Neutral Citation Number: [2020] EWHC 3073 (Admin)

Case No: CO/3024/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Tuesday 17th November 2020

Before :

LORD JUSTICE LEWIS
MR JUSTICE HOLGATE

- -

Between :

R (RIGHTS: COMMUNITY: ACTION)	**Claimant**
- and -	
SECRETARY OF STATE FOR HOUSING, COMMUNITIES and LOCAL GOVERNMENT	**Defendant**

- -
- -

Paul Brown QC and Alex Shattock (instructed by **Leigh Day**) for the **Claimant**
Rupert Warren QC and Ms. Anjoli Foster (instructed by **Government Legal Department**) for the **Defendant**

Hearing dates: 14th to 15th October 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 10:30am on Tuesday, 17th November 2020.

Lord Justice Lewis and Mr Justice Holgate :

1. This is the judgment of the Court to which we have both contributed.

2. The claimant seeks an order quashing the following statutory instruments: -

   - The Town and Country Planning (General Permitted Development) (England) (Amendment) (No. 2) Order 2020 ("SI 2020 No. 755")

   - The Town and Country Planning (General Permitted Development) (England) (Amendment) (No. 3) Order 2020 ("SI 2020 No. 756")

   - The Town and Country Planning (Use Classes) (Amendment) (England) Regulations 2020 ("SI 2020 No. 757").

3. The orders were made by the defendant on 20 July 2020. They were laid before Parliament on 21 July 2020 and came into force on 31 August 2020, or, in the case of SI 2020 No.757, on 1 September 2020. In brief summary, SI 2020 No 755 permitted development involving the construction of one or two additional storeys above a single dwelling house or above a detached or terraced building used for commercial purposes. SI 2020 No 756 permitted the demolition of a block of flats or certain commercial buildings and rebuilding for residential use. These SIs did this by amending the Town and Country Planning (General Permitted Development) (England) Order 2015 (SI 2015 No. 596) ("the GPDO 2015"). SI 2020 No. 757 amended the Town and Country Planning (Use Classes) Order 1987 (SI 1987 No. 764 ("the UCO 1987") by introducing a new commercial, business and service Use Class, with the effect that changes of use of buildings or land within that Class are removed from development control. The statutory instruments were the subject of the negative resolution procedure in Parliament. Motions to annul SI 2020 No. 755 and SI 2020 No. 756 were debated and rejected in Parliament on 30 September 2020.

4. On Thursday 27 August 2020, over 5 weeks after the statutory instruments had been laid before Parliament, and 1 to 2 working days before they were due to come into force, the claimant issued its claim for judicial review together with an application for urgent interim relief in the form of a stay on the statutory instruments coming into effect. On the following day the application for urgent relief was refused by Holgate J and the applications for an interim stay and for permission were adjourned to an oral hearing on 8 September 2020. The parties were invited to consider whether the matter should instead proceed as an expedited rolled-up hearing. They agreed that that would be preferable and so on 2 September the Court ordered a rolled-up hearing to take place by 15 October 2020. The claimant withdrew its application for interim relief.

5. In summary this claim raises the following issues for the Court to determine:-

   (i) Whether each of the statutory instruments constituted a plan or programme which ought to have been the subject of an environmental assessment before being made, pursuant to the Environmental Assessment of Plans and Programmes Regulations 2004 (SI 2004 No. 1633) ("the 2004 Regulations");

(ii) Whether in making SI 2020 No. 755 and SI 2020 No. 756 the defendant failed to comply with the public sector equality duty ("PSED") contained in section 149 of the Equality Act 2010;

(iii) Whether the defendant acted unlawfully as he (a) did not comply with requirements for lawful consultation by failing "conscientiously to consider" the responses submitted on the planning reforms proposed, (b) failed to take into account advice from the Government's own experts before making SI 2020 No. 755 and SI 2020 No. 756, (c) failed to act consistently by consulting on proposals relating to phone masts but not consulting on the statutory instruments at issue in the present case and (d) failed to undertake a further consultation exercise in relation to SI 2020 No 756.

6. It is important to emphasise at the outset what this case is and is not about. Judicial review is the means of ensuring that public bodies act within the limits of their legal powers and in accordance with the relevant procedures and legal principles governing the exercise of their decision-making functions. The role of the court in judicial review is concerned with resolving questions of law. The court is not responsible for making political, social, or economic choices. Those decisions, and those choices, are ones that Parliament has entrusted to ministers and other public bodies. The choices may be matters of legitimate public debate, but they are not matters for the court to determine. The Court is only concerned with the legal issues raised by the claimant as to whether the defendant has acted unlawfully. The claimant contends that the changes made by the SIs are radical and have been the subject of controversy. But it is not the role of the court to assess the underlying merits of the proposals. Similarly, criticism has been made of the way in which, or the speed with which, these changes were made. Again, these are not matters for the court to determine save and in so far as they involve questions concerning whether or not the appropriate legal procedures for making the changes were followed.

The Background

The Claimant

7. The claimant is a non-governmental campaigning organisation incorporated as a limited company in January 2019. It is comprised of campaigners, lawyers, planners, scientists and others who seek to persuade the Government and other public bodies to pursue particular action in relation to climate change and other environmental issues.

Permitted Development Rights

8. The GPDO 2015 grants planning permission for defined Classes of development. These are referred to as permitted development rights ("PD rights"). Where a development is granted planning permission by reason of a PD right, there is no necessity for a developer to apply for a separate grant of planning permission from a local planning authority ("LPA").

9. In 2013 the predecessor order to the GPDO 2015 was amended so as to permit the use of an office building to be changed to a use as dwelling houses. This right is now

found in the GPDO 2015 as Class O in Part 3 of Schedule 2. It is accompanied by other PD rights which allow buildings used for storage or distribution, light industry, or agriculture to be used as dwelling houses (Classes P, PA and Q respectively). These rights are subject to a condition that before development may be begun a developer must apply to the planning authority for a determination as to whether a "prior approval" is required on a defined and limited range of planning considerations. One of the Government's objectives in introducing these PD rights was to increase the supply of housing.

10. In May 2018 the Royal Institution of Chartered Surveyors published a report on the effects of the PD right allowing the use of office buildings to change to dwelling houses. It criticised the quality of the accommodation being provided under Class O, the sustainability of some of the locations and the inability of local authorities to secure a contribution to the provision of affordable housing. It suggested that the legislation should require planning permission to be obtained for this type of change of use.

11. On 30 January 2020 the Building Better, Building Beautiful Commission ("the Commission"), a body established to advise the Government on tackling poor quality design, published its final report "Living with Beauty" which made similar criticisms. The defendant received a copy of the report on 9 January and spoke at its launch on 30 January.

12. On 21 July 2020 the Ministry of Housing Communities and Local Government ("MHCLG") published a research paper into the quality of houses delivered through "change of use" PD rights (referred to as "the Clifford report"). That identified a number of concerns, including space standards, adequacy of natural light for occupiers, access to amenity space, the effects of surrounding land uses, and the mix of housing provided. Although the report was not published until July 2020, the defendant had received a summary of the scope of the report, key issues and findings on 10 January 2020 and a final version of the report on 21 April 2020 for him to consider.

The Process Leading to the SIs

13. In October 2018 MHCLG published a consultation paper entitled "Planning Reform: Supporting the high street and increasing the delivery of new homes." The consultation period ran between 29 October 2018 and 14 January 2019. The document proposed new PD rights covering such matters as permitting changes of use from retail to residential use, permitting the extension of buildings upwards to create additional homes and the demolition of certain commercial buildings for residential redevelopment. The paper stated that that last proposal would be the subject of a further consultation exercise.

14. On 1 May 2019 the defendant published the Government's response to the consultation. The document summarised the responses made to each question in the consultation paper and explained how the Government intended to proceed. Question 1.30 of the consultation paper had specifically asked consultees for views and evidence about the implications of the proposed changes for people with protected characteristics under the 2010 Act and whether anything could be done to mitigate

such impacts. However, this question attracted only a limited number of responses (para. 57). The responses given were summarised (para. 59), and the Government stated that they had been taken into consideration in preparing a public sector equality duty assessment (para. 60).

15. On 12 March 2020 the defendant issued a document entitled "Planning for the Future." Paragraph 10 stated that the Government would introduce new PD rights for building upwards over certain existing buildings and would "consult on the detail of a new PD right to allow vacant commercial buildings, industrial buildings and residential blocks to be demolished and replaced with well-designed new residential units which meet natural light standards."

16. Mr Simon Gallagher is the Director of Planning for MHCLG. In paragraph 10 of his witness statement he states that during the period January to March 2020 the first patients in the UK tested positive for Covid-19 and the first transmissions in the UK were confirmed. He says that the pandemic "has generated an economic emergency and upheaval of a scale and intensity not previously known in peacetime." He continues by stating that, as a consequence, the Government has had to intervene urgently in the economy as a whole in unprecedented ways in order to avert or minimise potentially very severe and long term impacts on the lives of citizens and the prospects for future economic growth. Forecasts for economic growth were reduced substantially. Indeed, one key forecast made in summer 2020 predicted a reduction in the economy for 2020 of 9.9% (paragraph 13). Through regular discussion with representatives of the housing and construction sectors, the MHCLG became aware of particular difficulties faced by the construction sector as a result of the pandemic. There was a record monthly decline of 40.2% of construction output in April 2020. Whilst the output of that sector had increased in May, June and July, it was still 11.6% lower in July 2020 compared with February 2020 (paragraph 14).

17. On 20 July 2020 a submission was put to the Minister for Housing asking him to approve the three statutory instruments. The submission records that it had been decided that in order to support economic renewal and regeneration and to respond to the economic crisis caused by the pandemic, additional PD rights for the redevelopment of vacant buildings for residential purposes and a broad Use Class of business, commercial and service uses would be introduced without consultation (paragraphs 2 to 3). The Minister's attention was drawn to criticisms that the recently enacted PD right for allowing the addition of 2 storeys to blocks of flats lacked any requirement for the provision of affordable housing (paragraph 7). The submission referred to the same point when discussing the application of the PSED to the proposed statutory instruments (paragraph 10). The PSED assessments and impact assessments for each statutory instrument were provided to the Minister.

18. The Explanatory Memoranda for SI 2020 No. 755 and SI 2020 No. 756 stated that the new PD rights were being introduced to speed up the delivery of housing, reduce the need to develop on greenfield land and to support economic recovery from the pandemic by encouraging development. The Explanatory Memorandum for SI 2020 No. 757 stated that the UCO 1987 was being amended to better reflect the diversity of uses found on high streets and in town centres, to provide flexibility for businesses to adapt and diversify to meet changing demands and to help town centres recover from the economic impact of the pandemic.

The Statutory Framework

Town and Country Planning Act 1990

19. It is necessary to identify the legal nature of the rights conferred by the GPDO 2015, and the exemptions created by the UCO 1987, before considering the application of the principles governing environmental assessment under the 2004 Regulations. We begin with the relevant primary legislation.

