Neutral Citation Number: [2021] EWHC 1649 (Admin)

Case No: CO/4828/2020

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

Bristol Civil Justice Centre
2 Redcliffe St, Redcliffe, Bristol, BS1 6GR

Date: 17/06/2021

Before :

THE HONOURABLE MRS JUSTICE STEYN DBE

- -

Between :

THE QUEEN ON THE APPLICATION OF STUART DANNING	**Claimant**
- and -	
SEDGEMOOR DISTRICT COUNCIL	**Defendant**
-and-	
DAVID FOLLAND	**Interested Party**

- -
- -

Christian Hawley (instructed by **Thrings LLP**) for the **Claimant**
Gavin Collett (instructed by **Sedgemoor District Council**) for the **Defendant**
The **Interested Party** did not appear and was not represented

Hearing date: 9 June 2021

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Approved Judgment

Mrs Justice Steyn :

1. This is a claim for judicial review by which the claimant challenges the decision of Sedgemoor District Council ("the Council"), made by the Planning Committee on 10 November 2020 and confirmed in a decision notice issued on 11 November 2020, to grant planning permission for the change of use of the Panborough Inn from a public house to a residential dwelling.

2. The claim proceeds on three grounds with the permission of HHJ Jarman QC (granted on 10 February 2021), namely:

   i) The Council has failed to consider or discharge its duty under s.149 of the Equality Act 2010;

   ii) The Council has failed to apply Policy D35 of the Sedgemoor Local Plan 2011-2032 in accordance with its express terms; and

   iii) The Council has failed to apply Policy WED13 of the Wedmore Neighbourhood Plan in accordance with its express terms.

3. HHJ Jarman QC rejected the claimant's contention that the claim is an Aarhus Convention claim and the claimant has not sought to renew that aspect of his claim.

4. I will address the planning claim first (that is, grounds 2 and 3 together), before turning to consider the public sector equality duty (ground 1).

The facts

5. The Panborough Inn is a public house on the north side of the Wells-Wedmore Road in the hamlet of Panborough, in Somerset. The public house is on the ground floor, while the first floor of the building is used as a residence. The interested party made an application for planning permission on 16 July 2020 for change of use of the Panborough Inn from a public house (*sui generis*) to a residential dwelling (Use Class C3) ("the planning application"). No physical alterations to the exterior of the building were proposed. The application was made under reference number 50/20/00062.

6. The Panborough Inn was a successful public house during the 1980s and 1990s, but in 2014 it closed. It remained closed for two years before it was bought by the current owners. During the period 2016-2019, a number of efforts were made by the owners to re-open the public house. However, it closed again in June 2019 and has remained closed since then.

7. On 6 August 2019, the applicant had made an earlier application for planning permission, which was withdrawn on 15 October 2020 when the Council's Senior Planning Officer, Mr Titchener, advised the applicant that in the absence of any evidence of recent marketing of the property as a public house, the application did not comply with the relevant policies and would not be supported by officers. Following the withdrawal of the earlier application, in November 2019 the Panborough Inn was put on the market through two agents.

8. The Council's Planning Committee met to consider and determine the planning application on 10 November 2020. By then, the efforts made over the previous 12

months to sell the Panborough Inn as a public house had proved unsuccessful. The Planning Committee received a report from Mr Titchener ("the Officer's Report") and he made a presentation to the Planning Committee at the meeting. The Planning Committee were aware that the application was contentious. Wedmore Parish Council objected, observing that "the local residents have mounted strong objection to its closure and the village will lose a vital local amenity". There were 45 representations received, of which 44 were objections.

9. The Planning Committee decided to grant the application. The implementation of the planning permission will extinguish the use of the Panborough Inn as a public house.

The relevant policies

10. When determining the application for planning permission the Council was required by s.70(2) of the Town and Country Planning Act 1990 to have regard to the Council's Development Plan, so far as material to the application. The Council's Development Plan consists of the Sedgemoor District Council Local Plan 2011-2032 (adopted 20 February 2019) ("the Local Plan") together with Neighbourhood Plans, including the Wedmore Neighbourhood Plan.

11. Policy D35 of the Local Plan provides, so far as material:

> "The loss of existing services and facilities that meet the day to day needs of the local community will be resisted unless it can be demonstrated that:
>
> - There is appropriate alternative provision available locally; and
> - There is no longer a demand for the use and/or is it not viable; and
> - The facility is no longer fit for its intended purpose;
> - There is evidence of community consultation and consideration of alternative ways of delivering the service.
>
> In order to sustain the Tier 4 settlements and smaller villages and hamlets in the Countryside, the loss of existing services and facilities will be resisted unless alternative provision can be demonstrated.
>
> …
>
> In all cases proposals to retain local services and facilities through combined use, or other innovative solutions to service provision will be supported." (emphasis added)

(Although there is no "and" at the end of the third bullet point, it is common ground that the four bullet points are cumulative.)

