them to do, which was to ask pertinent questions such as when relevant information about the proposed phased reduction could be put by the school before the relevant committee. At most, the note records that the parties were saying that they would consider the timeframe outside the meeting. Generalised references to what would be reasonable and practicable, it seems to me, again go no further and no less than one would expect. Everyone would be agreed that what has to be done is reasonable and practicable. Where there can often be critical differences is where there are differences of view about what will constitute a reasonable timeframe and what would constitute practicable steps in the circumstances of a particular case. It is precisely that kind of dispute which has arisen in the present case and which has no doubt generated the present litigation.*
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> *42 But there is nothing, in my judgment, in the note of attendance prepared on the claimant's own behalf of the meeting of 10 August 2011 which it can be said founds a legitimate expectation which would be of assistance to the claimant. There is nothing there which constitutes a promise or a representation by the Council that it would not issue a Breach of Condition Notice in the terms which eventually it did.*
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> *43 That conclusion on the facts of this case renders it unnecessary for me to consider a question which might have arisen in other circumstances, namely whether even a clear and unambiguous representation, devoid of relevant qualification, if made by the officers could bind the planning authority as a matter of law. That might depend in other cases on facts which it is not necessary to go into and have not been placed before this court. Such facts might include, for example, the question whether the officers had any relevant delegated authority, actual or ostensible, to make such representations on behalf of a local authority. As I have said, it is not necessary for the purpose of the present case to digress into such areas. They do not arise on the facts of this case in the light of the clear conclusion to which I have come that the claimant's case does not begin to get off the ground on the notes which it has placed before the court.*

43. As such this ground failed, together with the Claimant's other grounds, and the application was dismissed.

44. These cases need to be distinguished from the situation where there is a previous decision which establishes something as a clear benchmark of acceptability. In ***R (Creed-Miles) v. Southwark*** **[2013] EWHC 853**, an Inspector determining a previous appeal relating to the location of barges in front of Creeds Wharf on the River Thames had concluded that anything less than a minimum separation distance of 21 m would unacceptably prejudice the living conditions of the occupiers of Creeds Wharf. In subsequent correspondence with the Council, the Claimant had sought to agree a plan which showed the "exclusion zone" which resulted from the application of this. Although the Council did not specifically agree the plan the Claimant had submitted, the letter it wrote gave him comfort that both he and the Council understood the Inspector's decision in the same way. However, the Council subsequently granted permission for development within what the Claimant thought was the agreed exclusion zone.

45. In the High Court, the Claimant advanced an argument based on legitimate expectation, but the judge did not find it necessary to decide the case on that basis. Rather, the judge resolved an argument between the parties about exactly what the previous inspector had meant, and on that basis concluded that the LPA had allowed development within the 21m area which the Inspector had said would unacceptably prejudice the living conditions of the residents. There was, he said, no basis for ignoring what the inspector had said in this regard.

46. Thus expressed, the decision appears to turn more on the uncontroversial argument that the LPA had erred in law by misunderstanding what the previous Inspector had decided than on any principle of legitimate expectation.

Consultation

47. In ***R. (on the application of Halebank PC) v Halton BC*** [2012] EWHC 1889

(Admin) (discussed above) the parish council also ran an argument based on art. 6 of Directive 85/337, which reads as follows:

> *1) Member States shall take the measures necessary to ensure that the authorities likely to be concerned by the project by reason of their specific environmental responsibilities are given an opportunity to express their opinion on the request for development consent. Member States shall designate the authorities to be consulted for this purpose in general terms or in each case when the request for consent is made. The information gathered pursuant to Article 5 shall be forwarded to these authorities. Detailed arrangements for consultation shall be laid down by the Member States.*
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> *4) The public concerned should be given early and effective opportunities to participate in the environmental decision-making procedures referred to in Article 2(2) and shall, for that purpose, be entitled to express comments and opinions when all options are open to the competent authority or authorities before the decision on the request for development consent is taken.*

48. Article 6 of Directive 85/337 has been implemented, inter alia, in the Town and Country Planning (Development Management Procedure) England) Order 2010 No 2184 ("DMPO 2010") and the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 No 293 (EIA Regs).