20. By section 57(1) of the Town and Country Planning Act 1990 ("TCPA 1990") "planning permission is required for the development of any land."

21. Section 55(1) provides a general definition of "development", namely "the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land." Section 55(1A) provides:-

> "For the purposes of this Act "building operations" includes—
>
> demolition of buildings;
>
> rebuilding;
>
> structural alterations of or additions to buildings; and
>
> other operations normally undertaken by a person carrying on business as a builder."

22. Section 55(2) provides that certain operations or uses of land shall not be taken to involve development of that land and therefore they are excluded from the requirement to obtain planning permission and thus from development control. So, for example, works for maintaining, improving or altering a building which affect only its interior or do not alter its external appearance (paragraph (a)), the use of any buildings or land within the curtilage of a dwelling house for purposes incidental to the enjoyment of that dwelling house (paragraph (d)), or the use of land for agriculture or forestry and of any building occupied with such land for those purposes (paragraph (e)) is excluded from development control. Paragraph (f) excludes from the definition of development changes of use defined in an order, made by the Secretary of State:-

> "in the case of buildings or other land which are used for a purpose of any class specified in an order made by the Secretary of State under this section, the use of the buildings or other land or, subject to the provisions of the order, of any part of the buildings or the other land, for any other purpose of the same class."

The UCO 1987 was made under the predecessor to this provision (s. 22(2)(f) of the Town and Country Planning Act 1971).

23. Section 58 (1) provides that planning permission may be granted by *inter alia*:-

- a development order,
- a local development order,
- a neighbourhood order, or
- the LPA on an application made to that authority

Planning permission may also be granted through a "simplified planning zone scheme" (ss. 82 and 86) or through the designation of an "enterprise zone" (s. 88).

24. Unless planning permission is granted by a development order it is generally necessary for a landowner or developer to make an application to the relevant LPA for a grant of planning permission for the development proposed.

25. Section 59 deals with development orders:-

> "(1) The Secretary of State shall by order (in this Act referred to as a "development order") provide for the granting of planning permission."
>
> (2) A development order may either—
>
> (a) itself grant planning permission for development specified in the order or for development of any class specified; or
>
> (b) in respect of development for which planning permission is not granted by the order itself, provide for the granting of planning permission by the local planning authority (or, in the cases provided in the following provisions, by the Secretary of State [or the Welsh Ministers on application to the authority (or, in the cases provided in the following provisions, on application to the Secretary of State or the Welsh Ministers) in accordance with the provisions of the order.
>
> (3) A development order may be made either—
>
> (a) as a general order applicable, except so far as the order otherwise provides, to all land, or
>
> (b) as a special order applicable only to such land or descriptions of land as may be specified in the order.
>
> (4) In this Act, references to a development order are—
>
> in relation to England, references to a development order made by the Secretary of State;

> in relation to Wales, references to a development order made by the Welsh Ministers."

26. Section 59(2)(a), therefore, provides that a development order may itself grant planning permission for a development or a Class of development described in the order. For such planning permissions, s.60 provides that:-

> "(1) Planning permission granted by a development order may be granted either unconditionally or subject to such conditions or limitations as may be specified in the order.
>
> (1A) Without prejudice to the generality of subsection (1), where planning permission is granted by a development order for building operations in England, the order may require the approval of the local planning authority, or the Secretary of State, to be obtained—
>
> (a) for those operations, or
>
> (b) with respect to any matters that relate to those operations, or to the use of the land in question following those operations, and are specified in the order.
>
> (2) …….
>
> (2A) Without prejudice to the generality of subsection (1), where planning permission is granted by a development order for development consisting of a change in the use of land in England, the order may require the approval of the local planning authority, or of the Secretary of State, to be obtained—
>
> (a) for the use of the land for the new use;
>
> (b) with respect to matters that relate to the new use and are specified in the order.
>
> ……."

27. Thus, the effect of section 60(1A) and (2A) is that where a development order grants planning permission, the order may require the approval of the LPA to be obtained in relation to certain specified matters. Under the GPDO 2015 there are some PD rights which are subject to either prior approval of certain matters being obtained from the LPA or a determination by the authority as to whether such prior approval is required before the development may be begun.

28. Section 69 requires a local planning authority to maintain a publicly available register of *inter alia* "applications for planning permission". Section 69A extended that requirement to cover "prior approval applications in connection with planning permission granted by a development order." Subsection (2) provides:-

> "A "prior approval application", in connection with planning permission granted by a development order, means an application made to a local planning authority for—
>
> (a) any approval of the authority required under the order, or
>
> (b) a determination from the authority as to whether such approval is required."

29. It is clear from the structure of the TCPA 1990 (see e.g. ss. 57 to 59, 62, 69, 69A and 78) and the delegated legislation made thereunder, that an application for approval of matters required by a condition in a planning permission granted either expressly or as a PD right in the GPDO 2015 is not treated as being an application for planning permission.

30. The GPDO 2015 grants PD rights generally throughout England. But planning permissions may also be granted by orders made by other authorities on a more local basis: see, for example, sections 61A to 61P of the TCPA 1990 as amended (i.e. local development orders, neighbourhood development orders and mayoral development orders). The issue concerning the applicability of the 2004 Regulations may therefore also have implications for such local orders.

31. Section 59(2)(b) provides for the granting of a planning permission for development which is not permitted by a development order, by a local planning authority on an application made to it for that purpose (see also s. 62). The procedure for such applications is set out in the Town and Country Planning (Development Management Procedure) (England) Order 2015 (SI 2015 No 595) ("the DMPO").

32. Where an application is made to an LPA for planning permission, section 70(2) requires the authority to have regard to the provisions of the development plan so far as is material to that application. It was common ground before us that this duty does not apply to other types of application, such as an application for prior approval under the GPDO 2015. It follows that s. 38(6) of PCPA 2004, requiring a determination to be made in accordance with the development plan unless material considerations indicate otherwise, does not apply in the consideration of an application for prior approval. However, development plan policies may still be taken into account in so far as they are relevant to decisions under the controls which that order allows a planning authority to exercise.

The GPDO 2015

33. Article 3(1), entitled "Permitted development" provides that:-

> "planning permission is hereby granted for the classes of development described as permitted development in schedule 2."

34. Article 3(1) is subject to regulations 75 to 78 of the Conservation of Habitats and Species Regulations 2017 (SI 2017 No. 1012), so that if development would be likely to have a significant effect on a European conservation site, it may not be begun

unless the local planning authority concludes that it would not adversely affect the integrity of that site.

35. Article 3(1) is also subject to the provisions of the order. Under Article 3(2):-

> "any permission granted by article 3(1) is subject to any relevant exception, limitation or condition specified in Schedule 2."

36. The effect of article 3(10) is that development which is required to be the subject of environmental impact assessment ("EIA") under the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 (SI 2017 No. 571) ("the 2017 Regulations") is not permitted by the GPDO 2015.

37. Certain of the PD rights do not apply within "article 2(3) land" which is defined in Part 1 of Schedule 1 as:-

> "Land within—
>
> (a) an area designated as a conservation area under section 69 of the Planning (Listed Buildings and Conservation Areas) Act 1990 (designation of conservation areas);
>
> (b) an area of outstanding natural beauty;
>
> (c) an area specified by the Secretary of State for the purposes of section 41(3) of the Wildlife and Countryside Act 1981 (enhancement and protection of the natural beauty and amenity of the countryside);
>
> (d) the Broads;
>
> (e) a National Park; and
>
> (f) a World Heritage Site."

38. PD rights are granted by article 3(1). They are defined in Parts 1 to 20 of schedule 20. Each Part contains one or more Classes of development. The content of each PD right within a Class broadly follows the same pattern. First, the "permitted development" is described, second, any exclusions from that right are defined and third, pursuant to article 3(2), conditions are imposed upon the permission granted by article 3(1) and the relevant Class. Finally, interpretation provisions are added for some Classes.

39. By way of example, Part 1 of schedule 2 deals with development within the curtilage of a dwelling house and covers such matters as additions or alterations to a roof (Classes B and C), porches (Class D), incidental buildings (Class E), and hard surfaces (Class F). In the case of Class B, the "permitted development" is defined as "the enlargement of a dwelling house consisting of an addition to or alteration of a roof". Paragraph B.1 then defines development which is excluded from Class B by reference to *inter alia* height and volume restrictions and article 2(3) land. Paragraph

B.2 sets out the conditions imposed on the permitted development. This is a standard form or pattern for the grant of a PD right which does not require prior approval. In terms of legal structure, it is typical of the rights set out in schedule 2.

40. The same pattern is repeated for PD rights which are subject to some form of prior approval. In *Keenan v Woking Borough Council* [2018] PTSR 697 the Court of Appeal held that the grant of permission did not come about through article 3(2) and the conditions imposed by paragraph A.2 (of Parts 6 and 7). Rather it was granted by article 3(1) and the description of the PD right in Class A read together with the exclusions in paragraph A.1. The conditions imposed on a permission for PD do not form part of the grant of that permission by the GPDO. It followed that a condition allowing development to proceed where the local authority failed to determine whether prior approval was required within a prescribed time limit could not be relied upon as granting permission for development which fell outside the ambit of the PD right. ([34]-[37]).

41. Accordingly, article 3(1) of the GPDO 2015 grants planning permission for each development which falls within the ambit of the description in the relevant Class read together with any exclusions (see e.g. *Keenan* at [33]). If the development falls outside those legal parameters, it is to be treated as development without planning permission. Exclusions from the PD right granted by a particular Class (e.g. height or volumetric limits) form part of the definition of that right. Consequently, if a particular development is carried out which exceeds those limits, then the whole of that development is treated as having been carried out without any planning permission under the order and is liable to enforcement action (see e.g. *Garland v Minister of Housing and Local Government* (1968) 20 P&CR 93; *Rochdale Metropolitan Borough Council v Simmonds* (1980) 40 P&CR 432).

42. Likewise, it is common ground between the parties that where a person wishes to rely upon a PD right which is subject to a condition that before development commences prior approval must be obtained, or an application made to determine whether prior approval is required, then if that condition is breached, any such development is treated as having been undertaken without planning permission (see *Winters v Secretary of State for Communities and Local Government* [2017] PTSR 568).

43. Finally in relation to the GPDO 2015, we mention article 4, which provides a power for a planning authority to make a direction that a PD right granted by the order shall not apply within a specified area or to a particular development.

The Use Classes Order 1987

44. Before it was amended by SI 2020 No. 757, article 3(1) of the UCO 1987 provided:-

> "Subject to the provisions of this Order, where a building or other land is used for a purpose of any class specified in the Schedule, the use of that building or that other land for any other purpose of the same class shall not be taken to involve development of the land.

A "building" includes land occupied with the building and used for the same purposes (article 3(2)).''