12. The explanatory notes to Policy D35 address "Local Services" at §§7.279 to 7.291. Paragraph 7.280 states that local services include "*a range of community and cultural facilities that provide for the health, welfare, social, educational, spiritual, recreational, leisure and cultural needs of the community*". Such facilities "*include commercial services including shops, banks, pubs and other leisure facilities*".

13. The explanatory notes continue:

> "7.285 The overall spatial strategy therefore seeks to ensure that a range of services and facilities that meet the day to day needs of communities continues to be provided in rural places. At the Tier 1 settlements of Cheddar and Norther Petherton there is a greater range and depth of local shops and services but given their role it is important that the loss of existing services is resisted where possible. In Tier 2 and Tier 3 settlements some modest and sympathetic growth will support the viability of existing services and facilities and enhance their local service centre role. Similarly preventing their loss from these settlements is a priority and will not be permitted unless there is an overriding justification that outweighs the loss of the service or facility to the community. This will include where an appropriate alternative service or facility has been provided or where it is demonstrated that it is no longer viable.
>
> 7.286 <u>For the majority of the Tier 4 settlements and smaller villages and hamlets in the Countryside the loss of a service or facility will mean a total loss to the local community resulting in the need to travel even for basic services. It is therefore essential that the policy starting point is to retain such services to maintain the local centre role of these villages unless alternative provision is made. Alternative provision could include combined use, for example post office facilities integrated within an existing shop, or other innovative solutions</u>.
>
> 7.287 In demonstrating that a use is no longer viable the Council will expect submission of a full financial appraisal for the business and for it to have been subject to appropriate marketing. Appropriate marketing includes the following:
>
> - Through two or more local agents;
> - An independent valuation of price;
> - For a reasonable period of time (about 18 months).
>
> 7.288 Demonstration that the existing use is no longer viable will not be justification on its own to support its loss where this would be a total loss of such service to the village without appropriate alternative provision. …" (emphasis added)

14. Policy WED13 of the Wedmore Neighbourhood Plan provides:

> "1.1 Locally valued community facilities listed in Appendix 3 will be protected from loss. Proposals for the redevelopment or change of use of locally valued community facilities will only be supported where:
>
> i. there is no reasonable prospect of viable continued use of the existing building or facility and a need is demonstrated for the proposed change; and
>
> ii. there is no adverse impact on the natural and built environment of the adjoining area." (emphasis added)

15. Appendix 3 contains a list of 24 "*facilities protected under Policy WED13*", six of which are public houses, including the Panborough Inn.

The planning claim: Grounds 2 and 3

The Grounds

16. The Claimant contends that the Planning Committee was materially misdirected as to the proper interpretation of Policy D35 of the Local Plan (Ground 2) and Policy WED13 of the Wedmore Neighbourhood Plan (Ground 3). These submissions are based on the contention that the Officer's Report materially misstated:

    i) Policy D35 by omitting the policy requirements that:

        a) The facility is no longer fit for its intended purpose; and

        b) There is evidence of community consultation and consideration of alternative ways of delivering the service; and

    ii) Policy WED13 by omitting the policy requirements that:

        a) There must be a demonstrable need for the proposed change; and

        b) No adverse impact on the natural and built environment of the adjoining area.

The Officer's Report

17. Under the heading "Most Relevant Policies" the Officer's Report included Policies D35 and WED13, as well as a number of other policies. Under the heading "Main Issues", and the subheading "Policy context", the Officer's Report addressed Policy D35 in these terms:

> "The policy context for applications of this nature is set by policy D35 of the Sedgemoor Local Plan. This policy states that the loss of existing services and facilities that meet the day to day needs of the local community will be resisted unless certain criteria have been met. It must be demonstrated that there is appropriate alternative provision available locally, that there is no longer a demand for the use and/or it is not viable, that the facility is no

> longer fit for its intended purpose and that there is evidence of community consultation and consideration of alternative ways of delivering the service. The policy states that in order to sustain Tier 4 settlements and smaller villages and hamlets in the countryside, the loss of existing services and facilities will be resisted unless alternative provision can be demonstrated.
>
> Within the supporting text for the policy it states in demonstrating that a use is no longer viable, full financial appraisal for the business is required and for it to have been subject to appropriate marketing. Appropriate marketing includes through two or more agents, an independent valuation of price and for a reasonable period of time (about 18 months)."

18. The Officer's Report continued, addressing Policy WED13 in these terms:

> "Wedmore Neighbourhood Plan is also relevant. Policy WED13 states that locally valued community facilities will be protected from loss. Proposals for the development or change of use of locally valued community facilities will only be supported where there is no reasonable prospect of viable continued use of the existing building or facility and a need is demonstrated for the proposed change; and there is no adverse impact on the natural and built environment of the adjoining area."

