CONSULTATION: THE LEGAL REQUIREMENTS[1]

Introduction

1. Public participation and consultation lie at the heart of the statutory planning process. This talk considers requirements for consultation in a number of different planning contexts and the circumstances in which it has been argued that consultation procedures have been flawed, leading to legal challenges.

2. A legal requirement for consultation can be found in a number of statutory provisions, across the entire planning regime, including applications for planning permission and development consent, the production of development plans and other planning policy documents, strategic environmental assessment and environmental impact assessment.

3. In cases where there is no statutory requirement to undertake a consultation process, a number of principles are set out in the case-law to ensure that consultation which is undertaken is adequate and fair.

4. It is not possible in this talk to cover all of the detailed requirements across the various elements of the planning process; rather I will focus on the main legal issues which have arisen more recently, after setting out a brief overview of where the general statutory duties are found.

Overview of main statutory provisions

Localism Act 2011

5. Section 122 of the 2011 Act introduced a requirement upon prospective developers to consult local communities before submitting applications for certain developments of a description specified in a development order, by inserting new provisions into the Town and Country Planning Act 1990 ("the 1990 Act").

6. Section 61W of the 1990 Act requires a prospective developer to carry out pre-application consultation by publicising a proposed application for planning permission in order to bring it to the attention of a majority of the persons who live at, or otherwise occupy premises in the

[1] I am grateful to Sonal Barot of chambers for her assistance in the preparation of this paper.

vicinity of the land, [s. 61W(2)]. The proposed developer must also consult specified persons (as specified in a development order) about the application: [s. 61W(3)].

7. By virtue of s. 61W(4), the publicity under s. 61W(2), must set out how the proposed developer ("P") may be contacted by persons wishing to comment on or collaborate with P on the design of the proposed development. The publicity must also give such information about the proposed timetable for the consultation as is sufficient to ensure that persons wishing to comment on the proposed development can do so in good time.

8. Section 61W(7) of the 1990 Act provides that a person subject to the duty to consult under that provision must have regard to any advice given by the local planning authority as to good local practice.

9. Section 61X of the 1990 Act applies where a person has been required by s. 61W(1) to carry out consultation on a proposed application for planning permission and proposes to go ahead with making an application for planning permission (whether or not in the same terms as the proposed application). That person must, when deciding whether the application that the person is actually to make should be in the same terms as the proposed application, have regard to any responses to the consultation that the person has received.

10. Section 61Y of the 1990 Act enables the Secretary of State to set out further provisions as to how the consultation required under s. 61W should be undertaken in practice.

11. The impact assessment associated with the Localism Bill looked at what the impact would be if the measure applied only to large-scale major applications, in particular: residential developments of more than 200 homes or where the site area was 4 ha or more; and any non-residential developments providing 10,000 sqm or more of new floorspace, or with a site area of 2 ha or more. The government has stated its intention to make full and outline applications subject to this requirement, but not householder applications, LDC applications, prior notification applications, listed building and conservation area applications and section 73 applications.

12. Development order requirements for pre-application consultation have been introduced in windfarm cases where development comprises the installation of more than 2 turbines or where the hub height of any turbine exceeds 15 metres.[2] The relevant application for permission must demonstrate how account was taken of consultation responses.

[2] See Town and Country Planning (Development Management Procedure) (England) Order 2010/2184, art.s 3A and 3B, inserted by the Town and Country Planning (Development Management Procedure and Section 62A Applications) (England) (Amendment) Order 2013/2932 art.2(2) (December 17, 2013).

13. These changes extend the concept of pre-application consultation which was a key element of the approach taken by the Planning Act 2008 to nationally significant infrastructure projects.[3]

Applications for development consent under the Planning Act 2008

14. At the heart of the 2008 Act was the notion of "front loading" the preparation of an application for development consent. The purpose was to ensure that detailed matters were consulted upon and solutions or mitigation negotiated with the local community and other consultees before the submission of the application for development consent.

15. This included requirements placed upon developers to:
    a. conduct pre-application consultation with statutory consultees, local authorities, landowners and significantly affected persons (under section 42 of the Act);
    b. conduct pre-application consultation with the local community in accordance with a Statement of Community Consultation (the content of which must be the subject of consultation with the local authority and then publicised)(see section 47 of the Act;
    c. further pre-application publicity under section 48, coupled with a duty to take account of responses under section 49;
    d. prepare a consultation report under section 37, which should explain how the applicant has responded to representations made in response to the consultation.[4]

16. These more recent developments in pre-application consultation follow the long-established post-application requirements set out in the Town and Country Planning (Development Management Procedure) England Order 2010 ("the DMP Regulations").

Consultation under the Development Management Procedure Order

17. Part 1A of the DMPO Regulations[5] concerns pre-application consultation (see above). Article 13 sets out the procedure for post-application publicity.[6] Article 16 deals with post-application consultation with consultees who are particularised by reference to categories of development identified within Schedule 5. Article 20 sets out the requirements of this duty to respond to consultation (following on from the provision made for the duty in s. 54(2)(b) of the Planning and Compulsory Purchase Act 2004 ("the 2004 Act")). By article 21, each consultee must prepare an annual report on its performance of the duty.

[3] See further guidance on pre-application consultation generally in the NPPF, para.s 188-195.
[4] See generally "Planning Act 2008, Guidance on the pre-application process" (DCLG); and PINS "The developer's pre-application duties".
[5] Enacted pursuant to section 65 of the 1990 Act.
[6] See generally the PPG section entitled "Consultation and pre-decision matters".

Statements of Community Involvement

18. Local Planning Authorities ("LPAs") are required to adopt statements of community involvement ("CSI") pursuant to s. 18 of the Planning and Compulsory Purchase Act 2004 ("the 2004 Act"). Section 18(2) provides:

> "The statement of community involvement is a statement of the authority's policy as to the involvement in the exercise of the authority's functions under sections 19, 26 and 28 of this Act and Part 3 of the principal Act of persons who appear to the authority to have an interest in matters relating to development in their area."

19. The SCI therefore sets out the intentions of the local planning authority as regards community involvement in the functions identified by this provision, which relate essentially to the preparation of local development documents under the 2004 Act and development control (or management as it is now generally called) under the 1990 Act.

20. As is considered further below, an SCI can create a legitimate expectation as to how a local planning authority will carry out consultation as part of the planning process.

Preparation of the Local Plan

21. Regulation 18 of the Town and Country Planning (Local Planning) (England) Regulations 2012 ("the 2012 Regulations") is concerned with the requirement for public participation in the preparation of a local plan. It sets out a requirement for an LPA to notify particular bodies specified in that regulation (including specific and general consultation bodies and residents or other persons carrying on business in the LPA's area) of the subject of a local plan which the LPA propose to prepare and to invite each of them to make representations as to what a local plan with that subject ought to contain.