45. The schedule to the UCO 1987 contained a number of separate Use Classes, each of which described a range of uses. In summary, before the amendments made by SI 2020 No. 757, those Use Classes were as follows:-

A1 – Shops

A2 – Financial and professional services

A3 – Restaurants and cafes

A4 – Drinking establishments

A5 – Hot food takeaways

B1 – Business use

B2 – General industrial use

B3 – Storage or distribution use

C1 – Hotels

C2 – Residential institutions

C2A – Secure residential institutions

C3 – Dwelling houses

C4 – Houses in multiple occupation

D1 – Non-residential institutions

D2 – Assembly and leisure

The Statutory Instruments under challenge

46. We summarise below the key provisions of SI 2020 Nos. 755, 756 and 757. However, in order to put provisions in SI 2020 No. 755 and SI 2020 No. 756 into context, it is necessary first to refer to amendments to the GPDO 2015 which had previously been made with effect from 1 August 2020 by the Town and Country Planning (Permitted Development and Miscellaneous Amendments) (England) (Coronavirus) Regulations 2020 (SI 2020 No. 632). Despite its title, the relevant amendments have permanent effect.

SI 2020 No. 632

47. Regulation 22 inserted a new Part 20 into schedule 2 of the GPDO 2015 containing a new PD right, referred to as Class A, for the construction of new dwelling houses on top of detached blocks of flats. There has been no legal challenge to the validity of this statutory instrument.

48. Class A follows the pattern already described. Paragraph A describes the PD right, paragraph A.1 sets out exclusions from that right, and paragraph A.2 imposes conditions on the grant of permission under Class A. Those conditions include a requirement to apply for and obtain prior approval before beginning the development authorised. Paragraph B sets out the prior approval procedure and scope of the LPA's powers. Paragraph C contains some interpretation provisions.

49. The permission granted under Class A of Part 20 is for the construction of up to 2 additional storeys of new dwelling houses immediately above the existing highest storey of a purpose built, detached block of flats (as defined in paragraph C). The effect of exclusions set out in paragraph A.1 is that this new Class only applies *inter alia* if the existing building has 3 or more storeys above ground, the extended building would not exceed 30m in height and the highest part of the roof would not be increased by more than 7m. Class A does not apply to *inter alia* a listed building or to a building on article 2(3) land or on a site of special scientific interest (SSSI).

50. Paragraph A.2(1) imposes a condition that before development may begin the developer must apply to the LPA for prior approval of *inter alia* transport and highway impacts, contamination risks, flooding risks, the external appearance of the building, the provision of adequate natural light in all habitable rooms, and impact on the amenity of the existing building and neighbouring premises (including overlooking, privacy and loss of light). Paragraph B(3) allows the LPA to refuse the application by reference to the subjects listed in paragraph A.2(1), or the list of exclusions in paragraph A.1, or because of a failure by the developer to provide sufficient information to enable the LPA to determine whether the proposal complies with those matters. The LPA may impose conditions reasonably related to the subject matter of the prior approval (paragraph B(18)). Paragraph B(16) prohibits commencement of development before the applicant receives written notice of the grant of prior approval. Thus, the obtaining of prior approval is a pre-requisite for reliance upon the PD right.

51. Paragraph B(2) sets out the information and details which must be provided as part of the application for prior approval. This includes details of the application site, the new dwelling houses and related works, floor plans and elevations. Any development authorised must be carried out in accordance with the details authorised (paragraph B(17)). Paragraph B(5) to (7), (10), (11) and (12) sets out the consultations which must be carried out, as appropriate, with the highway authority and the Environment Agency (on flood risk) and requirements for notifying members of the public. Paragraph B(9) requires the LPA to refuse prior approval if "adequate natural light" is not provided in all habitable rooms.

SI 2020 No. 755

52. The new PD rights introduced by SI 2020 No.755 have the same structure and approach as was adopted for Class A in Part 20 of Schedule 2 to the GPDO 2015. These new rights fall into two parts.

53. First, article 3 inserts a new Class AA into Part 1 of Schedule 2 of the GPDO 2015, which deals with development within the curtilage of a dwelling house. We include

the text of Class AA in an annex to this judgment, as an example of the detailed provisions of the new PD rights.

54. Class AA provides for the enlargement of a single dwelling house by the construction of two additional storeys, where the existing building consists of two or more storeys, or otherwise one additional storey. "Storey" excludes basements and any accommodation in the roof (paragraph AA.4(2)).

55. Paragraph AA.1 contains a similar list of exclusions to those concerning Class A of Part 20. But there are some differences. Here, the highest part of the roof of the extended building must not exceed an overall height of 18m. The increase in the height of the building must not exceed 3.5m if the existing building is single storey, or 7m if more than one storey. Any additional storey may only be built on the "principal part" of the dwelling (as defined in paragraphs AA.4(1)). This PD right does not apply if one or more storeys have already been added to the original building (as defined in article 2(1)).

56. Paragraphs AA.2(3) and AA.3(13) prohibit any development beginning before prior approval is obtained dealing with matters such as impact on the amenity of any adjoining premises, the external appearance of the dwelling house, and impacts on air traffic and "protected vistas". The completed building may only be used as a single dwelling house (paragraph AA.2(2)). The structure of the prior approval procedure is similar to that previously described, but the detailed requirements have been adapted to reflect the nature of this PD right.

57. Secondly, article 4 of SI 2020 No. 755 amends the recently enacted part 20 of Schedule 2 to the GPDO 2015, by inserting four additional Classes of PD rights, which may be summarised as follows:-

Class AA

Up to two additional storeys of new dwelling houses above the topmost storey of a detached building used for retail purposes (Use Classes A1 to A3), offices, a betting office, launderette or pay day loan shop ("commercial uses") or a mixture of such uses, with or without dwelling houses. The overall height of the completed development may not exceed 30m.

Class AB

One additional storey of new dwelling houses (where the existing building is single storey), or otherwise up to two additional storeys, above a terraced building used for the same purposes as in Class AA. The overall height of the completed development may not exceed 18m.

Class AC

One additional storey of new dwelling houses, (where the existing building is single storey), or otherwise up to two additional storeys, above a terraced building in use as a single dwelling. The overall height of the completed development may not exceed 18m.

Class AD

One additional storey of new dwelling houses (where the existing building is single storey) or otherwise up to two additional storeys, above a detached single dwelling. The overall height of the completed development must not exceed 18m.

58. Otherwise, these four Classes of PD rights are subject to similar exclusions as apply to Class A of Part 20. The conditions include a requirement that prior approval be obtained before development may begin, which must then be carried out in accordance with the approved details. Substantially the same controls are exercisable by an LPA when determining an application for prior approval under these four Classes as apply under Class A. But in the case of Classes AA and AB, the authority may also refuse a proposal, or impose conditions on any approval granted, by reference to the impacts of noise on occupiers of the new dwelling houses and the impacts of the new residential use on the carrying on of any trade, business or other use of land in the area.

SI 2020 No.756

59. This statutory instrument amended GPDO 2015 as already amended by SI 2020 No. 755. Article 4 inserted a new Class ZA at the beginning of Part 20 entitled "Demolition of buildings and construction of new dwelling houses in their place." Part 20 now contains 6 classes: ZA, A, AA, AB, AC and AD. Class ZA has essentially the same legal structure as has already been summarised for the previous amendments.

60. Paragraph ZA defines new PD rights for the demolition of a single purpose-built block of flats, or of a single detached building with use rights within the B1 Use Class (ie. offices, light industry or research and development), and its replacement by either a purpose-built block of flats or a detached dwelling house. Under paragraph ZA.1 the existing building must have been constructed before 1 January 1990, have a footprint not exceeding 1,000sqm, a height not exceeding 18m, and must have been vacant for at least 6 months immediately before the application for prior approval. The existing building must not be a listed building, or an unlisted building in a conservation area, or on article 2(3) land, or within an SSSI. The footprint of the new building must not fall outside of the footprint of the old and its height must not exceed 7m above the height of the old or an overall height of 18m, whichever figure is the lower. The number of storeys in the new building may not exceed the number of storeys in the old by more than two.

61. Reliance upon Class ZA is subject to obtaining prior approval before development may begin. The matters for which the LPA's approval is required are similar to those governing the approval of PD proposals in Class AA and AB in Part 20. But in addition, the authority may control the impact of the development on heritage and archaeology, the method of demolition, the design as well as the external appearance of the new building, and landscaping. The details required for the application reflect those additional controls.

SI 2020 No. 757

62. This statutory instrument amends the UCO 1987 within England. In summary, the changes are:-

(i) The existing schedule to the UCO 1987 is renamed "Schedule 1";

(ii) The existing Use Classes A, B1 and D are revoked, so that schedule 1 refers solely to Classes B2, B8, C1, C2, C2A, C3 and C4;

(iii) Schedule 2 has been added to the UCO 1987. It includes a single new Class E, a "commercial, business and service" Use Class, which amalgamates much of the former A1 to A3 Use Classes, the B1 Use Class and elements of the D1 and D2 Use Classes;

(iv) Other uses in the former D1 and D2 Use Classes now form the new F1 (learning and non-residential institutions) and F2 (local community) Use Classes.

(v) Certain uses in the former A4, A5 and D2 Use Classes have been added to the list of article 3(6) *sui generis* uses, and thus brought into planning control.

The Directive and the 2004 Regulations

The Directive

63. Directive 2001/42/EC on the assessment of the effects of "certain plans and programmes" on the environment ("the Directive") was adopted on 27 June 2001. It can be seen from both its title and contents that the Directive does not apply to all plans and programmes which have environmental effects.

64. Recital (1), referring to what is now article 191 of the Treaty on the Functioning of the European Union, states:-

> "Article 174 of the Treaty provides that Community policy on the environment is to contribute to, inter alia, the preservation, protection and improvement of the quality of the environment, the protection of human health and the prudent and rational utilisation of natural resources and that it is to be based on the precautionary principle. Article 6 of the Treaty provides that environmental protection requirements are to be integrated into the definition of Community policies and activities, in particular with a view to promoting sustainable development."

65. Recital (4) states:-

> "Environmental assessment is an important tool for integrating environmental considerations into the preparation and adoption of certain plans and programmes which are likely to have significant effects on the environment in the Member States, because it ensures that such effects of implementing plans and

> programmes are taken into account during their preparation and before their adoption."

66. Recital (10) states that "plans and programmes prepared for a number of sectors" and setting a "framework for future development consent of projects listed in Annexes I and II to Council Directive 85/337/EEC" ("the EIA Directive" and see in this jurisdiction schedules 1 and 2 of the 2017 Regulations) and all plans and programmes requiring assessment under Directive 92/43/EEC ("the Habitats Directive"), are likely to have significant environmental effects and "should as a rule be made subject to systematic environmental assessment."

67. Recital (11) continues:-

> "Other plans and programmes which set the framework for future development consent of projects may not have significant effects on the environment in all cases and should be assessed only where Member States determine that they are likely to have such effects."

68. Article 1 headed "Objectives" provides:-

> "The objective of this Directive is to provide for a high level of protection of the environment and to contribute to the integration of environmental considerations into the preparation and adoption of plans and programmes with a view to promoting sustainable development, by ensuring that, in accordance with this Directive, an environmental assessment is carried out of certain plans and programmes which are likely to have significant effects on the environment."