19. The final paragraph of the section of the Officer's Report describing the policy context states:

> "The thrust of Sedgemoor and Wedmore policies is therefore broadly similar. The loss of such facilities should be resisted unless it has been demonstrated that there is alternative provision available and no demand for the facility through appropriate marketing."

20. Most of the remainder of the Officer's Report addresses the marketing of the Panborough Inn and the evidence (including the views of the Council's Economic Development officer and Valuer) as to the commercial viability of the public house.

21. Under the heading "Summary", the Officer's Report stated:

> "The advice received is that sufficient marketing has been undertaken at a price recommended by two independent agents and which has been considered by internal consultees as not being unreasonable. So whilst the marketing period falls short of the full 18 months the supporting text recommends, the advice received is that very little would be achieved by another period seeking to find a buyer. There is alternative provision within the vicinity (the Sheppey most notably). Whilst the loss of the facility has been resisted previously, it is not considered that there is any justification in doing so any further in light of the evidence and professional advice. Whilst the loss is regrettable,

> it is considered that the principle of changing the use to a dwelling should now be accepted."

22. Under the heading "Other Matters", the Officer's Report addressed environmental matters in these terms:

> "The county ecologist has commented upon the application and noted that the site lies within the consultation zone for the North Somerset and Mendip Bat SAC. However, they consider the proposal to be unlikely to have an effect on horseshoe bats and do not propose to carry out a habitat regulations assessment.
>
> The County Rights of Way team note the presence of an adjoining right of way (ROW). They however raise no objection and state works should not encroach on the ROW. An informative would be attached if permission is granted to bring attention to the matter.
>
> The highway authority has only provided standing advice on the application. The site has an existing access and large area for parking. Whilst some concern has been expressed by local residents about visibility at the access, it should be noted that the access is existing and lawful. The use as a dwelling and not as a pub is likely to result in a diminished use of the access and therefore would not give rise to additional highway safety concerns."

23. The Officer's Report recommended that permission should be granted.

The parties' submissions

24. The principles to be applied by the court when considering criticism of an officer's report to a planning committee are not in dispute. They were summarised by Lindblom LJ in *Mansell v Tonbridge & Malling Borough Council* [2017] EWCA Civ 1314, [2019] PTSR 1452 at [42]:

> "… (2) The principles are not complicated. Planning officers' reports to committee are not to be read with undue rigour, but with reasonable benevolence, and bearing in mind that they are written for councillors with local knowledge (see the judgment of Baroness Hale of Richmond JSC in *R (Morge) v Hampshire County Council* [2011] UKSC 2, at paragraph 36, and the judgment of Sullivan J, as he then was, in *R v Mendip District Council, Ex p Fabre* (2000) 80 P&CR 500 at p.509). Unless there is evidence to suggest otherwise, it may reasonably be assumed that, if the members followed the officer's recommendation, they did so on the basis of the advice that he or she gave (see the judgment of Lewison LJ in *R (Palmer) v Herefordshire Council* [2017] 1 WLR 411, at paragraph 7. The question for the court will always be whether, on a fair reading of the report as a whole, the officer has materially misled the members on a matter

> bearing upon their decision, and the error has gone uncorrected before the decision was made. Minor or inconsequential errors may be excused. It is only if the advice in the officer's report is such as to misdirect the members in a material way—so that, but for the flawed advice it was given, the committee's decision would or might have been different—that the court will be able to conclude that the decision itself was rendered unlawful by that advice.
>
> (3) Where the line is drawn between an officer's advice that is significantly or seriously misleading—misleading in a material way—and advice that is misleading but not significantly so will always depend on the context and circumstances in which the advice was given, and on the possible consequences of it. There will be cases in which a planning officer has inadvertently led a committee astray by making some significant error of fact (see, for example *R (Loader) v Rother District Council* [2016] EWCA Civ 796), or has plainly misdirected the members as to the meaning of a relevant policy (see, for example, *R (Watermead Parish Council) v Aylesbury Vale District Council* [2017] EWCA Civ 427). There will be others where the officer has simply failed to deal with a matter on which the committee ought to receive explicit advice if the local planning authority is to be seen to have performed its decision-making duties in accordance with the law (see, for example, *R (Williams) v Powys County Council* [2018] 1 WLR 439). But unless there is some distinct and material defect in the officer's advice, the court will not interfere." (emphasis added)

25. In *Morge v Hampshire County Council* [2011] UKSC 2, [2011] 1 WLR 268 Baroness Hale observed at [36]:

> "…in this country planning decisions are taken by democratically elected councillors, responsible to, and sensitive to the concerns of, their local communities. As Lord Hoffmann put it in *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295, para 69: In a democratic country, decisions about what the general interest requires are made by democratically elected bodies or persons accountable to them. Democratically elected bodies go about their decision-making in a different way from courts. They have professional advisers who investigate and report to them. Those reports obviously have to be clear and full enough to enable them to understand the issues and make up their minds within the limits that the law allows them. But the courts should not impose too demanding a standard upon such reports, for otherwise their whole purpose will be defeated: the councillors either will not read them or will not have a clear enough grasp of the issues to make a decision for themselves. It