22. In addition, regulation 20 provides that any person may make representations to an LPA about a local plan which the LPA proposes to submit to the Secretary of State. Any such representations must be received by the LPA by the date specified in the statement of the representations procedure.

23. Regulation 23 provides that before the person appointed to carry out the independent examination of the local plan makes a recommendation, they must consider any representations made in accordance with regulation 20 of the 2012 Regulations.

Supplementary Planning Documents

24. Regulations 13 of the 2012 Regulations provides that any person may make representations about an Supplementary Planning Document ("SPD"). Regulation 12 of the 2012 Regulations concerns public participation in respect of an SPD. They require the preparation of a statement which must set out how the main issues raised by consultees have been addressed.

Environmental Impact Assessment

25. EIA Directive (Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment) was transposed by the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 ("the 2011 Regulations").

26. Article 6 of the EIA Directive concerns public participation in the environmental decision-making process. Articles 6(4) and 6(6) provide:

> "4. The public concerned shall 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.
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> …
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> 6. Reasonable time-frames for the different phases shall be provided, allowing sufficient time for informing the public and for the public concerned to prepare and participate effectively in environmental decision-making subject to the provisions of this Article."

27. It is important to note that the newly amended EIA Directive "the new EIA Directive" (Directive 2014/52/EU on the assessment of the effects of certain public and private projects on the environment) entered into force on 15 May 2014 to simplify the rules for assessing the potential effects of projects on the environment[7]. The new EIA Directive amends Directive 2011/92/EU and must be transposed by 16 May 2017.

28. Furthermore, the new EIA Directive makes a number of amendments to Article 6 of Directive 2011/92/EU, including by the introduction of a minimum period of 30 days for consulting the public concerned on the environmental impact assessment report.

29. Part 5 of the 2011 Regulations concern publicity and procedures on submission of environmental statements for an application for planning permission, including where an environmental statement is submitted after the planning application.

[7] < http://ec.europa.eu/environment/eia/review.htm> accessed on 27 June 2014 .

30. The importance of consultation is highlighted by the prohibition on the grant of permission for EIA development (regulation 3(4)) before "environmental information" is taken into account. That environmental information includes not just an environmental statement, but also representations duly made about the environmental effects of the development (regulation 2(1)). [8]

Strategic Environmental Assessment

31. Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment ("the SEA Directive") is transposed into domestic law by the Environmental Assessment of Plans and Programmes Regulations 2004 ("the SEA Regulations"). SEA is required for "*plans and programmes*" referred to in Art. 3(2) of the SEA Directive *and* which are likely to have significant environmental effects. Provision to the same effect is made in regulation 5 of the SEA Regulations.

32. Article 5(1) of the SEA Directive requires preparation of an environmental report in instances where an environmental assessment is required under Article 3(1) of the Directive in respect of the implementation of a plan or programme.

33. Article 6 of the SEA Directive requires public consultation on the environmental report before the adoption of the relevant plan or programme. The importance of consultation can again be seen in the definition of "environmental assessment" in Article 2(b) of the SEA Directive which includes "the carrying out of consultations".

34. Regulation 13 of the SEA Regulations sets out the procedure for consultation upon a draft plan or programme and its accompanying environmental report ("the relevant documents"). Regulation 13(2) provides that as soon as reasonably practicable after their preparation, the responsible authority shall sent a copy of the relevant documents to the consultation body and invite it to express its opinion on the relevant documents within a specified period. By regulation 13(4) the consultation periods specified in regulation 13 must be of such length as will ensure that those to whom the invitation is extended are given an early and effective opportunity to express their opinion on the relevant documents.

35. It should be noted that in Re Seaport Investments [2008] Env LR 23 (in the High Court of Justice in Northern Ireland) Weatherup J held that the scheme of the SEA Directive and Regulations clearly envisaged the parallel development of the environmental report and the draft plan, with the former impacting on the development of the latter throughout the periods before, during and after the public consultation: see [37] – [52].

[8] See too Berkeley v. SSE [2001] AC 603, 615: procedure prescribed by the Directive means that "the public, however misguided or wrongheaded its views may be, is given an opportunity to express its opinion"; Ardagh Glass v. Chester CC [2010] EWCA Civ 172, where at first instance it the importance of public participation was noted even in involving retrospective applications for permission.

Habitats

36. The Habitats Directive (Council Directive 92/43) is implemented by the Conservation of Habitats and Species Regulations 2010/490 ("the 2010 Regulations"). Consultation requirements are contained in regulation 61 in respect of the assessment of implications for the protection of European sites (and European offshore marine sites) and regulation 102 in respect of consultation on land-use plans. The consultation provisions are in the same terms in both regulations and state:

> "(2) The plan-making authority must for the purposes of the assessment consult the appropriate nature conservation body and have regard to any representations made by that body within such reasonable time as the authority specify.
> (3) They must also, if they consider it appropriate, take the opinion of the general public, and if they do so, they must take such steps for that purpose as they consider appropriate."

Consultation: legal principles and cases

General

37. In the planning field, statute (including the provisions identified above) will often specify particular procedural requirements which consultation must achieve. In such cases the adherence to those requirements will be a question of fact for any individual case. However the application of these requirements will nonetheless be subject to minimum standards for lawful consultation (which will also apply in cases where a decision-maker will have a broad discretion as to how a consultation exercise should be carried out).

38. The general principles concerning were set out in R v N E Devon HA ex p Coughlan [2001] QB 213. At [108], Lord Woolf MR specified that:

> "It is common ground that, whether or not consultation of interested parties and the public is a legal requirement, if it is embarked upon it must be carried out properly. To be proper, consultation must be undertaken at a time when proposals are still at a formative stage;[9] it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response;[10] adequate time must be given for this purpose; and the product of consultation must be

[9] Consultation not at formative stage where letter invited representations in relation to possible mitigation of effects of decision which had been made: R (Dudley MBC) v. SSCLG [2012] EWHC 1729 (Admin) at [71-4]; although consultation on timing and implementation lawful where principle decided upon lawfully: R (Sardar) v. Watford BC [2006] EWHC 1590. There is no requirement to consult on all possible options: R v. Worcestershire HA, ex p. Kidderminster District CHC [2003] EWHC 3133.
[10] Sufficient information to enable an intelligent response requires the consultee to know not just what the proposal is in whatever detail is necessary, but also the factors likely to be of substantial importance to the decision: R (Bard Campaign) v. SSCLG [2009] EWHC 308 (Admin) at [98]; see too R v. SS Social Services, ex p. Association of Metropolitan Authorities [1986] 1 WLR 1. This does not necessarily require consultation on objections which have already been made: R (Beale) v. Camden LBC [2004] EWHC 6 (Admin).