49. The Parish Council argued that Article 6 is of direct effect, notwithstanding the time limits implemented in the DMPO 2010, and that those time limits were insufficient to provide adequate consultation. Responding to this argument, HHJ Gilbart said:

> *62 …the answer to that question depends on whether, in the particular circumstances of a particular development, the consultation has been such as to permit "early and effective opportunities to participate," as per Article 6(4). It is not enough that some comment or opinion could be expressed: the Article anticipates that the maker has had sufficient opportunity to be able to make an informed comment or opinion. If not, then it could not be said to be an "effective" opportunity to participate or to make a comment of utility for consideration when the authority makes its decision.*
>
> *63 I therefore decline to regard the setting of the consultation period in the domestic regulations as conclusive on the issue of adequacy. If the circumstances prevented the consultation from being effective, then there could be a breach of Article 6. Mr Fraser accepted that the local planning authority had the power to extend the period (or to put it another way, postpone the Committee meeting). The rationale of that power can only be based in the concept that in some cases*

circumstances may be considered to require longer periods for representations to be made.

64 But even if I am wrong about the effect of Article 6, HBC was under a duty to address arguments raised before it about the extension of consultation periods. It was not entitled to assume that because it had expected in advance that a period of 21 days would be enough, therefore it must still be so regarded when it had now received evidence to the contrary.

50. In ***R. (on the application of Wakil (t/a Orya Textiles)) v Hammersmith and Fulham LBC*** [2012] EWHC 1411 (QB); [2012] J.P.L. 1334 the Claimants applied for judicial review of the local authority's decision to produce and adopt a purported supplementary planning document (SPD). One of the grounds of appeal was that the decision to issue the SPD was flawed by failures in the consultation procedure.

51. Wilkie J noted that public consultation had to be undertaken at a time when proposals were at a formative stage and giving those consulted adequate time to give intelligent consideration and respond, per ***R. v North and East Devon HA Ex p. Coughlan*** [2001] Q.B. 213. It was held that, whilst the Claimant had been omitted from participation in an independent survey conducted in December 2009, that inadvertent failure did not infect the consultation process since, by the time the local authority took its decision in October 2010, the Claimant had had ample opportunity to make their views known and had done so:

I have concluded that there was a failing in respect of that early stage of the consultation in that the businesses on Goldhawk Road were omitted from participating in the survey conducted by M&N Communications. In my judgment, that was a failing, albeit an inadvertent one, which does not appear to have been picked up at any stage. The question for me is whether that failure, at the preliminary stage, so infects the consultation process that, applying the principles identified in Coughlan, the decision made following it falls to be quashed.

In my judgment, by the time the Council came to take its decision on the 27th October 2010, the Claimants had ample opportunity to make known their views on the issues which were particularly important to them and they had done so. The fact that those views had been communicated to the Council and had been subject to the kind of analysis which the statutory scheme requires, means that their accidental exclusion from participating in the earlier opinion survey had diminished to the point of insignificance.

52. Accordingly, this ground failed.

53. Consultation issues also arise in matters relating to national policy. There are two recent examples of this.

54. First, in ***R. (on the application of Milton Keynes Council) v Secretary of State for Communities and Local Government*** [2011] EWCA Civ 1575 the question for the Court of Appeal was whether the failure to directly consult local authorities during a consultation process for the making of statutory instruments creating a permitted development right enabling a change of use from use as a single dwelling to use as a small house in multiple occupation rendered the consultation process unlawful.

55. A comprehensive consultation exercise had been held in 2009 regarding HMOs. This included three options. Option 1 was to make no change to the planning legislation. Option 2 was to amend the Use Classes Order to introduce a new HMO use class. Option 3 was to amend the Use Classes Order, per Option 2, and also to amend the GPDO to allow for changes of use between a dwelling and an HMO to be permitted development. Only 1 percent of those consulted favour option 3. Option 2 was the most popular with 92% in favour. Statutory Instruments entered into force giving effect to Option 2.

56. The new Government then entered into power, with the view that Option 3 was the preferred solution. A further limited consultation exercise was carried out in 2010, in which the views of the Local Government Association were canvassed, but not the views of local authorities themselves.

57. At first instance, and before the Court of Appeal, the local authorities argued that the Government had totally changed policy since the April 2010 measures and, before that was done, a fuller consultation had been required. Since the questions posed in the limited consultation in 2010 differed from those posed in 2009 and required a response from local planning authorities,

all local planning authorities should have been consulted.