> is their job, and not the courts, to weigh the competing public and private interests involved." (emphasis added)

26. The Council emphasises – and the claimant acknowledges - that the Officer's Report, having said that "*certain criteria have to be met*", expressly drew attention to all four criteria in Policy D35, advising that each "*must be demonstrated*", including the two in respect of which the claimant contends the Planning Committee were misdirected, that is, that the facility is no longer fit for its intended purpose and that there is evidence of community consultation and consideration of alternative ways of delivering the service. In addition, all four criteria were referred to in the Officer's presentation to the Planning Committee.

27. The Officer's Report also expressly drew the Planning Committee's attention to both limbs of the first criterion of Policy WED13 (i.e. including the requirement that a need is demonstrated for the proposed change) and the second criterion (i.e. the lack of an adverse impact on the natural and built environment of the adjoining area). The Officer's presentation to the Planning Committee also referred to the second criterion, as well as the first limb of the first criterion (i.e. that there is no reasonable prospect of viable continued use), but not to the demonstrated need for the proposed change.

28. Nonetheless, the claimant maintains that the Planning Committee were misdirected. First, the Claimant contends that by focusing (in the final paragraph of the section of the Officer's Report describing the policy context) on the questions whether alternative provision is available and whether it has been demonstrated that a public house at the Panborough Inn is not viable, the Officer's Report provided a misleading summary of the policy and misdirected the Planning Committee as to how to apply it. Secondly, the claimant relies on the fact that almost the entirety of remainder of the report addresses the evidence of the viability of a public house on the site, and the efforts to sell it as a going concern, and does not address the application of those criteria that the claimant contends have been omitted. Thirdly, he relies on the omission of any reference to those criteria in the "Summary".

29. Fourthly, the claimant relies on Mr Titchener's witness statement in which he states:

> "18. The officer report I prepared was written for an informed audience and sought to convey the most relevant factors to the determination of the application. Whilst there are many considerations which can bear on an application, the purpose of the officer report was to expand on those points most pertinent to the determination, those elements for and against a particular proposal. There is generally no requirement to go into unnecessary detail on matters to which there is no dispute. If that approach was taken then officer reports would be particularly long and burdensome for the intended reader (and potentially draw attention away from what are the most pertinent factors).
>
> 19. The officer report therefore sought to focus on the elements most relevant to the determination. These were the requirements set out in local and neighbourhood plan policies regarding the viability of the public house, the marketing undertaken, the level of interest generated and the feedback from those viewing the

> property. This was supplemented with the views of the marketing agents and the Council's Valuer and Economic Development officer. Through focusing on the key matter of the viability of the public house and the marketing exercise, which once satisfied it followed that the other aspects of those policies would be addressed." (emphasis added)

30. Mr Hawley, Counsel for the claimant, submits that the advice that there was no justification for resisting the loss of this community facility was defective in circumstances where, although the full criteria were summarised, neither the Officer's Report nor the Officer's presentation considered whether (a) the criteria in the third and fourth bullet points of Policy D35 or (b) the criteria in the second limb of §1.1(i) and §1.1(ii) of WED13 were met, or how they were met. Given that the policies require the loss of community facilities to be resisted unless each of the criteria is met, each criterion was pertinent to the Planning Committee's determination.

31. Mr Hawley contends that the Officer's approach, as identified by him in the final sentence of §19 of his witness statement was wrong: the other discrete criteria were not satisfied by a finding that a public house was not viable. Whereas Mr Collett, on behalf of the Council, submits that the Officer's Report properly addressed the most important criteria, correctly recognising that the other criteria would logically be met if the Planning Committee found that use as a public house was not viable or would not give rise to any seriously debatable issue.

32. Addressing the individual criteria:

    i) The claimant submits Policy D35 requires that it is demonstrated that the facility is not fit for its intended purpose (as a public house) in addition to demonstrating whether or not it is viable. These are separate criteria. The requirement that a facility is not fit for its intended purpose would be otiose if it necessarily followed from a finding that it is not viable. The claimant contends no consideration was given to whether the facility was no longer fit for purpose, nor any explanation as to why it was no longer fit for purpose. The Council acknowledges that the criteria are separate and cumulative but submits that on the facts a finding that the facility was not fit for its intended purpose inevitably followed from the conclusion that a public house on the site was not commercially viable.