69. Article 2 defines terms used in the Directive. In particular article 2(a) defines "plans and programmes" as:-

> " 'plans and programmes' shall mean plans and programmes, including those co-financed by the European Community, as well as any modifications to them:
>
> — which are subject to preparation and/or adoption by an authority at national, regional or local level or which are prepared by an authority for adoption, through a legislative procedure by Parliament or Government, and
>
> — which are required by legislative, regulatory or administrative provisions".

70. Article 3 deals with the scope of the Directive. Article 3(1) to (4) provides:-

> "1. An environmental assessment, in accordance with Articles 4 to 9, shall be carried out for plans and programmes referred to in paragraphs 2 to 4 which are likely to have significant environmental effects.

> 2. Subject to paragraph 3, an environmental assessment shall be carried out for all plans and programmes,
>
> (a) which are prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use and which set the framework for future development consent of projects listed in Annexes I and II to Directive 85/337/EEC, or
>
> (b) which, in view of the likely effect on sites, have been determined to require an assessment pursuant to Article 6 or 7 of Directive 92/43/EEC.
>
> 3. Plans and programmes referred to in paragraph 2 which determine the use of small areas at local level and minor modifications to plans and programmes referred to in paragraph 2 shall require an environmental assessment only where the Member States determine that they are likely to have significant environmental effects.
>
> 4. Member States shall determine whether plans and programmes, other than those referred to in paragraph 2, which set the framework for future development consent of projects, are likely to have significant environmental effects."

71. It is common ground that the question here is whether the SIs under challenge fall within article 3(4). They could not fall within Article 3(2).

72. Where a measure does constitute a plan or programme, then, in deciding whether that plan or programme is likely to have a significant environmental effect, article 3(5) requires relevant criteria in Annex II to the Directive to be taken into account:-

> "1. The characteristics of plans and programmes, having regard, in particular, to
> — the degree to which the plan or programme sets a framework for projects and other activities, either with regard to the location, nature, size and operating conditions or by allocating resources,
> — the degree to which the plan or programme influences other plans and programmes including those in a hierarchy,
> — the relevance of the plan or programme for the integration of environmental considerations in particular with a view to promoting sustainable development,
> — environmental problems relevant to the plan or programme,
> — the relevance of the plan or programme for the implementation of Community legislation on the environment (e.g. plans and programmes linked to waste-management or water protection).

> 2. Characteristics of the effects and of the area likely to be affected, having regard, in particular, to
> — the probability, duration, frequency and reversibility of the effects,
> — the cumulative nature of the effects,
> — the transboundary nature of the effects,
> — the risks to human health or the environment (e.g. due to accidents),
> — the magnitude and spatial extent of the effects (geographical area and size of the population likely to be affected),
> — the value and vulnerability of the area likely to be affected due to:
> — special natural characteristics or cultural heritage,
> — exceeded environmental quality standards or limit values,
> — intensive land-use,
> — the effects on areas or landscapes which have a recognised national, Community or international protection status."

73. The environmental assessment required by the Directive is defined in article 2 as covering the preparation of an environmental report (dealing with the likely significant effects on the environment of implementing the plan or programme and "reasonable alternatives" – see Article 5(1) and Annex I), the carrying out of consultations with the public and certain bodies on the draft plan and the environmental report, taking that report and the results of those consultations into account in decision-making, and the provision of information on the decision (see Articles 4 to 9).

74. Article 4(1) emphasises that the environmental assessment is to be carried out "during the preparation of a plan or programme and before its adoption or submission to the legislative procedure."

The 2004 Regulations

75. For plans and programmes relating to the whole or part of England, the Directive has been transposed by the 2004 Regulations. The Regulations employ essentially the same language as the Directive, although the provisions have been re-ordered. The definition of "plans and programmes" in article 2 of the Directive has been repeated in regulation 2(1) of the 2004 Regulations. Articles 3(2) to (5) and 4(1) have been mirrored in regulations 5 and 9 and Schedule 1.

76. It is common ground that the question is whether the SIs under challenge fall within regulation 5(4), which provides:-

> "Subject to paragraph (5) and regulation 7, where–
>
> (a) the first formal preparatory act of a plan or programme, other than a plan or programme of the description set out in paragraph (2) or (3), is on or after 21st July 2004;

> (b) the plan or programme sets the framework for future development consent of projects; and
>
> (c) the plan or programme is the subject of a determination under regulation 9(1) or a direction under regulation 10(3) that it is likely to have significant environmental effects,
>
> the responsible authority shall carry out, or secure the carrying out of, an environmental assessment, in accordance with Part 3 of these Regulations, during the preparation of that plan or programme and before its adoption or submission to the legislative procedure"

77. Where a plan or programme falls within the scope of the 2004 Regulations (see regulations 2(1) and 3 subject to the exclusions in regulation 5(5) and (6)), regulation 9 requires the "responsible authority," essentially the authority by which or on whose behalf the document is prepared, to determine whether the plan or programme (or modification thereof) is likely to have significant environmental effects, applying the criteria in schedule 1. Regulation 8 prevents a plan or programme from being adopted or submitted to a legislative procedure until it is "screened" under regulation 9 and, if environmental assessment is required, until an environmental report is prepared (regulation 12), consultations take place on both the draft plan and the report (regulations 13 and 14), and all that material, including the outcome of such consultations, are taken into account by the responsible authority.

The Grounds of Challenge

78. The claimant relies upon the following grounds of challenge:-

> (1) In respect of each of the three SIs, the Secretary of State unlawfully failed to carry out an environmental assessment pursuant to the Directive and the 2004 Regulations. The measures in question clearly set the framework for development consents: alternatively, they modify an existing plan or programme that sets the framework for development consents. In terms of environmental impacts, the Secretary of State cannot rely on EIA to bypass the overarching SEA requirement: and in any event, the potential environmental impacts cannot be summarily dismissed without a proper screening process.
>
> (2) In respect of SI 2020 N0. 755 and SI 2020 No. 756 the Secretary of State failed to have due regard to the PSED in s.149 of the Equality Act 2010. In the light of the previously unpublished equality impact assessments, the claimant no longer pursues the argument that due regard was not had to the equality impacts of Class E (SI 2020 No. 757).
>
> (3) In respect of each of the three SIs, the Secretary of State failed to consider the weight of the evidence against these

radical reforms, including prior consultation responses and the advice of his own experts. Moreover, he acted with unlawful inconsistency, and in breach of an express promise to re-consult. This composite ground is divided as follows:

(a) The Secretary of State failed conscientiously to consider the responses to the consultation on proposed planning reforms which ran from 29 October 2018 to 14 January 2019, contrary to the fourth Sedley/Gunning principle (*R v Brent London Borough Council, ex p Gunning* (1985) 84 LGR 168). While he may have been aware of the highly negative consultation responses, he approached the consultation exercise with no intention of changing his mind about the substance of the reforms.

(b) In respect of SI 2020 No. 755 and SI 2020 No. 756, the Secretary of State failed to take into account the advice of the Government's own experts: in particular, the findings of the Building Better, Building Beautiful Commission's "Living with Beauty" Report and the findings of his own commissioned expert report "Research into the quality standard of homes delivered through change of use Permitted Development rights" (The Clifford report). While he may have been aware of these reports, he did not actively consider their findings or weigh them up in his mind.

(c) In respect of SI 2020 No. 755 and SI 2020 No. 756, the Secretary of State adopted an approach which was unfair, inconsistent and/or irrational in the context of the approach taken to similar proposed PD reforms: namely those relating to the deployment of 5G wireless masts.

(d) In respect of SI 2020 No. 756, the Secretary of State was required to reconsult before introducing Class ZA. There was a legitimate expectation of reconsultation on the proposal for a PD right allowing the demolition and rebuild of commercial properties and residential blocks, arising from an express and unequivocal promise to re-consult which was made in the original consultation document.

Ground 1 – The Applicability of the Directive and the 2004 Regulations to the SIs

The issues

79. From the statutory framework it can be seen that a plan or programme is only required to be the subject of an environmental assessment if all four of the following requirements are satisfied:-

(1) The plan or programme must be subject to preparation or adoption by an authority at national, regional, or local level, or be prepared by an authority for adoption, through a legislative procedure by Parliament or Government;

(2) The plan or programme must be required by legislative, regulatory or administrative provisions;

(3) The plan or programme must set the framework for future development consents of projects; and

(4) The plan or programme must be likely to have significant environmental effects.

80. It is common ground that the three SIs satisfy criterion (1). The SIs have been prepared and adopted by a national authority. Furthermore, it is clear from the legislation and the jurisprudence that a legislative measure may constitute a plan or programme requiring environmental assessment.

81. It is also common ground that the SIs satisfy criterion (2). It is well established in the case law of the Court of Justice of the European Union ("the CJEU") that "required" simply means "regulated" and so the requirement to carry out environmental assessment is not limited to plans or programmes which an authority is under a *duty* to prepare and adopt (see *Inter-Environnement Bruxelles ASBL v Region de Bruxelles – Capitale* (Case C-567/10 [2012] 2 CMLR 909 at [28] to [32]) ("*IEB 1*"). The CJEU has reaffirmed the principle stated in *IEB 1* (see *IEB 2* at [37]-[38]; *Thybaut v Region Wallone Case* C-160/17 at [43]; and *APS Onlus v Presidente del Consiglio dei Ministri* (Case C-305/18) at [45]. The three SIs were "regulated" in that they could only be made in accordance with the relevant provisions of the TCPA 1990.

82. The issues between the parties concern the application of criteria (3) and (4).

Submissions

83. In relation to criterion (3) Mr. Paul Brown QC, who, together with Mr Alex Shattock, appeared on behalf of the claimant, first submits that all three SIs should be treated as modifications of measures which themselves had required an environmental assessment and therefore should themselves be so assessed. A modification includes a repeal or abrogation of such a measure. The GPDO 2015 and UCO 1987 provide, or form part of, a statutory framework for granting future development consents and should therefore have been the subject of environmental assessment. Mr Brown submits that the SIs modify the GPDO 2015 or the UCO 1987 and so must also be subject to environmental assessment. Mr Brown accepts that his argument requires the court to accept that all PD rights granted by the GPDO 2015, and not just those subject to a prior approval procedure, set a framework for the grant of future development consents.

84. Second, Mr Brown submits that because the three statutory instruments grant permissions for development and reduce the range of planning considerations which may otherwise be taken into account at the prior approval stage (the new PD rights), or remove certain changes of use from development control altogether (the

UCO 1987), the effect is to disapply relevant provisions of the development plan on matters over which an LPA could otherwise exercise development control. By way of example, he refers to the inability of LPAs to apply development plan policies requiring the provision of affordable housing as a component of housing schemes. He also points out that many policies directly related to environmental protection cannot be relied upon as a basis for refusing prior approval (see *Murrell v Secretary of State for Communities and Local Government* [2011] 1 P & CR 6 at paragraphs [18 - 19] and [47]). But as Mr Brown accepted, this argument applies equally to PD rights generally, including those which are not subject to any form of prior approval.