58. The appeal was dismissed. Pill L.J. held that the fairness of the 2010 consultation had to be considered in the context of a very full consultation having been conducted in 2009:

> *32 I do not accept the submission that a decision-maker can routinely pick and choose whom he will consult. A fair consultation requires fairness in deciding whom to consult as well as fairness in deciding the subject matter of the consultation and its timing. The Buckinghamshire case was in a different statutory context in which it was decided that the local authority need not be consulted. No general principle that it is for the decision-maker alone to decide whom to consult can be extracted from that decision.*
>
> *33 The particular context must, however, be considered. The fairness of the 2010 consultation must be considered in the context of a very full consultation having been conducted in 2009. In that consultation, over a longer period, the council and all local planning authorities were given an opportunity to make representations upon a series of options, which included Option 3 subsequently adopted by the Secretary of State in September 2010. Option 3 was placed before them in 2009 and detailed submissions as to its adverse impact, and as to specific problems likely to arise, could have been, and probably were, made. I do not accept that, upon a change of Government policy, the entire process needed to be repeated. In 2010, the Government was entitled to conduct a more limited consultation, both as to the identity of consultees and the content and duration of the consultation.*
>
> *34 The council became aware of the 2010 consultation, as might be expected given the parties consulted. Having worked on the issue during the previous year, it could be expected to have relevant information available and to react promptly. The council did make representations, though directed primarily to the fundamental question whether the political decision was a sound one.*

59. Pill L.J. commented that the strongest part of the local authorities' argument was that they were best placed to answer the questions posed in the 2010 consultation. In regards to this, the Secretary of State submitted that the decision to implement Option 3 was a political decision and that the comments of Laws LJ in ***R v Secretary of State for Education and Employment ex parte Begbie*** [2000] 1 WLR 1115, at 1130, of the statement in Wade and Forsyth *Administrative Law*, 7th edn (1994), p.404 are relevant:

> *"Ministers' decisions on important matters of policy are not on that account sacrosanct against the unreasonableness doctrine, though the court must take special care, for constitutional reasons, not to pass judgment on action which is essentially political."*

Laws LJ added, at page 1131C:

> *"The more the decision challenged lies in what may inelegantly be called the macro-political field, the less intrusive will be the court's supervision."*

60. This submission was accepted:

> *36 The central issue to be decided by the Secretary of State was whether to permit a change of use from a dwelling house to a HMO without the need for planning permission. That required what was, adopting the expression of Laws LJ, a macro-political decision. It was to be taken and implemented, it was stated, unless "significant issues" or "significant new problems", the expressions used in the Ministerial briefing, arose during discussions with key stakeholders. It appears to me from Ms Turner's evidence, and the questions posed, that the consultation was conducted mainly as a public relations exercise because implementation of Option 3 "would have to be sensitively handled." It was still capable of being fair. The possibility was left open, in the framing of the questions, that significant issues would arise which required further consultation. The council has been unable to identify any such matters and I am not persuaded that they existed.*

61. Overall, Pill L.J. at [38] summed up the position as follows:

> *"That recent and comprehensive consultation in 2009 is in my judgment the key to the decision in the present situation. The Secretary of State was minded to make the orders challenged notwithstanding the strong, articulated objections to them by local planning authorities, of which he was aware. The decision to make them was a political decision which the Secretary of State was entitled to make. In the circumstances, he was then entitled, first, to make the consultation a limited one and, secondly, to decide that there was no evidence of significant new issues arising, which required fuller consultation."*

62. Consultation also featured among the grounds in the recent ***HS2*** challenge: ***R (HS2 Action Alliance & others) v. Secretary of State for Transport*** **[2013] EWCA Civ 920**. Three particular complaints were made:

    a. It was unfair to consult on the principle of HS2 without publishing the details of the route for Phase 2.
    b. The decision to reject an alternative put forward by the objectors (which involved optimizing use of the existing WCML) was based on reports from Atkins Consulting and Network Rail on which the objectors had never been given the opportunity to comment.
    c. The SoS had failed to consider part of the objector's consultation response.

