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Case No: CO/1615/2023
AC-2023-CDF-000057
[2024] EWHC 1242 (Admin)

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT

Cardiff Civil and Family Justice Centre
2 Park Street
Cardiff CF10 1ET

23rd May 2024

Before:

MR JUSTICE JAY

- -

Between:

THE KING (oao DR ROSALIND BRADBURY)	**Claimant**
- and –	
AWDURDOD PARC CENEDLAETHOL BANNAU BRYCHEINIOG (BRECON BEACONS NATIONAL PARK AUTHORITY)	**Defendant**
-and –	
MR JAMES DAVIES	**Interested Party**

- -
- -

Daniel Stedman Jones and Jake Thorold (instructed by **Richard Buxton Solicitors**) for the **Claimant**
Annabel Graham Paul (instructed by **Geldards LLP**) for the **Defendant**
The Interested Party was neither present nor represented

Hearing date: 15 May 2024

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Approved Judgment

This judgment was handed down by release to The National Archives on 23 May 2024 at 10.30am.

MR JUSTICE JAY:

INTRODUCTION

1. Dan Y Bwlch Farm, Cymyoy, Brecon Beacons, NP7 7NY ("the farm") is a sheep and cattle farm within the Brecon Beacons National Park. The Defendant is the local planning authority. Mr James Davies is the son of the owner of the farm and the applicant for the two planning permissions the subject of this application for judicial review, acting through his agent Ms Ellie Watkins of AgriAdviser. Mr Davies, as Interested Party, has played no active part in these proceedings. Dr Bradbury ("the Claimant") is an active member of the Friends of the Black Mountains, an informal group established to protect this particular location within the national park. Her standing to bring these proceedings is not disputed.

2. This claim for judicial review concerns two interrelated planning permissions for the following development:

   (1) Decision 1 (20/18928/FUL): "Erection of a steel portal frame, standard agricultural building to cover the sheep handling system and provision of rainwater storage tank."

   (2) Decision 2 (20/18931/FUL): "Steel portal frame roofing to form covered yard in-between two buildings and provision of rainwater storage tank."

3. The Defendant's planning committee unanimously resolved to grant planning permission for these developments at a meeting which took place on 21 March 2023. The formal decision notices granting permission were issued on 22 March and then uploaded to the Defendant's planning portal the following day. The judicial review challenge is directed, as it has to be, to the formal decisions made on 22 March although these entailed no further consideration of the issues: they merely brought into effect the resolutions of the planning committee.

4. The Claimant originally advanced four grounds of challenge. Permission was refused on Grounds 1 and 3 by Eyre J (on the papers), HHJ Jarman KC (at an oral hearing) and Lewison LJ (on appeal). Permission was granted on Ground 2 by Eyre J and on Ground 4 by Lewison LJ, following two refusals below.

5. By Ground 2 the Claimant contends that the Defendant acted in breach of the Local Government Act 1972 by failing to publish the updated Habitats Regulations Assessment Screening Matrix and Appropriate Assessments ("the AAs") online within three clear days before the planning committee meeting held on 21 March 2023 (limb 1); and further or alternatively the decisions were procedurally unfair in that the failure to publish the AAs deprived interested parties of the opportunity to comment in circumstances where the nature and scope of the AAs were highly controversial (limb 2a), and officers failed to place the AAs before the planning committee, depriving members of highly material evidence upon which their decision to grant planning permission necessarily depended (limb 2b).

6. By Ground 4 the Claimant contends that the Defendant misdirected itself and/or reached irrational decisions by finding that there would be no adverse effect on public rights of way, and thus as to compliance with policy 49 of the local development plan, in circumstances where the operation of the proposed development including the new access track would entail activities that would necessarily impact upon Public Footpath 50/293/01 ("the Footpath") contrary to the Highways Officer's advice that no further work should be undertaken on the Footpath.

ESSENTIAL FACTUAL BACKGROUND

7. Dan Y Bwlch is a farm centred around a late sixteenth century Grade II listed farmhouse. The farm extends to 64.7 hectares of owned land and 60.7 hectares of rented land, 32 hectares of which is on a long-term tenancy with the remainder on grass keep. The farm buildings ("the site") are located to the west and east of the formerly abandoned farmhouse which underwent rehabilitation to a dwelling following permission in 2014. According to the officer's reports, the operations on the farm involve the fattening of 7,500 store lambs each year over periods of four to six weeks – there are 600-800 store lambs on the holding at any one given time. This is in addition to a herd of 800 breeding ewes and 70 store cattle. The Claimant does not accept these figures but there is no evidence to gainsay them.