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conscientiously taken into account when the ultimate decision is taken:[11] R v Brent London Borough Council, Ex p Gunning (1985) 84 LGR 168."

39. Where there is no statutory requirement to undertake consultation, decision makers must as a broad principle adopt a fair procedure when reaching a decision, although the courts have indicated that this does not involve a general duty to consult:
    a. "it is not the law that authorities must necessarily consult those who are liable to be disadvantaged by a proposed decision": R (Hillingdon LBC v. Lord Chancellor [2008] EWHC 2683 (Admin) at [48];
    b. see too R (Stamford Chamber of Commerce) v. SSCLG [2009] EWHC 719 (absent an express statutory duty, express promise or established practice, local authority not required to consult before deciding not to request Secretary of State to save policy in local plan);
    c. see too R v. SSE ex p. Kent [1988] JPL 706: (no general requirement to consult those likely to be substantially affected by development proposals – rejected challenge by owner of adjoining land who, by administrative error, had not been sent notification of planning application, even though others further away had).

Legitimate expectations

40. However, a promise to consult or practice can generate a "legitimate expectation" that such consultation will be carried out. In R (Bhatt Murphy) v Independent Assessor [2008] EWCA Civ 755 at [26] – [36], Laws LJ considered the doctrine of legitimate expectation, drawing a distinction between procedural legitimate expectations and substantive legitimate expectations.

41. 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 such cases the court will not allow a decision-maker to effect the proposed change without notice or consultation, unless there is some overriding legal duty or countervailing public interest which requires this. In such cases, Laws LJ questioned whether it mattered that the claimant had known 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.

42. *Substantive* legitimate expectations arise where the court allows a claim to enforce the continued enjoyment of the content or substance of an existing policy or practice. As Laws LJ

[11] Consultation responses not conscientiously taken into account, where consultee's main and biggest point not addressed or referred to: R (Morris) v. Newport CC [2009] EWHC 3051.

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explained, such a policy could not 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 had 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, by which the relevant policy's continuance is assured.[12] In such cases a substantive promise cannot be binding if it is ultra vires or inconsistent with the statutory duties imposed on the authority.

43. 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, a legitimate expectation does 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.

44. These general principles have been applied in a number of recent planning cases, which are covered below.

Legitimate expectation and community engagement

45. In R (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.

46. 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. In 2007, the Council's UDP was adopted, which provided that the uses required for the site were as a community centre and health centre. Three applications for planning permission on the site. The planning permission that was granted reduced the floor space of the community centre and provided the community centre within the health centre, rather than as a free-standing unit.

47. One of the claimants' grounds of challenge was that there was a substantive legitimate expectation arising from the engagement that had taken place with the local community in 2001 and 2002, that the site would contain a freestanding community hall to be at least as large as the existing hall. These arguments were rejected by Lindblom J at first instance and on appeal, by the Court of Appeal. At [54] – [57], Pill LJ said:

[12] *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 the care home would be their home for life. An express and unqualified promise made to a small group of people on a number of occasions in precise terms.

"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."

48. Thus even if an understanding had been conveyed to the representatives of the community in the discussions that had taken place in 2001 and 2002, it was not sufficient to create a substantive legitimate expectation.

<u>SCIs</u>

49. A number of cases in the planning context have established that a procedural legitimate expectation can arise in respect of consultation. It is clear, for example, that an LPA's SCI can create such an expectation.

50. In R (Majed) v London Borough of Camden [2009] EWCA Civ 1029 the claimants had not been notified of a planning application, even though the local authority's SCI indicated that they should have been. The LPA had omitted to notify the claimants of the planning application, despite the fact that they were near neighbours of the applicant who had submitted the planning application.

51. Sullivan LJ did not accept the Council's argument that no legitimate expectation had arisen under the SCI because the General Development Procedure Order regulated the balance between the various interests in respect of the planning application and who should be notified. At [14] he observed that:

> "Legitimate expectation comes into play when there is a promise or a practice to do more than that which is required by statute".

52. Further, at [36] Arden LJ stated that she had "no doubt" that the claimant had a legitimate expectation that he would be sent notice of the planning application, which directly affected his property. She noted that:

> "The statement of community involvement is intended to promote a culture of open and participatory decision-making and the conclusion that Camden has promised that notice will be given to certain persons in normal circumstances is one it would normally be expected to fulfil and should occasion no surprise."

53. Similarly, in R (Kelly) v London Borough of Hounslow [2010] EWHC 1256, the Court quashed a planning permission granted by the local planning authority 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. The LPA had thus breached the claimant's legitimate expectation of notification at a time which enabled the claimant to have an appropriate opportunity to exercise the right to address the committee.

54. In R. (on the application of Vieira) v Camden LBC [2012] EWHC 287 (Admin) the claimants also succeeded in establishing legitimate expectations, a result of an SCI and the LPA's planning protocol, that they would be consulted on a revised drawing after the LPA had granted retrospective planning permission for a conservatory and trellis screen that had been built without planning permission on neighbouring property.

55. The local authority consulted the claimants, who objected to the proposals through their planning consultants 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.

56. Following an officer's report which recommended granting planning permission, the application was sent to a members' briefing panel to determine whether it should be dealt with by Officers under delegated powers or by members of the development control committee.

57. The panel decided to defer the decision, pending further negotiations with the applicant on the details of the proposals. The applicant subsequently submitted an amended drawing and the Council prepared a delegated report members briefing, which commented favourably on the amended plans. However, neither the amended drawing nor the report were put on the Council's website until after the decision to grant planning permission had been made. That decision had been made by officers, without the matter having gone back to the panel.

58. The claimants argued that the LPA was in breach of three legitimate expectations: (a) that it would consult the claimants on the revised drawing, as indicated in its SCI; (b) that it was in breach of a legitimate expectation created by the SCI and its published procedures for members briefings that application documents and reports would be made available on its website for comment before panel meetings; and (c) that it was in breach of a legitimate expectation created by its planning protocol, members briefing and its website in failing to consult a members briefing panel on whether the application should be referred to Committee.

59. In respect of the first ground of challenge, Lang J held that the claimants did have a legitimate expectation derived from the SCI that, following the revision of the planning application, the revised plans would be sent to them for their comments. The revision, although small, was significant as it would be a decisive factor when the members briefing panel came to re-consider whether the application should be sent to Committee or approved by officers under delegated powers: [73]. Lang J noted at [78] that no valid explanation had been put forward for the failure to consult the claimant.

60. In respect of the second ground of challenge, Lang J accepted that the LPA breached the claimant's legitimate expectation that they would be able to see and comment on, the officer's report: [79] – [88]. 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. Again, Lang J commented (at [85]) that no good reason had been put forward to explain the omission, and that the claimants suffered clear prejudice as a result of not seeing the report.