63. The first of these was rejected on the simple basis that, since it was perfectly lawful to consult on the principle of a proposal before consulting on detail, there was no reason why the SoS could not consult on the principle of HS2 and the detail of Phase 1, but leave the detail of Phase 2 to a later date. This was so even though knowledge of the detail was likely to affect the nature and degree of opposition to the principle. That fact did not make the process so unfair as to be unlawful.

64. The second limb was also rejected, since the issue of commuter capacity (which was relied on by Atkins and Network Rail) had been set out in the original consultation document. The Court of Appeal said it should have been obvious to consultees that any alternative proposal involving use of the existing lines would need to address this.

65. In relation to the third limb, it was common ground that, due to an administrative oversight, a 10-page consultation response was not included in the summary of consultation responses prepared for the SoS, and was therefore not taken into account in reaching the decision on HS2. At first instance, Ouseley J had said that on the face of it, this was unfair, but that all the important issues raised in the document had in fact been considered by the SoS. There was nothing else in the response which "had the potential to tilt the balance in favour of the hub option".

Fairness

66. In ***R. (on the application of Tait) v Secretary of State for Communities and Local Government*** [2012] EWHC 643 (Admin) the Claimant appealed against a decision of an Inspector upholding an enforcement notice. In the course of the appeal, the Claimant had received a letter from PINS stating that an accompanied site visit would be undertaken and that if she failed to attend the site visit might proceed in her absence. The Claimant stated that she had notified the Inspector that she would not be available on the

specified date and had understood that the site visit would not be carried out, although as a matter of fact this version of events was not accepted by Vincent Fraser QC (sitting as a Deputy High Court Judge).

67. The Inspector carried out the site visit, in the Claimant's absence, on the date specified in the letter together with a representative of the local planning authority. The enforcement notice was upheld, subject to variations.

68. One of the Claimant's grounds was that the site visit should not have been carried out in the presence of a local planning authority representative when she was absent. After considering PINS guidance, the letter sent to the Claimant, and existing case law, it was found that it was *"clear practice"* that when an accompanied site visit is undertaken there must be representatives from both parties and that the Claimant had a legitimate expectation that the Inspector would not undertake an accompanied site visit in her absence

69. The Judge then considered whether the Claimant had suffered any prejudice from the accompanied site visit, undertaken in her absence and held that there was as matters were raised during the visit on which the Claimant might have wished to express a view. However, importantly, it was held that there was no need for the Claimant to demonstrate actual prejudice:

> *"70 However, I am not convinced that there is a need in actual fact to identify any particular prejudice in matters such as this. The authorities that I have referred to have made it quite plain on a number of occasions that the judge was not convinced that there was any prejudice at all, but still found it necessary in the circumstances of the case to quash the decision, because of course it is most important in matters such as this that justice is seen to be done. The approach that is clearly generally taken is that if an inspector has a conversation about the case with one party in the absence of the other that raises a real risk that justice will not be seen to be done.*
>
> *71 It may be the case that the appellant has not in fact suffered any prejudice as a result of the conduct of the site visit, although as I have indicated I think there is actually some ground for saying that she has, but as the authorities to which I have referred demonstrate, that is not the appropriate test. In this case the Inspector undertook an accompanied site visit and discussed the case with the Local Planning Authority's representative in the absence of any representative from the appellant. That fails to accord with the Planning Inspectorate's own guidance, the advice provided in the letter of 16 July 2009 and the various authorities to which I have referred.*

72 In the circumstances of this case I do conclude that there is at the very least a real risk that the appellant was prejudiced and that an objective observer would conclude that this was not a fair procedure and there was consequently a real danger of bias. In those circumstances, there is a clear error of law in the conduct of this matter and on that ground the appeal is allowed."

70. In ***PNH (Properties) Ltd v Secretary of State for Communities and Local Government*** [2012] EWHC 1998 (Admin), the applicant applied to quash a decision of an Inspector upholding a refusal to grant outline planning permission for the development of a woodland area, including the building of two dwellings. Permission had been refused on the basis that the development would be detrimental to the overall character of the woodland. On appeal to the Secretary of State, the applicant submitted a s. 106 agreement covenanting to deliver to the local authority a satisfactory woodland management agreement prior to the commencement of development. The Inspector dismissed the appeal on the basis that there was no guarantee that the measures set out in the agreement could be enforced.