    ii) The claimant submits Policy D35 requires evidence of community consultation and consideration of alternative ways of delivering the service, and that such consultation must go beyond the ordinary process of notification of a planning application, with the right to object. If not, the policy requirement would be otiose. The claimant submits there was no evidence of consultation. The Council relies on the planning application as showing that in 2018 the owners made staff redundant and reduced the products on offer, and then later they sought feedback from the local community regarding the products on offer and opening hours and responded by introducing "Friday Night Fish and Chips" in December 2018 and longer opening hours in April 2019. The Council submits that a closed public house is private premises and, in this context, there was sufficient evidence to meet this criterion.

iii) In respect of Policy WED13, the claimant submits that the criterion stated in §1.1(i) that "there is no reasonable prospect of viable continued use of the existing building or facility and a need is demonstrated for the proposed change" provides a two-fold test, requiring the need for the proposed change to be demonstrated separately and in addition to there being no reasonable prospect of viable continued use of the existing building or facility. The claimant contends the Officer's Report (and presentation) discloses no consideration of whether there was a demonstrated need for the proposed change of use. The Council agrees that §1.1(i) provides a two-fold test but submits that on the facts the need for a change of use was demonstrated by the conclusion that use as a public house was not viable.

iv) As regards §1.1(ii) of Policy WED13, the claimant submits that it was insufficient for the Officer's Report to report the comments of statutory consultees in relation to bats, a public right of way and highways. The Officer's Report failed to give any consideration to whether the proposed change of use might have negative impacts for the natural and built environment. The claimant contends it may do so because the change of use to a residential dwelling carries with it permitted development rights. The Council contends that there was no adverse effect on the natural or built environment because the change of use involves no alteration to the structure of the property or any external feature. The only impact is a likely decrease in the number of vehicles accessing the site which would be beneficial to the environment.

Grounds 2 and 3: analysis and decision

33. In my judgment, the Officer's Report did not misdirect the Planning Committee in respect of the requirements that the facility was not fit for its intended purpose (Policy D35) or the need for the proposed change to be demonstrated (Policy WED13).

34. While the criterion that the facility is not fit for its intended purpose is separate from the criterion of viability, on the facts, the former may inexorably follow from the latter. Plainly, the Planning Committee considered that to be the position in this case. It is common ground that the Planning Committee concluded, and were entitled to conclude, that it is not viable to run a public house at this site. As the public house was commercially unviable it had closed and would remain closed. As it was no longer a viable use for the site, it followed that the facility is not fit to be used as a public house. The Council is right, in my judgment, that the focus is not on the fitness (or otherwise) of the building, but on the facility. The Planning Committee had been expressly directed that meeting this criterion was a requirement. In my view, the approach taken in the Officer's Report of focusing on the question whether the public house was commercially viable, without elaborating on the question of fitness of the facility for its intended purpose, was consistent with Baroness Hale's observations in *Morge* and did not render Officer's Report defective.

35. I take the same view in respect of the second limb of para 1.1(i) of WED1. While the criterion states a two fold test, on the facts, evidence of lack of viability may lead inexorably to the conclusion that the evidence demonstrated the need for the proposed change. When the Planning Committee met, the public house had been closed for about 18 months and it followed from the Planning Committee's conclusion – which the claimant does not challenge - that there was no reasonable prospect of viable continued

use of the existing building or facility as a public house. If it could not be re-opened or sold as a going concern, it could not be used and so would be likely to fall into disrepair, unless the permitted use changed. The Officer's Report identified this criterion. The focus on viability, without further express consideration of whether the need for the proposed change had been demonstrated, was not an erroneous approach.

36. The remaining two criteria concern the impact on the environment and consultation with the local community. It would not follow from a finding that use as a public house was not commercially viable that either of these criteria were met. In my judgment, while Mr Titchener's view that once "the key matter of the viability of the public house and the marketing exercise" was satisfied "it followed that the other aspects of those policies would be addressed" is sound in respect of the criteria I have addressed above, it does not hold good for the fourth bullet point of Policy D35 or for §1.1(2) of Policy WED13. The policies sought to avoid the loss of community facilities unless each criterion was met. It follows, in my judgment, that the Planning Committee needed to receive explicit advice in respect of these criteria if it was to be seen to have performed its decision-making duties in accordance with the law.

37. The effect of §1.1(ii) of Policy WED13 is that change of use of the Panborough Inn should not be supported if there was any adverse impact on the natural and built environment of the adjoining area. The Officer's Report drew attention to this requirement, addressed the county ecologist's view that the county ecologist did not propose to carry out a habitats regulation assessment and considered it unlikely the change of use would affect horseshoe bats, noted the proposal should not encroach on the right of way, and observed that the likely result of the change of use would be to diminish use of the access. In my judgment, the Officer's Report adequately addressed this criterion and did not misdirect the Planning Committee. It is true that reference was not made to the permitted development rights entailed in changing the use to a single dwelling, but the Officer's Report was addressed to a knowledgeable readership and there is no evidence, even bearing in mind such rights, that the proposal would have an adverse impact on the natural or built environment.