85. Mr Brown QC also submits in relation to the new PD rights that the development consents do not crystallise until prior approval is granted, relying upon *Murrell v Secretary of State for Communities and Local Government* [2011] 1 P&CR 6 at [42-3] and [46]. A developer does not have any right to carry out the development before then. Accordingly, it is said that the provisions in the statutory instruments which define matters which the LPA is to assess before granting prior approval amount to a framework for future development consents.

86. Mr. Rupert Warren QC, who together with Ms Anjoli Foster appeared on behalf of the defendant, responds firstly that the UCO 1987, and the amendments to it, are simply concerned with defining certain of the boundaries of development control, or, in other words, matters which do not require approval by way of a planning permission. The UCO 1987 does not set a framework for the grant of development consents. As for PD rights, the GPDO 2015 grants planning permission, whether subject to a prior approval procedure or not. The requirement to satisfy a prior approval procedure simply forms part of the conditions imposed on the grant of certain PD rights. It does not set a "framework" within the meaning of the 2004 Regulations. He also submits that the three statutory instruments do not have the effect of modifying any plans or programmes, such as development plans, which have been subject to environmental assessment.

87. If, however, the Court should decide that criterion (3) is satisfied, the defendant submits that criterion (4) is not. In his oral submissions Mr Warren QC referred to article 3(2)(a) of the Directive which refers to plans or programmes which set a framework for future development consents for projects required to be the subject of EIA. He then sought to rely upon article 3(10) of the GPDO 2015 which disapplies PD rights in respect of EIA development under the 2017 Regulations.

88. Mr. Brown QC submits that the defendant's reliance upon the exclusion of EIA development from PD rights to justify non-compliance with the Directive is conceptually wrong. An environmental assessment of plans or programmes is required *inter alia* to be separate from and take place before EIA for development projects requiring consent (see for example article 3(2) of the Directive). The nature of the assessment required is very different. In any event, if the SIs constitute plans or programmes satisfying criterion (3), then regulation 8(1) of the 2004 Regulations required a formal determination to be made by the "responsible authority" under regulation 9(1) as to whether the measures would be likely to have significant environmental effects. If the conclusion from this screening process is that they would not have such effects, then a reasoned decision should

have been published under regulation 9(3). The Secretary of State has not taken those steps.

Discussion

89. We can deal with SI 2020 No. 757 shortly. We agree with Mr Warren QC that a legal measure such as the UCO 1987, which simply defines whether certain changes of use constitute development for the purposes of development control, cannot be described as setting a framework for the grant of future development consents. By definition, it does no such thing. We note that the CJEU took the same approach in *Compagnie d'Entreprises CFE SA* ([AG 90-92] and [63]-[66]).

90. We turn to SI 2020 No. 755 and SI 2020 No. 756. The essential issue concerns the meaning of the phrase "set the framework for future development consents of projects" having regard to the context and the underlying purpose of the Directive. In terms of the wording of article 3(4), it is dealing with the framework for "future development consents". Further, the CJEU has held that the provision refers to any measure which establishes, by defining rules and procedures for scrutiny applicable to the relevant sector, a significant body of criteria and detailed rules for the grant and implementation of consents for the development of land (see e.g. *IEB 1* at [30]; *Nomarchiaki Aftodioikisi Aitoloakarnanias and others* Case C-43/10; [2013] Env.L.R. 453 at [95]; *D'Oultremont v Region Wallone* Case C-290/15 at [49]; *IEB 2* at [53]; *Thybaut* at [54]; *APS Onlus* at [50]; *Compagnie d'Enterprises CFE SA v Region de Bruxelles-Capitale* [2020] Env.LR. 285 at [61]). In other words, article 3(4) of the Directive concerns measures which deal with future development consents, and which do so by setting out a significant body of criteria for determining how such future development consents will be determined.

91. The provision must be read in the light of the underlying objective. The CJEU has stated that the objective of the Directive in article 1, namely to provide a high level of protection for the environment and the integration of environmental considerations into the preparation and adoption of plans and programmes so as to promote sustainable development, should be taken into account when deciding whether a measure falls within the scope of the Directive and that the provisions defining that scope should be interpreted broadly (*IEB 1* at [7]; *D'Oultremont* at [39]-[40]; *Terre Wallone ASBL v Region Wallone* Case C-321/18; [2020] CMLR 1 at [24]).

92. However, not every domestic measure involving a plan or programme which would be likely to have significant environmental effects is required to be the subject of environmental assessment under the Directive. The Directive was not drafted so as to produce that outcome. Article 1 sets out the objective. Article 3 defines those projects which are within the scope of the Directive and so require an appropriate assessment. The wording of article 3(2) and (4) sets out the boundaries of what constitutes a plan or programme which must be the subject of an environmental assessment. The Supreme Court made this point in *Buckinghamshire County Council*. Lord Sumption JSC said at [120]:-

> "The starting point is that the SEA Directive plainly does not require an environmental assessment to be carried out for all

> "plans or programmes" whose implementation would have a major impact on the environment. Even on the footing that a plan or programme is required (or regulated) by legislative, regulatory or administrative provisions within article 2(a) and has a "significant environmental [effect]" within article 3(1), an environmental assessment is still not required unless the plan or programme in question "[sets] the framework for future development consent" within article 3(2)(a)."

93. The National Planning Policy Framework ("NPPF") illustrates the point. There can be little doubt that the NPPF does satisfy criterion (3). It contains a significant body of criteria amounting to a framework for determining applications for future development consent. But in *R (Friends of the Earth Limited) v Secretary of State for Housing, Communities and Local Government* [2019] PTSR 1540 Dove J held that the NPPF does not satisfy criterion (2). It is not a measure required or regulated by legislative, regulatory or administrative provisions and for that reason did not need to be the subject of an environmental assessment (see [46] to [52]).

94. Moreover, a purposive and broad approach to EU legislation for the protection of the environment and the assessment of environmental effects must not disregard the clearly expressed wording of that legislation (*Brussels Hoofdstedelijk Gewest v Vlaamse Gewest Case* C-275/09 at [AG 28] and [29]). Effect must be given to the expression "sets the framework for future development consent of projects" which delimits the scope of the Directive. Those words must be applied, they cannot be ignored (see e.g. *Walton v Scottish Ministers* [2013] PTSR 51 at [65]-[69]).

95. In the case of SI 2020 No. 755 and SI 2020 No.756, the statutory instruments themselves granted planning permission for the carrying out of development falling within the scope of PD rights as defined in the order itself. That follows from the wording of section 59(2) of the TCPA which provides that a development order may "itself grant planning permission for the development specified in the order" and article 3(1) of the GPDO which provides that "planning permission is granted for the classes of development described". That is confirmed by the decision of the Court of Appeal in *Keenan v Woking Borough Council* [2018] PTSR 697 at [33]. Accordingly, the provisions of the two statutory instruments (and indeed the GPDO generally) do not set the framework for the grant of future development consents. They are the measure by which planning permission for defined developments is granted. It is a condition of certain planning permissions granted by the two statutory instruments that specified matters must be the subject of prior approval before the development may be begun. But these provisions do not set out a significant body of criteria or rules by which the application for prior approval of those matters is to be determined. Rather, they delimit the scope of the powers which the planning authority may exercise at that stage. The provisions do not themselves set criteria or rules for determining, or constraining, how those discretionary powers are to be exercised within those limits.

96. We consider that the provisions of the two statutory instruments at issue do not set a framework for future development consents. They grant planning permission for certain defined development. As a condition of that planning permission, they provide for certain matters to be approved by the planning authority before the

particular development may be begun, but they do not set out a significant body of criteria or rules for determining how the authority should exercise the powers of control given to it. Whether the development consent is seen as the planning permission granted by the GPDO 2015, or a combination of that planning permission and the prior approval of specified matters before the development may begin, the two statutory instruments do not set the framework for future development consents.

97. Furthermore, we do not consider that the references in *Murrell v Secretary of State for Communities and Local Government* [2011] 1 P. & C.R. 6 to permissions accruing or crystallising on the expiry of the period for determining whether prior approval of certain matters is required, assists in the resolution of the issues in this case. Those phrases were used to assist in the determination of the issue in that case, which was concerned with the time at which development could be begun where a local authority had 28 days within which to determine whether prior approval of certain matters was required and that time had expired without any decision being issued. In that context, it is understandable that the court referred to the planning permission as having accrued or crystallised at the date when the period for making a determination had expired. But the court was not seeking to qualify the statutory provisions which make it clear that planning permission is granted by the article 3(1) of the GPDO itself. Indeed, the Court of Appeal in *Keenan v Woking Borough Council* [2018] PTSR 697 held that article 3(1) of the GPDO granted planning permission and considered its analysis to be consistent with the decision in *Murrell* as appears from paragraph 39 of its judgment.

98. Nor do we do consider that the statutory instruments have the effect of repealing or modifying an pre-existing plan or programme which had been the subject of an environmental assessment, such as a development plan, as in *IEB 1* or in *Cala Homes (South) Limited v Secretary of State for Communities and Local Government* [2010] EWHC 2866 (Admin) at [61]-[63]. The content of such plans remains unaffected by this legislation.

99. Likewise, we do not accept that the grant of a PD right, whether or not subject to prior approval, falls within the scope of the Directive and the 2004 Regulations because it is said to involve a derogation from development plan polices. Here, Mr Brown QC sought to rely upon *Thybaut*, notably at [37] and [56]-[58]. But in that case the designation of an urban land consolidation area qualified for environmental assessment because, although it did not itself lay down any positive requirements, it paved the way for a future urban development plan which could allow for "departures" or derogations from existing development plans and planning rules (article 127(3) of the Walloon Code). In other words, that designation satisfied the essential requirement in criterion (3) that the measure in question must set a framework for future development consents or must modify such a framework.

100. Thus, *Thybaut* does not assist as to the correct legal analysis of SI 2020 No. 755 and SI 2020 No. 756. Those instruments grant planning permissions as PD rights. The fact that they make it unnecessary to make an application to a local planning authority for a grant of planning permission, with the consequence that an authority which might otherwise have had to deal with that application does not consider the

application of development plan policies, does not convert them into a framework for future development consents. That consequence should not be confused with the question of whether these measures themselves amount to plans or programmes setting the framework for future development consents. The same analysis applies as in the case of PD rights which are not subject to any form of prior approval.

101. We would make two further observations. First, it is unnecessary to review the domestic legislation considered in the decisions of the CJEU to which we were referred. We were taken carefully through that material by counsel for the defendant in his submissions. None of the cases involved a measure which itself granted some form of development consent, as do SI 2020 No. 755 and SI 2020 No. 756. In some cases the domestic measures set criteria or rules which would be applied in future permitting, for example, the rules for the management of nitrates in agriculture (*Terre Wallone ASBL v Region Wallone* C-105/09 and C-110/09 at [19] to [24] and [43] to [54]). In other cases, the measure was required to be the subject of an environmental assessment because it amended or repealed an existing development plan which itself had been the subject of environmental assessment (see eg. *IEB 1* at [36] to [43]).