71. The applicant appealed on the grounds that, inter alia, the Inspector should have raised the issue of the enforceability of the planning obligation on appeal and given an opportunity to respond. The application was refused by Clive Lewis QC (sitting as a Deputy High Court Judge) on the basis that the Inspector had not raised a new point which the applicant could not reasonably have been aware was an issue:

The Inspector was not, in my judgment, raising a new issue about the enforceability of the planning obligation. There was no obligation on him to go back to the Claimant and point out the deficiencies in the planning obligation that the Claimant had submitted. The Inspector was, in truth, adjudicating on the adequacy of what the Claimant had put forward as a means of achieving benefits which the Claimant said would outweigh any harm. In my judgment, therefore, there was no procedural unfairness in the way in which the Inspector dealt with the planning obligation submitted by the Claimant.

72. Moreover, it was also held that the Inspector's decision had not depended on the problems relating to the enforceability of the s. 106 agreement. As such,

even if fairness did require the problems of enforceability to be raised with the applicant, the ground would have failed in any event.

73. Alternatively, the applicant raised a number of discrete complaints about the way in which the hearing was conducted. The Deputy Judge first commented on the nature of the evidence relied upon to support this ground:

> *More importantly, the dictated note does not only set out factual material but includes comments made by Mr Leay (see for example, paragraph 12 of the note, which records that the Inspector "indicated (with some disdain it seemed) that the last Inspector was an Architect"). The same is true of the letter of complaint dated 5 April 2011 (after the decision had been published) and which sets out in part the views of the writer on the Inspector's conduct. By way of example, it says that the Inspector "responded dismissively" to the Claimant's argument without recording in fact what was said. That is also the case in part of a third document relied upon, an e-mail of 21 February 2011, sent before the decision was published, where the writer complains that the Inspector "appeared impatient". In dealing with complaints of procedural unfairness, which are based on claims about what an inspector said or did at a hearing or site visit, it is important to separate out the actual facts from comments or the views of one of the parties on those facts. A court can then consider whether the facts show that there was procedural unfairness in the way in which the arguments and evidence of the parties was dealt with.*

74. Then, after considering the complaints raised, he found that taken individually or cumulatively, they did not demonstrate any procedural unfairness.

75. In ***Sea Estates Ltd v Secretary of State for Communities and Local Government*** [2012] EWHC 2252 (Admin) the applicant applied to quash the decision of an Inspector dismissing its appeal against the refusal to grant planning permission for a building adjacent to a Grade II listed church. The application for permission had been submitted to the local authority, together with a plan which was subsequently amended on a number of occasions in the course of negotiations with the local authority. The appeal proceeded by way of written representations and was refused because of the effect of the proposed development on the setting of the church and the character of the street. In the course of her decision, the Inspector decided that it was inappropriate to consider the revisions to the plan.

76. It was argued by the applicant that the Inspector had erred in refusing to consider the revisions to the plans in reaching her decision. However, since the local authority had refused permission based on the original plan it was held that there was no merit in arguing that the Inspector refused to consider amendments to the plans that were properly before her.

77. It was also said that it was procedurally unfair to consider the appeal on the basis of written representations rather than in an oral hearing. This argument was also unsuccessful:

> *40 Ground three is a complaint that there was no oral hearing. The Claimant's request for an oral hearing was considered by the Secretary of State. A decision was made for the appeal to be conducted by written representations as provided by section 319(2)(C) . That decision appears to have been notified on 23 March 2010.*
>
> *41 I am satisfied that, in the circumstances, procedural fairness did not require an oral hearing and that the written representation procedure was appropriate. The main issue was correctly identified in paragraph 5 of the appeal decision. That was an issue that was unlikely to be illuminated by an oral hearing.*
>
> *42 In any event, in the Planning Appeal Form that was advanced to set in motion the planning appeal, the question as to the hearing procedure was answered implicitly with a request for a hearing rather than a decision on the documents, but the question, "Is there any further information relevant to the hearing which you need to tell us about. If so, please explain below," was answered "no" and the space for comment was left blank.*
>
> *43 It seems to me that it is incumbent on appellants if they wish to have an oral hearing to set out in, at least in brief summary, the reasons why.*