61. Lang J also accepted that the claimant's third ground of challenge had been made out: there was a legitimate expectation that the members briefing panel would be consulted on whether the application would be decided by officers under delegated powers or referred to committee for a decision: [89] – [104].

62. At [92], Lang J noted that in a number of emails and in its response to the pre-action letter and in its summary grounds, the LPA had incorrectly stated that the application had been approved by the panel stating: "in my view, the reasons that the Defendant mis-represented the true position was because referral back to the Members Briefing Panel was the expected and usual procedure which should have been followed."

63. The LPA 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. Lang J did not accept this as a matter of fact. In any event she held that the proper course would have been to postpone reconsideration until the members briefing panel was established, since there was no particular urgency about the application: [101] – [103].

64. Lang J also rejected the LPA'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]:
>
> > "…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."

65. The representations made by the LPA in its SCI, on its website and in its planning protocol were thus sufficiently unambiguous to create a legitimate expectation.

Timing and adequacy of opportunity: EIA and consultation under the DMPO

66. In R (Halebank Parish Council) v Halton Borough Council [2012] EWHC 1889 the claimant parish council applied for judicial review of the borough council's grant of planning permission for the erection of a rail served storage and distribution warehouse and related development on a site owned by the borough council.

67. One of the parish council's grounds of challenge concerned the way in which the borough council dealt with the planning application and in particular whether it afforded the parish council sufficient opportunity to participate in the decision making process. The parish council had been given 21 days in which to respond to the planning application and had been provided with a copy of the Environmental Statement which ran to over nine hundred pages. That was shortly before the August holidays.

68. The parish council asked for an extension of the 21 day consultation period on the grounds that the development was complex and demanded detailed scrutiny, and no parish council meetings had been scheduled in August. This request was refused by an officer who had no authority to make such a refusal. A second and third request by the parish council for a deferment received no response. The development control committee delegated authority to one of the Council's officers to approve the application.

69. Because the development required environmental assessment, Article 6 of the EIA Directive came into play. The parish council argued that there had been a breach of Article 6 of the Directive, which it argued was of direct effect, notwithstanding the time limits implemented in the DMPO. The DMPO therefore did not deprive Article 6 of effect where the periods prescribed were insufficient to provide adequate consultation. Responding to that argument HHJ Gilbart said at [62] – [64]:

> "62 In my judgement 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. Mr Gibbs had no authority to write as he did on 9th August 2011, and it was incumbent on the Committee to consider the matter anyway."

70. HHJ Gilbart QC thus held that there could be a breach of Article 6 of the Directive even if the consultation requirements of the DMPO were complied with. The consultation period set out in the domestic regulations was not conclusive as to the adequacy of the consultation period.

71. The parish council also argued that there had been a breach of its legitimate expectation in the way that the consultation process had been conducted, relying on a Cabinet Office Code of Practice on Consultation document, which it argued had been incorporated into the Council's SCI.

72. HHJ Gilbart QC accepted that the Cabinet Office document had been incorporated into the SCI and held that the Committee had not addressed the questions raised in its own adopted policy. That was a breach of the claimant's legitimate expectation: [66].

73. At [68] - [71] HHJ Gilbart QC responded to submissions made on behalf of the Council that the time permitted for consultation was adequate, that members of the parish council could have met over the summer period and that no prejudice had been caused to the parish council:

"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 amounted to a breach of Article 6 and was in any event contrary to the legitimate expectation the PC had as to the conduct of the consultation process."

Changes to proposed policy: consultation and local policy documents[13]

74. In R (Barrow Borough Council) v Cumbria County Council [2011] EWHC 2051 (Admin), Barrow Borough Council ("BBC") sought an order quashing Cumbria Council's Minerals and Waste Development Framework Site Allocations Policies Development Plan ("the DPD").

75. The case was decided under the Town and Country Planning (Local Development)(England) Regulations 2004, which insofar as relevant provided for similar consultation requirements to those prescribed under the 2012 Regulations.

76. The proceedings were concerned with the inclusion of a site (M12) in the DPD. A number of rounds of consultation took place in respect of the DPD. Site M12 was included in the second round of consultation but not in the first or third rounds of consultation. During the second round of consultation, BBC had objected to the inclusion of the M12 Site in the DPD.

77. The site had not been included in the DPD when it was submitted to an Inspector for examination, but was subsequently added following the Inspector's concerns in relation to soundness.

78. BBC argued that it should have been, but was not consulted before the site was included or proposed for inclusion within the DPD by Cumbria Council. It relied upon a letter of the Defendant which stated "Site M12 was removed from the Site Allocations Policies at an earlier stage of consultation and could not now be reinstated without a further round of public consultation". It also submitted that the approach adopted before the Inspector was contrary to that set out in PINS guidelines for inquiries of the sort being undertaken.

79. Cumbria Council argued that BBC was or ought to have been aware of the risk of Site M12 being included in the DPD.

[13] The general position of the courts is that re-consultation will be necessary only if proposals have been amended so fundamentally as to make them fresh proposals: Wandsworth (below).

80. HHJ Pelling QC rejected the submissions made by Cumbria Council. He held at [24] that BBC was entitled to assume that the defendant would seek to uphold its proposed DPD, and that if changes were proposed they would not be considered without either a consultation process taking place or at least notice of what was proposed being given to the claimant as a person that had objected previously to the inclusion of the M12 site. He went on to say:

> "The underlying assumption that applies in this area of planning law is that only those objecting to what the LPA proposes in its submitted DPD document have a right to be heard before the Inspector, and that those who do not object will have their relevant interests represented by the LPA before the Inspector because the LPA would be seeking to uphold its own document."

81. HHJ Pelling QC was satisfied that there had been a failure to comply with the procedural requirements in respect of the examination of the DPD. That failure consisted of Cumbria's application to include the M12 site in the DPD at the examination stage when it had not been included in previous consultations and when Cumbria had apparently accepted BBC's objection in relation to the M12 site during the second round of consultation. BBC had been deprived of any opportunity to object to the inclusion of Site M12 on soundness grounds. He thus quashed the DPD.

No flaw in the consultation process

82. However, there have been numerous examples of unsuccessful challenges based on allegations relating to consultation. Examples are given below, covering some of the topics set out above.

83. In circumstances where an SCI is at pre-submission stage, a claimant is unlikely to be able to rely upon it to establish a legitimate expectation in respect of consultation. Thus in R (Save our Parkland Appeal Limited) v East Devon District Council [2013] EWHC 22 (Admin), the defendant council granted outline planning permission for a development of up to 400 homes. The Claimant sought to rely upon the Council's SCI, which was still in its pre-submission stage. HHJ Sycamore concluded that the SCI could not be relied upon as the basis for any claim to legitimate expectation, stating at [40]:

> "The claimant seeks to rely upon the Statement of Community Involvement ("the Statement") published by the defendant in support of its submissions in relation to a breach of legitimate expectation. This is a document which was published in March 2008 but is described as a pre-submission draft statement consultation. Its status as a draft is clear from paragraph 1.11 which explains:

> "Following consideration of any comments received, and amendments, where appropriate, we will produce the submitted version of the statement of community involvement on which formal responses will be sought."