102. Secondly, we note that the contention that legislation of this kind falls within the scope of Article 3(4) of the Directive and so is required to be the subject of environmental assessment appears to be a novel one. It has wide ramifications. As Mr Brown QC accepted, it would apply to the grant of PD rights by the GPDO 2015 generally and not just those which are subject to prior approval. If the creation of PD rights by a general development order constituted a "plan or programme" requiring an environmental assessment, then it would seem to follow that the removal of such rights by a direction under article 4 of the GPDO 2015 (see [53] above), typically within a district, would also fall within the scope of the Directive. It would also appear that the same would apply to local development orders, neighbourhood development orders and mayoral development orders granting planning permissions. On that basis, screening decisions would have to be made under regulation 9(1) of the 2004 Regulations and, where there are likely to be significant environmental effects, environmental assessments carried out. That does not, of course, affect the interpretation of the provisions of the Directive or the application of the 2004 regulations to the present case. It does, however, serve to underline the fact that the interpretation advanced by the claimant has consequences for other legal regimes.

103. We consider, therefore, that the statutory instruments in issue are not a plan or programme within the meaning of article 3(4) of the Directive because they do not set the framework for future development consents. Accordingly, criterion (3) is not satisfied.

104. If we were wrong on that conclusion, it would be necessary to consider Mr Warren's submissions on criterion (4). We can deal with this issue shortly.

105. First, Mr Warren's argument does not apply to SI 2020 No. 757.

106. Secondly, in relation to the SI 2020 No. 755 and SI 2020 No 756, the only relevant effect of article 3(10) of the GPDO 2015 is that those SIs could not fall within

article 3(2) of the Directive or regulation 5(2) of the 2004 Regulations. Mr Warren's submission does not answer the relevant question, namely whether the SIs would be likely to have significant environmental effects for the purposes of article 3(4) of the Directive or regulation 5(4) of the 2004 Regulations. If the SIs were (contrary to our view) plans or programmes, the potential environmental effects of those plans would need to be considered. The environmental assessment of plans or programmes falling within Article 3(4) of the Directive is different in kind from the EIA required for individual projects. The former is considering environmental effects potentially arising from the plans and programmes. The latter is concerned with EIA of an individual project.

107. Finally, if, contrary to our view, the statutory instruments did satisfy criterion 3, the defendant would have been required to make and publish a screening decision under regulation 9(1) of the 2004 Regulation (see also regulation 11) to consider whether or not there were potentially significant environmental effects. The Secretary of State did not do this.

108. We conclude that none of the statutory instruments challenged constitute a plan or programme setting the framework for future development consents within the meaning of article 3(4) of the Directive. For that reason, there was no requirement for them to be subject to an environmental assessment. We accept that this ground of challenge is arguable and we grant permission to apply for judicial review on this ground. Ultimately, for the reasons given above, ground 1 does not succeed.

Ground 2 – The Public Sector Equality Duty

109. Mr Brown submitted that the defendant failed to comply with its public sector equality duty under section 149 of the 2010 Act when making SI 2020 No. 755 and SI 2020 No. 756, particularly having regard to the decisions in *R (Bracking) v Secretary of State for Work and Pensions* [2014] EWCA Civ 1345, [2014] Eq. LR. 60 and *Hurley v Secretary of State for Business, Innovation and Skills* [2012] EWHC 201. In particular, he submitted that the defendant failed to carry out appropriate equality impact assessments with respect to those statutory instruments and failed to have regard to what he described as the known impact of small, out-of-town permitted development units on those with protected characteristics as defined by the 2010 Act. In that regard, Mr Brown principally relied upon a witness statement of Polly Neate, the chief executive of Shelter, dated 29 September 2020. We grant permission to the claimant to rely upon this statement.

110. Mr Warren submitted that the defendant did complete a PSED assessment for each SI. The defendant recognised that the grant of PD rights might result in there being less affordable housing being provided than would otherwise be the case and considered the impact on the elderly and the disabled, but considered that the impact was likely to be limited. Further, the PSED assessments found that the PD rights would contribute to overall housing supply and bring forward development that might not otherwise be available and that was seen as likely to contribute to enhancing equality of access. In those circumstances, the defendant had had due regard to the matters referred to in section 149 of the 2010 Act.

Discussion

111. The provisions of section 149 of the 2010 Act on which the claimant principally relies state that:-

> "(1) A public authority must, in the exercise of its functions, have due regard to the need to—
>
> (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
>
> (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
>
> (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.
>
> "(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—
>
> (a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
>
> (b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;
>
> …..
>
> " (7) The relevant protected characteristics are—
>
> age;
>
> disability;
>
> ….."

112. The general approach to whether the PSED has been complied with is well-established. Relevant principles are set out in the decision of the Court of Appeal in *R (Bracking) v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345; [2014] Eq LR 60, especially at [26]. There, the relevant government department decided to close a fund operated by an independent non-governmental body which, broadly, provided funding to assist disabled persons to lead independent lives. On the facts, the Court of Appeal concluded that the information provided to the relevant minister did not give her an adequate awareness that the proposals would place independent living in serious peril for a large number of people and the Court concluded, in that particular case, that the minister had not complied with the PSED and quashed the decision. As the Court of Appeal has

subsequently observed, that decision has to be read in context and the application of the PSED will differ from case to case depending upon the function being exercised and the facts of the case. Furthermore, courts should be careful not to read the judgment in *Bracking* as though it were a statute. See *Powell v Dacorum Borough Council* [2019] EWCA Civ 23, [2019] HLR 21 at [51].

113. The Court of Appeal in *R (Baker) v Secretary of State for Communities and Local Government* [2009] PTSR 809 has also given valuable guidance on assessing whether there had been compliance with section 71 of the Race Relations Act 1996 ("the 1996 Act"). Similar principles apply to the equivalent duty in section 149 of the 2010 Act: see *Hotak v London Borough of Southwark* [2016] A.C. 811 at [73-74]. In broad terms, the duty is a duty to have due regard to the specified matters, not a duty to achieve a specific result. The duty is one of substance, not form, and the real issue is whether the relevant public authority has, in substance, had regard to the relevant matters, taking into account the nature of the decision and the public authority's reasoning (see, e.g., *Baker* at [36-37], and *Bracking* at [26]). As Lord Neuberger observed at paragraph 74 of his judgment in *Hotak v London Borough of Southwark* "the weight and extent of the duty are highly fact-sensitive and dependant on individual judgment".

114. Furthermore, it is helpful to identify the specific functions that a defendant is exercising as it is in the exercise of its functions that a public authority is under a duty to have due regard to the specified matters. The question of what regard is due will be influenced by a number of factors including, but not limited to, the nature of the decision being taken, the stage of the decision-making process that has been reached and the particular characteristics of the function being exercised.

115. The position in the present case is this. First, the consultation paper issued at the start of the process stated that the proposals had to be assessed by reference to the PSED contained in the 2010 Act. It specifically asked whether those responding had any evidence and any views about the implications of the proposed changes on people with protected characteristics and whether there was anything that could be done to mitigate any impact that they identified.

116. Secondly, equality impact assessments were prepared for each of the proposed SIs. By way of example, the assessment for what became SI 2020 No. 755 described the proposals. It noted that the intended outcome was, amongst other things, to support the development of additional homes and expressed the view that that would benefit individuals from protected groups who needed housing. It noted that there had been a limited response to the invitation to comment on the equality impacts of the proposals but that those who commented raised concerns that building upwards could negatively impact those with limited mobility such as the elderly and disabled persons. The assessment considered in detail the impact on the elderly and the disabled and concluded, for the reasons given, that the proposals would not have a disproportionate direct or indirect impact on protected groups. The assessment also noted that there were concerns about the lack of affordable housing in permitted development schemes generally. It then assessed the impact of that issue in detail by reference to those groups with protected characteristics. The assessment concluded that there would be limited potential impact. The assessment also considered possible amendments to the proposals to mitigate the

possibility of any impact on protected groups. A similar exercise was carried out in relation to the proposed SI 2020 No. 756 and the impact of granting rights to demolish a vacant block of flats or commercial building and allow rebuilding as residential development and also in respect of SI 2020 No. 757 and the changes to the UCO 1987, notably the introduction of a new commercial, business and service Use Class.

117. Thirdly, the attention of the minister was specifically drawn to the PSED. The written submission which went to the minister seeking his approval of the SIs expressly referred to the duty and summarised the conclusions of the equality impact assessments. The assessments themselves were annexed to the submission. They summarised the essentials of the duty and, as discussed above, conducted an analysis of the likely impact of the proposed changes on, amongst others, the elderly, the disabled and those who might need affordable housing.

118. In those circumstances, there is no proper or realistic basis upon which it could be said that the defendant failed to have due regard to the specific matters set out in section 149 of the 2010 Act.

119. So far as the evidence of Ms Neate is concerned that referred, broadly, to two matters. First, Ms Neate refers to the view that the changes to the permitted rights regime would not contribute to the objective of providing good quality, affordable homes and says that she and others wrote to the Secretary of State on 21 January 2019 to raise that issue. The witness statement does not specifically say that the question of the impact of affordable housing was linked to an impact upon people with protected characteristics, although the statement refers to the writer's view on the impact on vulnerable families and the homeless. The question of affordable housing, however, was a matter that was specifically considered as part of the equality impact assessment process and was referred to in the submission to the minister. It is impossible to suggest that the Secretary of State failed to have due regard to this issue.

120. Secondly, at paragraph 19 and following of her statement, Ms Neate refers to an "additional equalities concern" which relates to "our knowledge that some new housing schemes coming through the PDR route are being used by local authorities as temporary accommodation for homeless families". She expresses the view that by that route, it seems, small, poor quality housing was provided in inappropriate locations for homeless families. She then analyses some statistics and concludes that certain groups with protected characteristics were overrepresented in that group.

121. There is no basis for concluding that that provides, even arguably, any foundation for the allegation that the minister did not have due regard to the matters referred to in section 149 of the 2020 Act. The information is said to have emerged from Shelter's own casework experience with homeless families. It is based on what it is said that local authorities are doing, that is using some developments carried out under PD rights to provide temporary accommodation for homeless families. However, that information was not provided to the minister. There is no realistic basis for concluding that he could or should have anticipated what Shelter now

says might occur if the proposals were implemented or for inferring that there was some failure to have due regard to relevant equality matters because of that.

122. For completeness we note that the claimant's skeleton argument but not the grounds, suggest that the defendant has failed in his duty of continuing inquiry. The skeleton argument points to paragraphs in the equality impact assessment which refer to the fact that while some further information and data might be helpful the cost and time required to obtain the data would be disproportionate given the evidence supporting the view that any potential adverse impact would be minimal. A decision not to make further inquiries will be legally flawed only if it is irrational: see *R (Khatun) v Newham LBC* [2004] 1 W.L.R. 417 especially [35]. There was nothing irrational in the present case to decide that it would be disproportionate in the circumstances to pursue further inquiries to obtain further information. If, therefore, the claimant intended this to be a ground of claim (for which an application for permission would be required), it would in any event be unarguable.