38. As regards evidence of community consultation and consideration of alternative ways of delivering the service, the Planning Committee were directed to this criterion but no evidence of community consultation was referred to in the Officer's Report or presentation. The way in which this criterion was said to be met was not addressed anywhere in the Officer's Report or presentation. No reference was made to community consultation when explaining the "thrust" of the policy or in the Officer's summary of reasons why the policies were considered to be met.

39. Policy D35 clearly calls for the loss of community facilities to be resisted unless there is evidence of community consultation and consideration of alternative ways of delivering the service. The essential starting point is that community facilities should be retained unless such community consultation (with the opportunity such consultation gives to consider innovative solutions) has occurred. I agree with the claimant that this requirement is not met by the ordinary process of applying for planning permission. It is intended to provide an added degree of protection for community facilities which would be absent if no more was required than making a planning application in the usual way.

40. The Council sought to rely on the planning application itself as evidence meeting this criterion. However, this is evidence that while the public house was open (in late 2018/early 2019) the owners sought feedback from the local community regarding products and opening hours. It was not evidence that the local community were consulted about the permanent loss of the public house or given an opportunity to propose possible solutions to avoid such an eventuality.

41. Mr Collett submits forcefully that the community facility had already been lost because the public house was closed and not viable, therefore it was unlikely to reopen. However, it is clear – and he does not dispute - that Policy D35 applies to the Panborough Inn, even though it had been closed since June 2019. Indeed, the protection against loss of community facilities would be seriously eroded if a facility such as a public house were to be treated as no longer being a community facility because it has closed its doors. The Planning Committee was entitled to find on the evidence before it that the public house is not commercially viable, but that does not detract from the importance of requiring evidence of community consultation (which could conceivably give rise to innovative solutions).

42. Moreover, while I acknowledge that the policy section refers to this criterion, reading the Officer's Report as a whole together with the presentation, there is nothing to indicate that the Planning Committee were directed to consider whether there was evidence to meet this criterion.

43. In my judgment, the claimant has established that the Planning Committee failed to apply the fourth bullet point of Policy D35 and to this extent the claimant succeeds on Ground 2. For the reasons I have given, the remainder of the claim that the Planning Committee failed to apply Policies D35 and WED13 fails.

Ground 1 – Equality Act 2010

The legal framework

44. S.149(1) of the EA 2010 provides, so far as material:

> "A public authority must, in the exercise of its functions, have due regard to the need to –
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> (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 person who share a relevant protected characteristic that are different from the needs of persons who do not share it;
>
> (c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.
>
> …
>
> (7) The relevant protected characteristics are –
>
> age;
> disability;
> gender reassignment;
> pregnancy and maternity;
> race;
> religion or belief;
> sex;
> sexual orientation."

45. In *Hotak v London Borough of Southwark* [2015] UKSC 30, [2016] AC 811, Lord Neuberger (giving a judgment with which Lords Clarke, Wilson and Hughes agreed) addressed the public sector equality duty. At [74]-[75] Lord Neuberger said:

> "As Dyson LJ emphasised in the *Baker* case [2009] PTSR 809, para 31, the equality duty is "not a duty to achieve a result", but a duty "to have regard to the need" to achieve the goals identified in paras (a) to (c) of section 149(1) of the 2010 Act. Wilson LJ explained that the Parliamentary intention behind section 149 was that there should "be a culture of greater awareness of the existence and legal consequences of disability": *Pieretti v Enfield London Borough Council* [2011] PTSR 565. He went on to say in para 33 that the extent of the "regard" which must be had to the six aspects of the duty (now in subsections (1) and (3) of section 149 of the 2010 Act) must be what is "appropriate in all the circumstances". Lord Clarke of Stone-cum-Ebony JSC suggested in argument that this was not a particularly helpful guide and I agree with him. However, in the light of the word "due" in section 149(1), I do not think it is possible to be more precise or prescriptive, given that the weight and extent of the duty are highly fact-sensitive and dependent on individual judgment.

> As was made clear in a passage in the *Bracking* case [2014] Eq LR 60, para 60, the duty "must be exercised in 'substance, with rigour and with an open mind'": per Aikens LJ in *R (Brown) v Secretary of State for Work and Pensions (Equality and Human Rights Commission intervening)* [2009] PTSR 1506, para 92. And, as Elias LJ said in the *Hurley* case [2012] HRLR 13, paras 77-78 it is for the decision-maker to determine how much weight to give to the duty: the court simply has to be satisfied that "there has been a rigorous consideration of the duty". Provided that there has been "a proper and conscientious focus on the statutory criteria", he said "the court cannot interfere … simply because it would have given greater weight to the equality implications of the decision".