The Statement would then be subject to examination by an inspector and only then for adoption by the Council. The document has not been adopted and although it continues to be displayed on the defendant's website it remains a pre-submission draft consultation. In any event the draft does not make any unambiguous statements that no planning applications will be granted whilst the plan is emerging. There is nothing in the document to indicate that following the issue of a preferred options document no planning permissions for housing generally or indeed in relation to this specific site would be granted. In my judgment the Statement cannot be relied upon as the basis for any claim to legitimate expectation."

84. The Claimant also complained that by granting the planning permission, the Council had pre-empted the Local Development Framework ("LDF") consultation process. It asserted that there was a legitimate expectation that the council would make the strategic decision as to the scale and location of new housing in Axminster through the LDF process, and not through a process of determining a planning application which pre-empted the LDF consultation process.

85. HHJ Sycamore noted at [37] that in contending that the defendant acted in breach of legitimate expectation, the claimant's contention was essentially that planning permission should not have been granted for the development until the processes for adoption of the core strategy were completed. In addition at [23] he observed that the consultation process was at a very early stage and was in relation to preferred options for the LDF Core Strategy. There was no early prospect of the development of planned documents being submitted for independent examination, as required. At [34] and [36], he noted:

> "34. I have already pointed out that the application for outline planning permission was submitted on 19 April 2010. The consultation upon the Core Strategy Preferred Options commenced on the 6 September 2010 and I remind myself that this was not a consultation on a draft Core Strategy but on potential options for a Core Strategy, which would be produced at a later stage.
>
> …
>
> 36. As I have already observed, it was on 21 September 2010 that the defendant's Development Committee resolved to grant outline planning permission to develop up to 400 houses at the site. That outline planning permission was granted on 28 March 2011. By the time the Section 106 Agreement had been completed and the planning permission had been granted the consultation responses received in respect of the Preferred Options Consultation had been analysed and reported to members. Those responses did not raise any matters which had not already been raised and considered

by the defendant in the third party representations and objections to the planning application considered on 21 September 2010"

86. Insofar as the claimant sought to rely on a legitimate expectation, HHJ Sycamore QC held that there was no basis to suggest that any specific undertaking was given to any particular individual or group. He noted that although regulation 25 of the 2004 Regulations provided for public participation in the development plan process, they were silent as to the effect of the consultation upon the determination of applications for planning permission. Furthermore, the regulations did not constitute a representation by the defendant and did not provide any basis upon which a legitimate expectation could be based [39].

87. In Performance Retail Limited Partnership v Eastbourne Borough Council [2014] EWHC 102 (Admin) the Claimant applied for an order quashing the adopted Eastbourne Core Strategy Local Plan (February 2013) after an inspector had recommended its adoption subject to certain modifications.

88. At the time of the submission of the Core Strategy for examination by the Inspector, the Sovereign Harbour Retail Park ("SHRP") which was located well outside Eastbourne town centre was designated as a District Shopping Centre ("DSC").

89. The Council had submitted the Core Strategy document with a list of proposed modifications, including removal of the designation of SHRP as a DSC. The Inspectorate drew a distinction between minor changes and major modifications in the Council's proposed list. The deletion of SHRP from classification as a DSC was regarded as a major modification which the Inspectorate regarded as requiring public consultation for six weeks.

90. The claimant applied for an order quashing the Core Strategy insofar as it designated the SHRP as a DSC. The designation of SHRP was important to the claimant because it conferred certain planning advantages, which the claimant argued would endanger the continued primacy of the town centre itself.

91. One of the grounds raised by the claimant was that the modifications to the Core Strategy recommended by the Inspector, and their effect on the plan as a whole, had not been the subject of proper consultation with the claimant as required under s. 20(7C) of the Planning and Compulsory Purchase Act 2004 concerning modifications.

92. At [53], the Court noted that although the Council had sent out a number of letters to various individuals and bodies inviting representations in respect of the modifications, it had not sent a letter to the claimant. However the Council had given notice of the main modifications on its website and set out special process for submitting responses. Notice of the main modifications was also deposited at various Deposit Centres where Council documents are available to the public and notice of the consultation was given in a local newspaper.

93. At [54] the Court rejected the claimant's argument that it had a legitimate expectation of being individually notified of future consultations:

> "I do not accept, Mr Boyle's submission that reg 23 of the 2012 Regulations required consultation in relation to proposed s 20(7C) modifications. Regulation 23 requires the inspector to take into account consultation responses made under 2012 reg 20 (old reg 28), that is responses prior to submission of the document for examination. It is clear, however, that the inspector directed that there be consultation; she said that any modifications proposed by the Council after the close of the examination would be subject to consultation and would be placed on the Council's website. Publication on the website was a process of consultation used by the Council, and the notifications actually given of the consultation in this case are clearly in general terms adequate. The claimant says that it was entitled to an individual notice that a consultation process was running. That entitlement would have to be derived from the law, or a promise, or a legitimate expectation. There was no legal requirement to notify the claimant individually, and there was no express promise to do so. Although there had been a great deal of correspondence between the claimant and the Council, including in relation to previous consultations, I can see nothing to support a view that the claimant had a legitimate expectation of being individually notified of future consultations, giving rise to a claim that the consultation process would be invalidated by failure to give such notice. Custom in relation to consultation before the examination does become law in relation to a subsequent examination directed by the inspector."

94. The Court noted at [55] that the Claimant had failed to explain whether, or if so, why it had failed to observe that a matter of such importance to it had been widely publicised. In those circumstances, there was no basis for saying that the notice of the consultation was not sufficient for the purposes of alerting the Claimant. The Claimant could not show that it had been denied the opportunity to make representations. Nor had the Claimant been able to show that the failure to send individual notice had prejudiced it in any way.

95. Finally, the Court noted at [56] that it was difficult to see what substantively the Claimant was deprived of the chance to say. The consultation was on modifications to the submitted document, and the retention of the designation of SHRP as a DSC was not a modification. Thus even if the claimant had established an expectation of individual notification, there was no good reason to grant relief on this ground of challenge.

96. In Bishop's Stortford Civic Federation v East Hertford District Council [2014] EWHC 348 the claimants were unsuccessful in challenging a grant of planning permission where there had been a failure to consult upon certain documents.