123. In the circumstances, ground 2 of the claim is unarguable. There is no realistic prospect of the claimant establishing that there has been any failure to have due regard to the matters specified in section 149 of the 2010 Act. Permission to apply for judicial review on this ground is, accordingly, refused.

Ground 3 – Failure to take account of material considerations, inconsistency, and departure from a promise to consult

124. Mr Brown submitted that there were four matters which considered individually or cumulatively rendered the making of the SIs unlawful. First, he submitted that the defendant failed conscientiously to consider the responses to the consultation paper as required by the fourth principle governing consultation in *R v Brent London Borough Council ex p. Gunning* (1985) 74 LGR 168, endorsed in *R (Moseley) v London Borough of Haringey* [2014] 1 WLR 3947. He confirmed at the hearing that he was not suggesting that the defendant had approached the matter with a closed mind, or that the defendant had predetermined the issue or was biased. Nor was the challenge based on any absence of reasons. Rather, he submitted that there was nothing in the explanatory memorandum or other documents to explain how it was that the defendant took the consultation responses into account or how they informed the ultimate outcome.

125. Secondly, Mr Brown submitted that the defendant failed to take into account material considerations before laying the SIs before Parliament in July 2020. He submitted that the defendant failed to have regard to the advice of his experts including, in particular, the report of the Building Better, Building Beautiful Commission and the Clifford report.

126. Thirdly, Mr Brown submitted that the defendant had adopted an approach that was unfair, inconsistent or irrational as compared with the approach adopted in relation to proposals for PD rights in connection with the deployment of 5G networks and mobile telephony. In the latter case, the defendant had proposed to undertake a further technical consultation on the details but he had decided not to conduct a further technical consultation in the case of the SIs, notwithstanding, in Mr

Brown's submission, that similar environmental and landscape concerns would arise.

127. Fourthly, Mr Brown submitted that the defendant had expressly promised a further consultation exercise on the subject matter of SI 2020 No. 756, that is the grant of PD rights for the demolition of commercial buildings or purpose-built blocks of flats and rebuilding for residential purposes. The earlier promise gave rise to a legitimate expectation of further consultation. The test for whether the defendant could resile from that expectation was set out in the judgment of Lord Carnwath in *United Policy Holders v Attorney General of Trinidad and Tobago* [2016] 1 W.L.R. 3383 especially at [121], namely that it was for the public body to demonstrate that there were good reasons, judged by the court to be proportionate, for resiling from the promise. The threshold for permitting a departure was higher in cases involving a departure from a legitimate expectation which gave rise to a procedural expectation of consultation as compared with a substantive benefit. In the present case, the defendant had not shown good reason for departing from the promise and to do so was not proportionate. In that regard, Mr Brown submitted that it was relevant that the issue had been consulted upon before, and further consultation was considered appropriate. Further, the PD rights were not granted for the short term, nor were they limited to the period when considerations relating to the coronavirus pandemic prevailed but would continue beyond that. Finally, the development could not be begun until prior approval had been obtained which, he submitted, indicated that, given that development would not begin quickly, time could have been taken to consult prior to making the SIs.

128. Mr Warren submitted that the Government response to the consultation exercise summarised the responses received as did the explanatory memoranda to the SIs. In the circumstances, it was not arguable that the defendant had failed to consider conscientiously the responses made. Similarly, the defendant had commissioned and received copies of the Commission's report and the Clifford report. Further, the position in relation to development relating to 5G networks was materially different from that in relation to PD rights to demolish a commercial building or block of flats and erect a residential building. On the facts, there was no basis for concluding that there had been any unfair, inconsistent or irrational treatment. The defendant in the present case decided to depart from the promise of further consultation because of the need to assist in the recovery from the economic difficulties created by the coronavirus pandemic, as appeared from the contemporaneous documentation and the witness statement of Mr Gallagher. In the circumstances, the defendant had shown good cause for departing from the promise and its actions were proportionate in the circumstances.

Discussion

129. In relation to ground 3a, the consultation paper had sought views on a number of questions. In May 2019, the Government published a document summarising the views that had been expressed, the concerns that had been raised and the Government's response to those matters. Before making the SIs, the defendant was provided with draft copies of the explanatory memorandum for each SI. The explanatory memorandum for the draft SI 2020 No 755 and SI 2020 No. 757 again summarised briefly the degree of support for, and opposition to, the proposal, and

the concerns that had been raised. The explanatory memorandum for the draft SI 2020 No 756 referred to the consultation responses and noted that there was to have been a further consultation but it had been decided to introduce the PD right without further consultation in order to support economic regeneration. It noted that the Government had considered the range of matters to be left to planning authorities for prior approval while maintaining a simplified planning system. In those circumstances it is not arguable that the defendant failed conscientiously to consider the consultation responses. The decision on whether to proceed, and if so what provisions to include in the SIs, in the light of the consultation responses and other relevant matters were questions for the defendant to determine.

130. Similarly, it is not arguable that the defendant failed to have regard to the Commission's report and the Clifford report before making SI 2020 No. 755 and SI 2020 No. 756 (ground 3b). The defendant had commissioned those reports. He had been provided with a copy of the Commission's report in January 2020. He had publicly made comments on that report at its launch. In relation to the Clifford Report, as Mr Gallagher explains in his witness statement, the defendant also received a submission annexing the report and asking for confirmation on the scope and timing of the proposals for PD rights and the timing of publication of the report. In these circumstances, there is no realistic or arguable basis upon which it could be claimed that there was any failure to have regard to that material.

131. In relation to ground 3c, Mr Brown's essential argument is that there was a legal obligation to conduct a further consultation on technical matters before making the SIs. The basis for that submission is that that was required as a matter of consistency, fairness and rationality given that the defendant had decided to undertake a second consultation on technical matters in relation to PD rights to support the deployment of 5G coverage.

132. An obligation to consult may be imposed by statute or by the common law in defined circumstances, such as where there is an express promise or past practice of consultation on a particular matter. Mr Brown did not refer in written or oral argument to any authority suggesting that any principle of consistency could generate a legally enforceable obligation to consult. Nor did he refer to any case law dealing with the circumstances when fairness imposed procedural obligations to consult. We doubt that the fact that a government department has chosen to consult on one proposal of itself gives rise to any enforceable public law obligation to consult on a different proposal. It is not necessary to consider that issue further as the premise upon which Mr Brown's argument relies is not well founded. He submits that the issues arising out of granting PD rights in relation to the development of 5G networks are similar to those arising out of the PD rights granted in this case. As Mr Gallagher explains in his witness statement, the Government considers whether to consult or not on an individual basis and the relevant circumstances at issue. The Government considered that the grant of the PD rights and the changes to the Use Classes introduced by the SIs were not similar to the issues arising in relation to the development of 5G networks and involved the balancing of different considerations. In those circumstances, the approach of the defendant is not irrational. Given the differences that are considered to arise in relation to the technical issues surrounding the development of 5G networks, questions of consistency and fairness do not arise.

133. Dealing with ground 3d, it is common ground between the parties that the defendant did make a representation that there would be a further consultation in relation to the proposal to grant PD rights to demolish certain commercial buildings or residential blocks and rebuild for residential use and that representation gave rise to a legitimate expectation of consultation in relation to the subject matter of that particular SI. The question is whether the defendant acted lawfully by resiling from that representation and proceeding to make SI 2020 No. 756 without further consultation.

134. The test identified by Mr Brown is derived from the observations of Lord Carnwath in *United Policyholders Group v Attorney-General of Trinidad and Tobago* [2015] 1 W.L.R. 3383. That case concerned representations by the government that policyholders of a particular insurance company which was in financial deficit would receive all sums due under their policies. A subsequent government sought to resile from that representation. The case, therefore, concerned a legitimate expectation of a substantive benefit (payment of sums due under certain insurance policies) rather than, as here, a procedural legitimate expectation (of public consultation prior to the making of a statutory instrument). Lord Carnwath reviewed the emerging case law on this aspect of legitimate expectations and said, at paragraph 121 of his judgment:-

> "121. In summary, the trend of modern authority, judicial and academic, favours a narrow interpretation of the Coughlan principle, which can be simply stated. Where a promise or representation, which is "clear, unambiguous and devoid of relevant qualification", has been given to an identifiable defined person or group by a public authority for its own purposes, either in return for action by the person or group, or on the basis of which the person or group has acted to its detriment, the court will require it to be honoured, unless the authority is able to show good reasons, judged by the court to be proportionate, to resile from it. In judging proportionality the court will take into account any conflict with wider policy issues, particularly those of a "macro-economic" or "macro-political" kind. By that test, for the reasons given by Lord Neuberger PSC, the present appeal must fail."

135. Mr Brown also referred to *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374. That case did involve a departure from a procedural legitimate expectation (of consultation) taken on the grounds of national security. The issue in that case turned primarily on questions of the proper role of the court in the assessment of such issues and does not assist materially in the consideration of the present case.

136. There were limited submissions made on the issue of the proper approach of the court to considering when a departure from a procedural legitimate expectation was lawful and little reference to the case law. In those circumstances, it is neither possible nor appropriate for this court to express concluded views on that issue. For that reason we proceed on the basis of the approach indicated by the claimant, namely that is for the defendant to establish good reason for a departure and for the

court to determine if those reasons are proportionate, and assuming that there is some different and higher threshold for departure in cases involving procedural legitimate expectations, without deciding whether or not that is the correct approach.

137. First, the defendant has established that there were good reasons for departing from the promise in the present case and not having a second consultation on the proposals for PD rights for demolition of commercial or residential buildings and rebuilding for residential use. The coronavirus pandemic had led to severe economic difficulties including a reduction in the rate of construction and planning applications. The government decided to grant the PD rights in order to stimulate regeneration at a time of great economic difficulty arising out of the pandemic. That appears from the terms of the explanatory memorandum to SI 2020 No. 576.The matter is fully explained in the witness statement of Mr Gallagher who refers to the large-scale public health emergency created by the coronavirus pandemic which in turn generated an economic emergency and upheaval on a scale not previously known in peacetime. The Government had sought to intervene in the economy in unprecedented ways to minimise the very severe effects of the pandemic. In the light of that, the decision was taken in favour of urgent action rather than further consultation.

138. Secondly, the reasons are proportionate in the circumstances. On the one hand, the decision to depart from the promise deprived the public of the opportunity of making further representations on the proposed PD rights and deprived the Government of further, potentially helpful, input into the policy decision. On the other hand, the economic situation was grave. The grant of PD rights was intended to encourage developers to start the process of taking steps to carry out developments. That in turn would contribute to addressing the economic effects arising out of the pandemic. That was a proportionate course of action in the circumstances. It is correct that developments could not be begun until prior approval of certain matters had been obtained. But the aim was to stimulate the process of development in circumstances of economic urgency. It is correct that the PD rights would continue after the end of the current pandemic (unless amending legislation is enacted) but that does not render departure from the promise of further consultation disproportionate. It is correct that there was a proposal to create PD rights which involved further consultation. But circumstances had changed because of the pandemic. The reasons given for departing from the promise of further consultation were good and were proportionate.