78. In ***Dudgeon Offshore Wind Ltd v Secretary of State for Communities and Local Government*** [2012] EWHC 861 (Admin), the Claimant appealed against the dismissal by the Secretary of State of its appeal against a local authority's refusal of planning permission to build an electrical substation. At the appeal, the Inspector had refused to hear submissions regarding the suitability of alternative sites, and assured the parties that he would not take this into consideration. However, his report commented on the availability of alternative sites as a reason for dismissing the appeal, stating that:

> *"…there would be substantial environmental consequences and these indicate that planning permission should be withheld. Subject to further assessment, there may be*

alternative sites, although at present it cannot be determined that any would necessarily offer more attractive solutions in planning terms. Nevertheless, in current circumstances the possibility of locating an acceptable site elsewhere tells against acceptance of the environmental consequences that would be associated with this particular development at Little Dunham."

79. The question of "alternative sites" was named by the Secretary of State as one of the "main issues" in his agreeing with the Inspector's report and dismissing the appeal. He held that *"there is a possibility of locating an acceptable site elsewhere, and that this tells against acceptance of the environmental consequences, in particular the visual impact on the landscape… that would be associated with this particular location for the proposed development."*

80. The Secretary of State argued that in these passages, the possibility of alternative sites was not being weighed into the planning balance in considering the environmental effects of the development. Rather, the Inspector had decided that planning permission should be refused, on the basis of the environmental impact of this site alone. The reference to alternative sites is in the context of considering a possible argument that this was the only site where the substation could be located, notwithstanding the environmental effects. It was said that there was no "substantial prejudice" to the Claimant, in terms of s. 288(5)(b), in not being able to make this argument since it was bound to fail.

81. This was not accepted. It was held that there was unfairness to the Claimant in not being able to make submissions on alternative sites. As to whether this had amounted to "substantial prejudice", it was noted that this requirement only applied where there had been a breach of one of the "relevant requirements" in relation to the decision, and that a breach of natural justice alone result in the decision being quashed under s. 288(5)(b):

The substantial unfairness requirement applies only to limb (ii), a failure to comply with relevant requirements. But a failure to comply with natural justice may also be seen properly as a limb (i) case since the decision maker has no power to act outside natural justice…In any event, it seems to me that where a party has been deprived of

the opportunity to make representations on a matter which the decision-maker has gone on to take into account, that is itself amounts to a substantial prejudice unless the breach is purely technical or could not possibly have made a difference. It is not necessary for the aggrieved party to show that he would have succeeded on the point or even that, prima facie, he would have done so.

…In truth, the Secretaries of State's claimed analysis of the alternative sites issue and its impact is over-sophisticated and fails to dislodge the essential point. The decision-makers took into account a matter on which Dudgeon was not given the opportunity to be heard. For that reason Ground 1 succeeds and the Secretaries of State's decision must be quashed.

82. In ***R. (on the application of Ashley) v Secretary of State for Communities and Local Government*** [2012] EWCA Civ 559; [2012] J.P.L. 1235, the Appellant appealed against the decision at first instance ([2011] 14 E.G. 94 (C.S.)) upholding the grant of planning permission on the basis that there had been no unfairness in the conduct of the planning appeal. In this case, the developer had applied for planning permission for a residential development adjacent to the Appellant's property. The Appellant had objected to the development on the ground that the parking area would result in excessive noise. The application was refused on this basis. The developer appealed, and the appeal proceeded by way of written representations.

83. The following sequence of events then occurred:

(1) The developer submitted general grounds of appeal unsupported by expert evidence.

(2) The main parties submitted their statements by the deadline. The developer's statement contained for the first time a copy of a noise expert's assessment.

(3) The main parties' statements were not sent to third parties.

(4) Simultaneously with the deadline for the submission of statements, the deadline for the submission of third party comments on the appeal passed.

84. The Inspector allowed the appeal and granted permission for the development.

85. The Appellant sought to quash the decision on the basis that it was contrary to the requirements of natural justice for the appeal to be determined by reliance on expert noise evidence which was produced for the first time in the developer's written submissions, and which was therefore not available to interested parties at any stage of the written representations procedure.

86. At first instance, the grant of planning permission was upheld, with Robin Purchas QC (sitting as a Deputy High Court Judge) finding that the Appellant could have found out about the expert report if he had visited the local authority's planning office to inspect the documents that were to go before the inspector in the appeal, and then requested the opportunity to make further representations.