97. The planning permission was granted to develop land in Bishop's Stortford. The second ground of challenge concerned whether the Council acted unfairly in granting planning permission by failing to give the Claimant and others an opportunity to comment on additional documents submitted by the developer before the grant of permission, on whih consultation did not take place. In particular the Court was asked to consider whether the Council acted in breach of regulation 19 of the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 [the predecessor to regulation 22 of the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 ("the 2011 Regulations")]. The additional documents were an Environmental Statement addendum and a Supplementary Planning Statement.

98. The Environmental Statement Addendum explained that its purpose was to update the policy position in the context of the recently introduced NPPF and to establish whether, despite policy changes, the findings of the originally submitted Environmental Statement remained sound. The addendum went through the various headings in the original Environmental Statement and concluded that it the findings of the Environmental Statement were still sound. The "Supplementary Planning Statement" noted that, subsequent to consideration of the proposals by the Council's planning committee in August 2011, the NPPF was to come into effect. As a result, it was necessary for the Council to review its decision-making in light of the new national policy context. Despite the changed policy context established by the NPPF, the document concluded, the proposals were acceptable, indeed more so.

99. Both documents were placed on the planning file available for public inspection at the Council's office but, apparently by mistake, they were not uploaded to the Council's website. There was thus no consultation process in respect of those documents.

100. Cranston J concluded that the failure to consult on the July 2012 documents constituted a breach of neither the duty to adopt a fair procedure nor the EIA Regulations. In respect of unfairness, Cranston J said at [45]:

> "In my view there was no unfairness. The documents in question were placed on the planning file, albeit not as good practice dictated uploaded onto the website. The Federation had the opportunity to comment. The July documents updated the situation in the light of the NPPF. As Mr Steptoe confirmed in his assessment in December 2012, there was no material change arising in respect of the changes in policy. Any unfairness to the Federation was entirely technical. The NPPF did not make any difference to the assessment of the application, indeed, it strengthened it. English law does not recognise a technical breach of natural justice: *George v Secretary of State for the Environment (1979) 38 P & CR 609* , 617, 621."

101. Furthermore, Cranston J did not accept that there had been a breach of regulation 19 of the 1999 Regulations. At [46] he said:

> "In any event since the Environment Assessment Addendum was only an updating exercise which related to an assessment of the NPPF, and the NPPF was found to have no effect on the assessment of the planning merits, it did not contain substantive information as required by the definition of "any other information" in the Regulations. As Mr Steptoe, the head of planning concluded in his assessment in December 2012, it made no difference to the planning judgment in respect of the proposed development. The Addendum document would not be caught by the approach of Lewis J in Corbett v Cornwall Council [2013] EWHC 2958 . Regulation 19 was not engaged. Even if I had found that there had been a breach of Regulation 19 , since it was at best a technical breach, which would not have resulted in any different outcome, I would have withheld a remedy because there was no substantial prejudice to the Federation: see *Walton v Scottish Ministers [2012] UKSC 44; [2013] PTSR 51* , [138], per Lord Carnwarth; [156], per Lord Hope."

102. In R (Gate on behalf of Transport Solutions For Lancaster and Morecambe) v Secretary of State for Transport [2013] EWHC 2937 (Admin) the Claimant challenged the "Torrisholme to the M6 Link (A683 Completion of Heysham to M6 Link Road) Order 2013" which provided a road to link the M6 Motorway to the port of Heysham on Morecombe Bay. The claimant complained that the consultation process was launched on the assumption that the project would proceed along a particular geographical route and that contributions from the public would not be entertained to the extent that they related to the viability of alternatives.

103. At [49]-[50] Turner J rejected the challenge on the facts, finding that the main relevant issues had been adequately addressed in consultation, as the consultation report on the application for development consent confirmed. He added that a decision following a consultation process was not unlawful simply because it is possible in hindsight to conceive of a process that would have been an improvement on that which was actually carried out. He thus declined to conclude that the matters complained of by the claimant were of sufficient practical substance to render the decision unlawful. It was not the duty of the court to "micromanage for perfection".

Quashing not guaranteed

104. There are instances where even though a flaw in the consultation process can be identified, this is not sufficient to demonstrate that the entire consultation process has been inadequate. In such cases, a Court will be unlikely to quash a decision on the basis of failures in the consultation procedure.

105. Indeed, it is well established that the remedies granted in a judicial review claim are discretionary and that, even if judicial review grounds are made out, the decision whether to grant relief will turn on the specific facts of the case. See, for example, R v. Panel on Take-overs and Mergers ex p. Datafin plc [1987] Q.B. 815 at 840 and Bolton Metropolitan Borough Council v. Secretary of State for the Environment (1990) 61 P. & C.R. 343 at 353[14].

106. Similarly in Forest of Dean Friends of the Earth v Forest of Dean DC [2013] EWHC 1567 (Admin), the Forest of Dean Friends of the Earth ("FDFOE") sought to challenge approval of the Council's development plan documents. One of the grounds of challenge was that the Council had failed to undertake a full and proper consultation exercise in that the Appropriate Assessment under the 2010 Regulations was not informed by Natural England and there was no adequate consultation with the public.

107. Edwards-Stuart J rejected the claimants' challenge on this ground. In respect of consultation with Natural England, he found that the complaint failed on the facts [111]. In respect of consultation with the public, Edwards-Stuart J. noted at [114] that it went without saying as a general rule: "that where there is to be a public consultation on a particular issue, the public is entitled to have access to the material that is to be relied on by the body seeking consultation a reasonable time before the relevant hearing is to take place or the date by which representations are to be submitted."

108. At [114], Edwards-Stuart J. noted that on the facts of the case, the documents to be examined were fairly extensive and in the circumstances a reasonable period of notice would have been not less than six weeks, particularly as the consultation period overlapped with the end of the summer holiday season. It was held that the Council had issued too many important documents at the last minute in breach of reg. 102(3) of the Conservation of Habitats and Species Regulations 2010. The steps taken by the Council to take into account the opinion of the general public fell well short of those which any reasonable council, having decided to consult, should have taken: [117]. Accordingly he held that the Council failed to carry out an adequate consultation: [122].

109. However, the Judge did not consider that it would be appropriate or proportionate to quash the decisions to adopt the development plan documents. In the circumstances, the Claimants and others had been provided with an opportunity to present their views and to have them taken into account by both the Council and the Inspector. The Inspector had given interested parties a further period in which to make supplementary written submissions. This mitigated, to some extent, the Council's failings: [118] and [123]. The Council was however to ensure that the mitigating steps that had been incorporated into the plans were strictly implemented.

[14] The discretion of the courts in the context of a breach of an EU directive transposed into UK law is not considered in this paper.