139. In his written and oral submissions, Mr Brown submitted that grounds 3a to 3d should be seen as one overarching or composite ground of challenge and should be viewed cumulatively. In our judgment, the grounds are factually and conceptually distinct and are better approached in that way. But even if they were considered cumulatively, they do not establish any unlawfulness on the part of the defendant.

140. We would refuse permission to apply on grounds 3a, 3b and 3c on the basis that those grounds are not arguable. We recognise that the claim that the departure from the promise of further consultation raises arguable issues which needed examination by the court. Accordingly, we grant permission to apply on ground 3d but, for the reasons given, ground 3d fails.

CONCLUSIONS

141. The three SIs did not set a framework for future development consents within the meaning of Article 3(4) of the Directive. The departure from the promise to consult on the proposals on PD rights to demolish office buildings and erect buildings for residential use was lawful. The claim for judicial review is therefore dismissed.

Annex: Example of a permitted development right subject to prior approval Class AA of Part 1 to Schedule 2 to GPDO 2015 (inserted by SI 2020 No. 755)

"*Class AA - enlargement of a dwellinghouse by construction of additional storeys*

AA. - Permitted development

The enlargement of a dwellinghouse consisting of the construction of—

(a) up to two additional storeys, where the existing dwellinghouse consists of two or more storeys; or

(b) one additional storey, where the existing dwellinghouse consists of one storey,

immediately above the topmost storey of the dwellinghouse, together with any engineering operations reasonably necessary for the purpose of that construction.

AA.1. - Development not permitted

Development is not permitted by Class AA if—

(a) permission to use the dwellinghouse as a dwellinghouse has been granted only by virtue of Class M, N, O, P, PA or Q of Part 3 of this Schedule (changes of use);

(b) the dwellinghouse is located on—

(i) article 2(3) land; or

(ii) a site of special scientific interest;

(c) the dwellinghouse was constructed before 1st July 1948 or after 28th October 2018;
(d) the existing dwellinghouse has been enlarged by the addition of one or more storeys above the original dwellinghouse, whether in reliance on the permission granted by Class AA or otherwise;
(e) following the development the height of the highest part of the roof of the dwellinghouse would exceed 18 metres;
(f) following the development the height of the highest part of the roof of the dwellinghouse would exceed the height of the highest part of the roof of the existing dwellinghouse by more than—
(i) 3.5 metres, where the existing dwellinghouse consists of one storey; or
(ii) 7 metres, where the existing dwellinghouse consists of more than one storey;
(g) the dwellinghouse is not detached and following the development the height of the highest part of its roof would exceed by more than 3.5 metres—
(i) in the case of a semi-detached house, the height of the highest part of the roof of the building with which it shares a party wall (or, as the case may be, which has a main wall adjoining its main wall); or
(ii) in the case of a terrace house, the height of the highest part of the roof of every other building in the row in which it is situated;
(h) the floor to ceiling height of any additional storey, measured internally, would exceed the lower of—
(i) 3 metres; or
(ii) the floor to ceiling height, measured internally, of any storey of the principal part of the existing dwellinghouse;
(i) any additional storey is constructed other than on the principal part of the dwellinghouse;
(j) the development would include the provision of visible support structures on or attached to the exterior of the dwellinghouse upon completion of the development; or
(k) the development would include any engineering operations other than works within the curtilage of the dwellinghouse to strengthen its existing walls or existing foundations.

AA.2. - Conditions

(1) Development is permitted by Class AA subject to the conditions set out in sub-paragraphs (2) and (3).
(2) The conditions in this sub-paragraph are as follows—
(a) the materials used in any exterior work must be of a similar appearance to those used in the construction of the exterior of the existing dwellinghouse;
(b) the development must not include a window in any wall or roof slope forming a side elevation of the dwelling house;
(c) the roof pitch of the principal part of the dwellinghouse following the development must be the same as the roof pitch of the existing dwellinghouse; and
(d) following the development, the dwellinghouse must be used as a dwellinghouse within the meaning of Class C3 of the Schedule to the Use Classes Order and for no other purpose, except to the extent that the other purpose is ancillary to the primary use as a dwellinghouse.

(3) The conditions in this sub-paragraph are as follows—

(a) before beginning the development, the developer must apply to the local planning authority for prior approval as to—

(i) impact on the amenity of any adjoining premises including overlooking, privacy and the loss of light;

(ii) the external appearance of the dwellinghouse, including the design and architectural features of—

(aa) the principal elevation of the dwellinghouse, and

(bb) any side elevation of the dwellinghouse that fronts a highway;

(iii) air traffic and defence asset impacts of the development; and

(iv) whether, as a result of the siting of the dwellinghouse, the development will impact on a protected view identified in the Directions Relating to Protected Vistas dated 15th March 2012 issued by the Secretary of State;

(b) before beginning the development, the developer must provide the local planning authority with a report for the management of the construction of the development, which sets out the proposed development hours of operation and how any adverse impact of noise, dust, vibration and traffic on adjoining owners or occupiers will be mitigated;

(c) the development must be completed within a period of 3 years starting with the date prior approval is granted;

(d) the developer must notify the local planning authority of the completion of the development as soon as reasonably practicable after completion; and

(e) that notification must be in writing and include—

(i) the name of the developer;

(ii) the address of the dwellinghouse; and

(iii) the date of completion.

AA.3. - Procedure for applications for prior approval

(1) The following sub-paragraphs apply where an application to the local planning authority for prior approval is required by paragraph AA.2(3)(a)

(2) The application must be accompanied by—

(a) a written description of the proposed development, including details of any works proposed;

(b) a plan which is drawn to an identified scale and shows the direction of North, indicating the site and showing the proposed development; and

(c) a plan which is drawn to an identified scale and shows—

(i) the existing and proposed elevations of the dwellinghouse, and

(ii) the position and dimensions of the proposed windows.

(3) The local planning authority may refuse an application where, in its opinion—

(a) the proposed development does not comply with, or

(b) the developer has provided insufficient information to enable the authority to establish whether the proposed development complies with,

any conditions, limitations or restrictions specified in paragraphs AA.1 and AA.2.

(4) Sub-paragraphs (5) to (8) do not apply where a local planning authority refuses an application under sub-paragraph (3); and for the purposes of section 78 (appeals) of the Act, such a refusal is to be treated as a refusal of an application for approval.

(5) The local planning authority must notify each adjoining owner or occupier about the proposed development by serving on them a notice which—

(a) describes the proposed development, including the maximum height of the proposed additional storeys;

(b) provides the address of the proposed development; and

(c) specifies the date, which must not be less than 21 days from the date the notice is given, by which representations are to be received by the local planning authority.

(6) Where the application relates to prior approval as to the impact on air traffic or defence assets, the local planning authority must consult any relevant operators of aerodromes, technical sites or defence assets and where appropriate the Civil Aviation Authority and the Secretary of State for Defence.

(7) Where an aerodrome, technical site or defence asset is identified on a safeguarding map provided to the local planning authority, the local planning authority must not grant prior approval contrary to the advice of the operator of the aerodrome, technical site or defence asset, the Civil Aviation Authority or the Secretary of State for Defence.

(8) Where the application relates to prior approval as to the impact on protected views, the local planning authority must consult Historic England, the Mayor of London and any local planning authorities identified in the Directions Relating to Protected Vistas dated 15th March 2012 issued by the Secretary of State.

(9) The local planning authority must notify the consultees referred to in sub-paragraphs (6) and (8) specifying the date by which they must respond, being not less than 21 days from the date the notice is given.

(10) When computing the number of days in sub-paragraphs (5)(c) and (9), any day which is a public holiday must be disregarded.

(11) The local planning authority may require the developer to submit such information as the authority may reasonably require in order to determine the application, which may include—

(a) assessments of impacts or risks;

(b) statements setting out how impacts or risks are to be mitigated, having regard to the National Planning Policy Framework issued by the Ministry of Housing, Communities and Local Government in February 2019; and

(c) details of proposed building or other operations.

(12) The local planning authority must, when determining an application—

(a) take into account any representations made to them as a result of any notice given under sub-paragraph (5) and any consultation under sub-paragraph (6) or (8); and

(b) have regard to the National Planning Policy Framework issued by the Ministry of Housing, Communities and Local Government in February 2019, so far as relevant to the subject matter of the prior approval, as if the application were a planning application.

(13) The development must not begin before the receipt by the applicant from the local planning authority of a written notice giving their prior approval.

(14) The development must be carried out in accordance with the details approved by the local planning authority.

(15) The local planning authority may grant prior approval unconditionally or subject to conditions reasonably related to the subject matter of the prior approval.

AA.4. - Interpretation of Class AA

(1) For the purposes of Class AA—

"defence asset" means a site identified on a safeguarding map provided to the local planning authority for the purposes of a direction made by the Secretary of State in

exercise of the powers conferred by article 31(1) of the Procedure Order or any previous powers to the like effect;

"detached", in relation to a dwellinghouse, means that the dwellinghouse does not—

(a) share a party wall with another building; or

(b) have a main wall adjoining the main wall of another building;

"principal part", in relation to a dwellinghouse, means the main part of the dwellinghouse excluding any front, side or rear extension of a lower height, whether this forms part of the original dwellinghouse or is a subsequent addition;

"semi-detached", in relation to a dwellinghouse, means that the dwellinghouse is neither detached nor a terrace house;

"technical sites" has the same meaning as in the Town and Country Planning (Safeguarded Aerodromes, Technical Sites and Military Explosives Storage Areas) Direction 2002;

"terrace house" means a dwellinghouse situated in a row of three or more buildings, where—

(a) it shares a party wall with, or has a main wall adjoining the main wall of, the building on either side; or

(b) if it is at the end of a row, it shares a party wall with, or has a main wall adjoining the main wall of, a building which fulfils the requirements of paragraph a.

(2) In Class AA references to a "storey" do not include—

(a) any storey below ground level; or

(b) any accommodation within the roof of a dwellinghouse, whether comprising part of the original dwellinghouse or created by a subsequent addition or alteration,

and accordingly, references to an "additional storey" include a storey constructed in reliance on the permission granted by Class AA which replaces accommodation within the roof of the existing dwellinghouse.".

(3) In Class B (additions etc to the roof of a dwellinghouse), in paragraph B.1 (development not permitted)—

(a) at the end of sub-paragraph (f) omit "or";

(b) at the end of sub-paragraph (g) insert—

"; or

(h) the existing dwellinghouse has been enlarged in reliance on the permission granted by Class AA (enlargement of a dwellinghouse by construction of additional storeys).".

(4) In paragraph I (interpretation of Part 1), in the definition of "terrace house", before "means" insert ", except in Class AA (enlargement of a dwellinghouse by construction of additional storeys),".”