87. The Appeal was allowed. Where the written representations procedure was adopted, the guidance strongly discouraged an interested person from making enquiries of a planning officer after the six-week period for representations ended. The Appellant had been told in express terms that any representations made after October 29 would not be considered by the inspector. In those circumstances, the Appellant was not to blame for failing to inspect evidence submitted on the last possible day:

> *32. I have come to the conclusion that the hearing was, in the circumstances, unfair. My conclusion depends on a combination of circumstances which may occur only rarely. First, a reason for refusal was directed specifically to particular premises, 136 Domonic Drive, to the amenity of which particular attention could be expected to be given during the appeal process. Secondly, the noise issue which was, in the event, crucial, had not been the subject of specific consideration in submissions to the planning board, either by Taylor Wimpey or by the council. Thirdly, expert evidence was neither mentioned nor was it specifically contemplated in the ground of appeal submitted. Fourthly, the written representation procedure had been selected on the assumption that disputed expert evidence was not to be involved in the appeal. The appellant could not be expected to anticipate that such evidence would be crucial to the appeal decision. Fifthly, the appellant was told in terms that 29 October was the "final submission date". The appellant should have been told of the committee report and given an opportunity to respond.*
>
> *33. Attractive though the submission is that the appellant had only himself to blame because of his failure to inspect the later evidence at the council offices, he does not appear to me in the particular circumstances to have had that "fair crack of the whip" to which he was entitled (Lord Russell in Fairmount Investments Ltd v Secretary of*

State for the Environment [1976] 1 WLR 1255). It follows that I respectfully disagree with the judge's finding that it was not unfair to have expected the claimant or the interested parties in the circumstances to have availed themselves of those opportunities; that is the opportunities "to enquire what representations had been made by [Taylor Wimpey] or to inspect the council's file in that respect."

88. It was also held that the written representations procedure was inappropriate to determine the appeal:

26. The written representation procedure is designed to enable an appeal to proceed "quickly and fairly" and I emphasise the word "fairly" (paragraph 4.1.1. of the Guidance). The criteria for determining the procedure for a planning appeal is at Annex C of the Guidance, which states that written representations would be the most appropriate procedure if "the Inspector should not need to test the evidence by questioning or to clarify any other matters." It is stated that an inquiry, an alternative procedure, would be the most appropriate procedure, where "evidence needs to be tested", if both "the issues are complex and likely to need evidence to be given by expert witnesses."

27. I regard that Guidance as a strong indication that, had challenge been made to the expert acoustic report, a different procedure would have been followed. That view is supported by the Inspector, finding it appropriate to state, at paragraph 18, that he relied on the report "in the absence of any contrary evidence."

89. Finally, it was recommended that the guidance be reviewed:

31. It is not necessary to my conclusion but in my respectful view, the Planning Inspectorate's Guidance should be reviewed with a view to preventing the unfairness which, in my judgment, may arise if it is followed. There are circumstances in which, to avoid unfairness, representations by interested parties outside the six-week period will be appropriate. The view I have formed that in the circumstances the procedure followed was unfair is given further weight, in my view, by reference to the Guidance which has a potential for unfairness. The contents of the Guidance may have influenced the Inspectorate when failing to take action in a situation where written expert evidence had for the first time been submitted by the appellant on the last day of the six week period. No action was taken.

90. In ***Cubitt-Smith v Secretary of State for Communities and Local Government*** [2012] EWHC 68 (Admin) the decision of an Inspector on appeal was challenged on the basis that he had failed to take into account the views of local residents in reaching his decision. In particular, it was said that the Council's summary of objections received wrongly classified some representations as objections, and that the schedule of correspondence

attached to the front of the consultation representations was confusing and misleading.

91. It was held that there was no basis upon which to conclude that the Inspector had not taken into account the views of local residents in reaching the decision. Whilst Lang J accepted that the Council's summary of the response to the consultation was insufficient to give a full and accurate picture of the responses received and that the schedule of correspondence was confusing, it was found that the Inspector would not have relied on either of these documents in making his decision since he had the benefit of the original source material upon which these summaries were based.

PAUL BROWN QC

Landmark Chambers
London
18 September 2013