110. Similarly, in R (on the application of Edwards) v. Environment Agency (No. 2) [2008] UKHL 22, the House of Lords considered an application to quash a permit issued by the Environment Agency for the operation of a cement works. The chief grounds were that the Agency did not disclose enough information about the environmental impact of the plant to satisfy its consultation duties. The Court of Appeal had found that internal air quality reports had been potentially material to EA's decision, and to the members of the public who were seeking to influence it, and the failure to disclose them had been a breach of the Agency’s common law duty of fairness. It refused relief, however, partly because the data which was now out-of-date. No appeal was made to the House of Lords on the consultation issue, however in dismissing the appeal their Lordships emphasised the discretionary nature of judicial review and found that the reports on which consultation ought to have taken place had been overtaken by more recent (see Per Lord Hoffman at [62]-[65]).

Other topics

Section 106 agreements

111. In R (Police and Crime Commissioner for Leicestershire) v Blaby District Council [2014] EWHC 1719 (Admin) the LPA had granted planning permission for a substantial development in south west Leicestershire, subject to certain conditions and the conclusion of a suitable s. 106 agreement.

112. The case focused upon the effect of the development on the local police force. In particular, the Claimant alleged that that there was an inadequate provision of certain aspects of funding for police services by the developers, at appropriate times during the course of the development.

113. The need to provide funding for police resources had been identified during the discussions leading to the grant of planning permission, and agreement had been reached as to the amount that would be required and met by the developers. However, the Claimant contended that there were procedural deficiencies in the final stages of the planning process that left the police out of the relevant negotiations and ought to lead to the planning permission being quashed. The focus of the challenge was on when certain features of the funding for police equipment and premises should come on-stream during the development. The Claimant argued that the provision in the s106 agreement as to when those figures would be paid resulted from an inadequate process of engagement by the Defendant with the issues affecting the services that the Claimant would be required to provide and led to provisions that were irrational.

114. One of the Claimant’s grounds of challenge was that based on the correspondence, meetings and other communications that the police had had with the local authority, the police had a

legitimate expectation that the Council would consult them on the level of and timing of the delivery of the financial contribution and that the outcome of these discussion would be represented in the s106 agreement.

115. At [71] Foskett J accepted that a legitimate expectation was capable of arising in the planning context:

> "There is, of course, a good deal of authority on the issue of legitimate expectation. I am quite prepared to accept for present purposes that a course of dealing between two parties in the kind of context with which this case is concerned can in some circumstances give rise to a legitimate expectation that some particular process will be followed by the public authority the subject of the challenged decision before the decision is taken. The course of dealing can be on such a basis that the necessarily "clear and unambiguous" representation upon which such an expectation is based may arise."

116. Foskett J noted at [84] that there were features of the way the police contribution was dealt with in the s106 agreement that were not very satisfactory. However, having taken into account the lengthy background of communication that led to the terms of the s 106 agreement, he did not accept that a legitimate expectation had arisen that the police would be consulted on the level of and timing of the delivery of the contribution or on the specific terms of the s106 agreement:

> "Did anything of that nature arise in this case? I do not think so. What one can see from the communications to which I have referred is a pattern of negotiation, in effect between the Claimant and the developers with the Defendant as the intermediary, where no unequivocal representation was made by the Defendant that could have led to an expectation that it would be consulted "on the level of and timing of the delivery of the contribution". That having been said, however, there can be little doubt that the Defendant was aware of the Claimant's view on the timing of the premises contribution which, in one sense, was the most significant part of what was required by way of infrastructure funding. The equipment contribution was discussed and the police could have given "chapter and verse" on that if they had chosen to do so prior to the final discussions between the Defendant and the developers. However, I do not see any basis for a specific obligation on the Defendant's part to inquire about that." (at [72])

HS2

117. Challenges to the adequacy of consultation have also arisen in context of national policy and Parliamentary procedure. The most notable recent decisions in this regard concern the *HS2* litigation which was recently heard in the Supreme Court.

118. The respondent Secretary of State had issued a Command Paper ("DNS") and a next steps document outlining the proposal strategy for the implementation and route of HS2. The decisions in the DNS and the decision relating to compensation measures were the subject of five separate claims for judicial review, heard together by Ouseley J at first instance [R.(on the application of Buckinghamshire CC) v Secretary of State for Transport [2013] EWHC 481 (Admin)], who found that the consultation processes in respect of the compensation decision was so unfair as to be unlawful. On all other grounds, Ouseley J dismissed the claims.

119. In the Court of Appeal ([2013] EWCA Civ 920) a number of the grounds of appeal concerned the lawfulness of the consultation process. It was argued that the consultation on the principle of HS2 was rendered unlawful by the fact that the details of only half the proposed route (Phase 1) had been published at the time. That approach was said to be fundamentally unfair to those potentially affected by Phase 2 who had no way of knowing the nature or scale of any detrimental impacts on them and of responding accordingly in relation to the principle of HS2. At first instance Ouseley J had rejected this ground, commenting:

> "327. … It is not inherently so unfair as to be unlawful to have a first stage at which the principle of a proposal is considered, followed by a second stage for consultation on the detail of its impact. Although I accept without hesitation that knowledge of the detail can affect the nature and degree of opposition to the principle, and that the results of the consultation in all probability would have shown greater opposition in principle if the routes to the north had been identified in detail, that does not make such a process so unfair here as to be unlawful.
> 328. As Mr Mould pointed out, what happened in this process was that in fact the detail of Phase 1 was considered alongside the principle of the Y network. It would have been lawful for the detail to have been consulted upon after consultation on the principle. It cannot then be unlawful for principle and detail to go together in relation to Phase 1 in the first consultation. That neither makes it unfair for the SST not to do the same expressly in Phase 2 for eventual Phase 2 consultees, nor does it make it unfair for the Phase 1 consultees who objected in principle not to have the benefit of the probable greater degree of opposition that publication of the details of the routes to the north would have engendered."

120. The Court of Appeal agreed with those reasons, and also accepted that the Secretary of State had a wide discretion as to the scope and structure of a consultation of the nature of the one being considered.

121. A further ground concerned the failure of the Secretary of State to re-consult a consortium of local authorities in respect of further reports commissioned by the Secretary of State. The appellants argued that the issue of capacity on commuter services came as a bolt out of the blue as a result. The appellants relied on the Court of Appeal decision in R (Edwards) v Environment Agency (above).

122. The Court of Appeal did not accept that the non-disclosure of the report made the consultation unlawful and unfair. The appellants should have been aware that capacity on commuter services was one of the points of concern. Indeed, it should have been obvious that any alternative proposal involving use of the existing lines needed to consider the effect on commuter capacity as well as capacity on a long-distance service [104].

123. Another ground concerned the consideration given to the Secretary of State to the consultation response of Heathrow Hub Limited ("HHL"). Specifically, a substantial part of HHL's response was omitted by mistake from consideration by the Secretary of State. HHL argued that its response was a relevant consideration and it had a legitimate expectation that it would be conscientiously considered as well as an express promise to that effect.