46. As both parties acknowledge, the duty is engaged when a local planning authority determines a planning application. The public authority decision maker must be aware of the duty to have "due regard" to the relevant matters. The duty must be fulfilled at the time when a particular decision is being considered. The duty is non-delegable. It is well established that the duty is one of substance, not form: it is not a question of ticking boxes. There is no duty to make express reference to the regard paid to the relevant duty so, although it is good practice to refer to the duty and evidentially useful in demonstrating discharge of the duty, the absence of a reference to the public sector equality duty is not determinative. The question for the court in this context is whether the Officer's Report and presentation and the Planning Committee's decision show that the Council has, in substance, had regard to the relevant matters.

The parties' submissions

47. Two points are not in dispute. First, there is no reference to the public sector equality duty in any of the materials put to the Planning Committee, or in any note of the discussion or their reasoning. Second, the logically prior question for the Planning Committee to ask itself was whether the planning decision that it was required to make could have any implications for the matters set out in s.149(1)(a) to (c) of the Equality Act 2010.

48. The claimant submits that there is no evidence that the Planning Committee asked itself that question. Although the loss of a community facility falls upon the community generally, the claimant contends the effect of the impact could be different for those with protected characteristics. So the loss of a community facility such as a public house could have a negative impact in public sector equality duty terms, and that was a matter that had to be considered.

49. The Council submits that in this case the clear answer to the question whether the proposed application has any impact, adverse or beneficial, on those with a relevant protected characteristic was 'no'. That is because the Panborough Inn was already a closed public house which was not likely to reopen because it was not viable. As such, the Council contends it is not a community facility but private premises of the owner. The application for change of use does not affect the public's lack of access to the building and so it is incapable of having any impact on those with a relevant protected characteristic.

50. In support of the contention that this issue was considered, the Council relies on a witness statement from Mr Titchener in which he states:

> "Whilst there was no reference in the officer report or presentation, I had due regard to the PSED in making the recommendation that the application should be approved. The proposal related to the loss of a public house. The Main Issues section noted that the loss of such facilities which meet the day to day needs of the local community should be resisted unless certain criteria are met. In making the assessment it was noted the community wide use of public houses. They have wide appeal to communities in general. There is no one specific protected characteristic group which makes use of such a facility – their use cuts across most groups. Whilst individual users of public houses may be from a particular protected characteristic group, they are likely to identify themselves in other ways when visiting such a premises. For example, groups of walkers may use a facility before or after a hike, the skittles team will visit in some evenings, families may go for a meal. The loss of such a facility would impact all these groups and any others that make use of the premises. The impact is community-wide. It was not considered however that it impacted any specific protected group. Neither did any of the public consultation responses make any reference to the harm the proposal would have on any specific protected characteristics.
>
> It should also be borne in mind that the public house was already closed at the time of making the determination as was noted in the officer report. Members of the community (whether they belonged to a protected group or not) had not been able to make use of the facility for some time. Indications from the marketing and advice received was that the facility was highly unlikely to be commercially viable and so was unlikely to open as a public house again. The facility would likely remain closed whether or not planning permission was granted. As a private operation, the Council could not force the owner to open the facility to members of the public – that is a purely private decision. So, regardless of what decision was taken on the application by the Council, no particular group would likely be able to access the facility after the decision was taken.
>
> Furthermore, the officer report noted the alternative provision which existed locally. Discussion was given to the Sheppey, a public house in one of the nearest villages at Godney. The valuer also noted the competition from provision in Wedmore, Wells and Wookey. So even if permission was granted, alternative facilities were available to meet the needs of local residents.
>
> So whilst the PSED is not expressly referenced in the report, due regard was considered throughout the assessment process, but no specific protected characteristics pursuant to the PSED were

> identified as being impacted as a result of the recommendation to grant planning permission."

51. The claimant objects to the Council's reliance on this evidence. First, he submits that Mr Titchener was not the decision-maker and the duty was not his. It was the Planning Committee which was under a duty to consider the implications of the proposal as regards the public sector equality duty and there is an absence of any such consideration. The claimant submits that it is telling that the witness statement of Councillor Hendry makes no reference to the public sector equality duty.

52. Secondly, the claimant submits the court should be slow to admit elucidatory statements such as the paragraphs of Mr Titchener's statement addressing the public sector equality duty. He relies on *Flaxby v Harrogate Borough Council* [2020] EWHC 3204 (Admin), per Holgate J at [12]-[19]. In particular, at [18] Holgate J observed:

> "… lengthy witness statements are normally unnecessary because of the general principles governing the admissibility of fresh evidence in judicial review or statutory review. Except for certain cases of procedural error or unfairness or perhaps irrationality, judicial or statutory review generally proceeds on the basis of the material which was before the decision-maker together with the decision itself (*R v Secretary of State for the Environment ex parte Powis* [1981] 1 WLR 584: *Newsmith Stainless Limited v Secretary of State for the Environment* [2017] PTSR 1126; *R (Network Rail Infrastructure Limited) v Secretary of State for the Environment, Food and Rural Affairs* [2017] PTSR 1662 at [10])."