124. The Court of Appeal held that Ouseley J had been correct to conclude that almost all the points in HHL's full consultation response were taken into account and there was nothing that might have led the Secretary of State to reach a different decision as to the best way that Heathrow Airport could be served by HS2.

125. Both the Court of Appeal and the Supreme Court also considered whether the hybrid bill procedure, under which Parliament was invited to authorise the HS2 projects by Acts of Parliament, was compliant with the requirements of EIA Directive 2011/92/EU. The appellants argued that in order to achieve the objectives of the EIA Directive, the Parliamentary procedure must allow effective public participation, as required by Article 6 of the EIA Directive. However, it was not possible for there to be effective public participation under the hybrid bill procedure.

126. Both the Supreme Court ([2014] 1 WLR 324) and the Court of Appeal rejected the contention that the EIA legislative exemption in article 1(4) of the EIA Directive[15] would not be met by the Parliamentary procedure for hybrid bills. At [100] – [116], Lord Reed said:

> "100. The appellants did not seek to argue that appropriate information could not be made available. As I have explained, their primary objection was to the fact that the decision whether to approve the principal elements of the project would be subject to the whip and thus to party oversight. Although this was not spelled out, the

[15] Article 1(4) provides: "The Directive shall not apply to projects the details of which are adopted by a specific act of national legislation, since the objectives of this Directive, including that of supplying information, are achieved through the legislative process."

implication of their argument is that a decision by Parliament would be compatible with the EIA Directive only if Members of Parliament were allowed a free vote, regardless of their party allegiance or of their membership of the Government.

101. There is however nothing in the case law of the Court of Justice to suggest that the influence of Parliamentary parties, or of Government, over voting in national legislatures is incompatible with article 1(4)…

109. The contention that the procedure currently envisaged by the Government will not permit an adequate examination of the environmental information to take place appears to me to be equally unpersuasive. I observe in the first place that there is nothing either in the text of article 1(4) of the EIA Directive, or in the exegesis of that text by the Court of Justice, to suggest that national courts are required not only to confirm that there has been a substantive legislative process and that the appropriate information was made available to the members of the legislature, but must in addition review the adequacy of the legislature's consideration of that information, for example by assessing the quality of the debate and examining the extent to which members participated in it. These are not matters which are apt for judicial supervision. Nor is there anything to suggest the inevitable corollary: that national courts should strike down legislation if they conclude that the legislature's consideration of the information was inadequate…

113. In the present case, there is in any event no reason to suppose that Members of Parliament will be unable properly to examine and debate the proposed project…”.[16]

Secondary legislation

127. In R (Milton Keynes Council) v Secretary of State for the Communities and Local Government [2011] EWCA Civ 1575 a number of local authorities sought to quash a decision of the SSCLG to make two statutory instruments, the Town and Country Planning (General Permitted Development)(Amendment)(No 2)(England) Order 2010 and the Town and Country Planning (Compensation)(No 3)(England) Regulations 2010 and in particular, certain provisions of those statutory instruments concerning houses in multiple occupation (“HMOs”). The councils argued that the SSCLG erred in law by failing sufficiently to consult local planning authorities before making the orders.

[16] For other cases relating to consultation on national policy, see R. (Medway Council) v Secretary of State for Transport, Local Government and the Regions [2002] EWHC 2516 (Admin); [2003] J.P.L. 583 (challenge to the Secretary of State's decision to exclude any options relating to the expansion of Gatwick airport from a consultation document preparatory to a White Paper on the future development of air transport); R. (Wandsworth LBC) v Secretary of State for Transport [2005] EWHC 20 (Admin); [2006] 1 E.G.L.R. 91; (challenge to the lawfulness of the White Paper "The Future of Air Transport") and R (Greenpeace Ltd v Secretary Of State For Trade And Industry [2007] EWHC 311 (Admin) (challenge to the consultation process leading to “The Energy Challenge Energy Review Report 2006” on the proposed nuclear new build).

128. In 2009 the Government had published a consultation paper in respect of HMOs, and a comprehensive consultation exercise had been carried out. Three options were canvassed in the consultation. The first was to make no change to planning legislation but instead promote best practice through other means and existing legislative powers. The second option proposed amendment of the Use Classes Order ("UCO") to introduce a HMO use class and definition of an HMO along the lines of the Housing Act 2004. The third option involved amendment of the UCO and also an amendment of the GPDO to allow for changes of use between a dwelling and a HMO to be permitted development. Option 2 was the most popular option.

129. A new Government then entered into power following the May 2010 election and took the view that option 3 was more appropriate than option 2. Limited consultation with "key partners" was carried out in this regard, taking into account the views of the Local Government Association, but not specifically consulting the local authorities.

130. The councils argued that questions posed in 2010 were different from those posed in 2009 and plainly required a response from LPAs. In dismissing the Council's appeal in the Court of Appeal, Pill LJ emphasised that the fairness of the 2010 consultation must be seen in the light of the very full consultation that took place on 2009:

> "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.
>
> 35 As I see it, the appellants' best point is that it was local planning authorities who were best able to answer the questions actually posed in the letter of 17 June 2010. There is force in the submission that, if the Government wanted answers to those questions, it should have turned to local authorities to provide them. However, I am not persuaded that the consultation is rendered unfair by the failure to consult them directly.

> …
> 38 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."

131. It can be seen therefore that the clear emphasis of the authorities is on whether a party can show that it suffered prejudice as a result of a flawed consultation process. Where no prejudice can be demonstrated, a Court will be unlikely to quash a decision.

Conclusions

132. Despite the detailed consultation requirements laid down in statute and relating to a wide range of decisions in the planning field, there remains ample scope for issues to arise. Indeed, the High Court has just heard a challenge (Kendall v Rochford District Council *CO/1531/2014*) to Rochford District Council's allocations plan, which sets out proposals for 550 new homes on green belt land in the period up to 2021, on the basis that the Council failed to comply with its Statement of Community Involvement and failed to carry out a proper consultation.[17] The ongoing emergence of case law indicates that there is often a tension between an authority wishing to take a decision expeditiously and affording the public the time it would prefer to respond to proposals. This tension is a traditional feature of the planning system and no statutory provision is likely to completely remove it. In circumstances where legal challenges relating to consultation are not uncommon, it is often prudent to err on the side of caution – recent cases suggest that this should particularly be so when applying SCIs. The delay which arises from procedurally risky decisions may well be greater than that involved in ensuring that any potentially valid procedural complaint is addressed prior to any decision being reached.

[17] <http://www.planningresource.co.uk/article/1299404/residents-claim-inadequate-consultation-high-court-site-allocation-challenge> accessed on 27 June 2014.