53. The claimant also draws attention to *Timmins v Gedling Borough Council* [2014] EWHC 654 (Admin) in which Green J observed at [110]

> "… It seems to me that as a matter of first principle it should be rare indeed that a court will accept *ex post facto* explanations and justifications which risk conflicting with the reasons set out in the decision. The giving of such explanations will always risk the criticism that they constitute forensic 'boot strapping' …"

54. The Council rejects this contention, submitting that there are no gaps to be plugged and the purposes of the statements from both Mr Titchener and Councillor Hendy is purely to set the background and basis on which the Officer's Report and presentation were submitted to the Planning Committee, and to describe the process the Planning Committee, as an informed readership, followed.

PSED: analysis and decision

55. While I accept that for the most part the Council's statements do no more than set the background, insofar as the Council relies on Mr Titchener's evidence to establish that he had regard to the public sector equality duty the evidence is clearly, in my judgment, an attempt to fill the gap in the documents which were before the Planning Committee. I agree with the claimant that this attempt must fail. First, this is *ex post facto* evidence that an officer had regard to a consideration which nowhere appears in the

contemporaneous documents to have been considered. I am not prepared to give any weight to that evidence. Secondly, in any event, *ex post facto* evidence regarding what an officer had in mind (but never expressed) tells the court nothing about whether the Planning Committee had regard to the relevant matters in accordance with the public sector equality duty.

56. In my judgment, the evidence shows that the Planning Committee did not ask itself whether the planning decision that it was required to make could have any implications for the matters set out in s.149(1)(a) to (c) of the Equality Act 2010. There is a complete absence of evidence to the contrary. Accordingly, the claimant has established that the Council failed to comply with its s.149 duty.

57. However, that is not the end of the matter. In large part, the Council's submissions under this head were directed towards supporting the submission that s.31(2A) of the Senior Courts Act 1981 applies, and I consider them in that context.

Section 21(2A) of the Senior Courts Act 1981

58. Section 31(2A) of the Senior Courts Act 1981 provides so far as material:

> "The High Court – (a) must refuse to grant relief on an application for judicial review… if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred".

59. If the court is to consider whether a particular outcome was "highly likely" not to have been substantially different if the conduct complained of had not occurred, it must necessarily undertake its own objective assessment of the decision-making process, and what its result would have been if the decision-maker had not erred in law.

60. Section 31(2A) is designed to ensure that the judicial review process remains flexible and realistic. Even if there has been some flaw in the decision-making process which might render the decision unlawful, if quashing the decision would be a waste of time and public money (because, even when adjustment is made for the error, it is highly likely that the same decision would be reached), the decision should not be quashed.

61. If the only flaw in the decision-making process had been the failure to comply with section 149 of the Equality Act 2010, although the "highly likely" threshold is a high one I would have found that it was met. *First*, it is notable that there is no suggestion that any of the objections to the grant of planning permission suggested that the proposed change of use would have an adverse impact on any protected characteristics. While I accept that the duty fell on the Council irrespective of any representations received, it is striking that even at this stage of the proceedings there is no evidence to suggest that if the Council had asked itself whether the proposed change of use could have any implications for protected interests that the answer would have been anything but 'no'.

62. *Secondly*, the Planning Committee found that the Panborough Inn is not financially viable as a going concern. While for the purposes of the application of the policies, the Panborough Inn had to be treated as a community facility, in considering whether the

proposed change of use would have an adverse impact the Planning Committee would have been bound to take into account that the Panborough Inn was already closed to the public, and the Committee's assessment of whether there was any realistic prospect of it reopening. It would have followed from the Planning Committee's conclusions that the change of use would have no adverse effect on protected characteristics because, in real terms, the Committee's assessment was that members of the public would continue to have no access to the Panborough Inn (because it would remain closed) irrespective of whether the change of use application was granted.

63. However, I have also found that the Council failed properly to apply the requirement in Policy D35 to resist the loss of community facilities unless it can be demonstrated that there is evidence of community consultation and consideration of alternative ways of delivering the service. In my judgment, it cannot be said to be highly likely that the decision would not have been substantially different if the Planning Committee had considered whether that criterion was met. Given the paucity of evidence of community consultation regarding loss of this public house, and ways in which such loss might be avoided, the Planning Committee might well have taken the view that evidence of such community consultation had not been demonstrated and, on that basis, refused planning permission.

Conclusion

64. For the reasons I have given, the claim is allowed on Grounds 1 and, in part, on Ground 2, but otherwise dismissed. I will hear submissions on the appropriate form of order.