8. The River Honddu is approximately 600m to the south west of the site into which a spring rising approximately 60m to the south east of the site runs. The Honddu joins the Monnow at Pandy and from there joins the River Wye at Monmouth. The site is within the catchment of the River Wye Special Conservation Area ("SAC"). It is not in issue that the Wye suffers from pollution from amongst other substances phosphorus (or, more accurately, derivates such as phosphates) caused in part by organic manures and slurries entering the ecosystem and ending up in the river. Sheep are one of the main culprits.

9. The Claimant's case is that the site has expanded since 2017. In June of that year the Interested Party was granted planning permission to erect a steel frame agricultural building to be used as a hay/straw barn, along with a seasonal lambing shed for welfare purposes. In 2019 a further application was made for a "general purpose building" at the east end of the site. In 2020 a cross-compliance breach report by the expert statutory consultee, National Resources Wales ("NRW"), completed at the farm between 2 January and 2 March 2020 identified overgrazing, excessive poaching[1] and a failure to maintain a minimum level of soil cover.

10. The planning applications with which these proceedings are concerned were made in 2020. The officer's report described the main application in these terms:

> "This application has been made concurrently with 20/18931/FUL, which is for the covering of an existing concrete yard to the front of an existing agricultural building (17/14785/FUL). The handling area is to the north of and abuts the concrete yard, is at a higher level supported by a retaining wall and the area is not concrete itself but a bare earth pen enclosed by a retaining wall to the north and post and rail fencing to other boundaries. The proposal is to reduce the

[1] Trampling of the ground by livestock.

> ground level of the existing handling yard to match the adjoining yard and cover it with a roof structure to be of juniper green coloured fibre cement sheeting. There will be concrete panel walls to a height of 2 metre to the north, west and east sides with Yorkshire boarding from the top of the panels up to the roof on the west elevation only. The structure will be approximately 12.2m wide by 22.9m long and 4.27 metres to eaves with a ridge height of 6m. The south elevation is open to the existing covered yard over which a roof structure is proposed in the concurrent planning application."

11. In short, the idea is to create a single large structure, comprising an existing livestock shed, a covered sheep handling system and a yard in between covered by a roof.

12. The line of the Footpath on the Definitive Map runs between the existing livestock shed (to the west of the Footpath) and existing structures to the east. The proposed development (and steps have already been taken to start building) will be to the west of the Footpath rather than encroaching on it.

13. Planning permission was granted in relation to these applications on two occasions but, following the issue of proceedings by the Claimant, each was quashed by consent. The applications have attracted controversy in the local area, primarily owing to concerns about the River Wye and fuelled by NRW's somewhat damming cross-compliance report to which I have already referred. Ms Annabel Graham Paul told me that NRW are taking steps to address the matters set out in this report but I was given no further details. Moreover, local residents are convinced that the real reason the Interested Party is pursuing these planning applications is to increase the capacity of the farm, particularly in relation to sheep numbers.

14. This argument formed the basis of Ground 1 which was not accepted by the Defendant and failed before the three judges I have mentioned. The reasons for this failure may be shortly summarised. First, the Defendant commissioned independent agricultural advice from Reading Agricultural Consultants which concluded that these buildings were being constructed to enhance animal welfare and facilitate handling operations away from the elements, and:

> "perhaps more importantly, there would not be a danger of run-off from yards or the poaching of the collecting area in the field which then washes into the yard … covering these areas … will assist in prevention of yard run-off and pollution of water courses. The erection of the buildings does not intensify the agricultural operations of the farm as livestock numbers will remain the same."

Secondly, and connectedly, the advice of NRW was that the proposal amounted to betterment. Thirdly, planning condition 4 – "the development hereby approved, shall be used for the handling of livestock only, and at no time shall be used for the housing of livestock" – could not be clearer.

15. On the two previous occasions where the applications led to quashing orders the Defendant completed AAs under the Conservation of Habitats and Species

Regulations 2017 (2017 SI No 1012) ("the HRA Regulations"). These were the same for each application. It was accepted that, as there was foul and surface water drainage associated with these proposals, likely significant effects could not be ruled out. There were no material differences between these AAs. NRW was consulted on both occasions and did not object, subject to conditions. The unspoken premise of these AAs was that there would be no increase in livestock numbers, and the reason behind the recommended condition (which in due course became planning condition 4) was to provide an additional level of protection.

16. In July 2022 NRW issued revised advice to LPAs for planning applications affecting phosphorus-sensitive river SACs. Various types of development could be screened out as not likely to have a significant effect on a river SAC including:

> "any development that reduces the frequency, or volume, of irregular phosphorus discharges within a SAC river catchment such as the erection of agricultural structures and drainage schemes to separate rainwater from manures and slurries by covering yards and existing manure/slurry stores. Note that any such development must not be linked to an increase in livestock numbers or the capacity for an increase in livestock numbers through provision of additional infrastructure."

17. On 3 March 2023 a planning ecologist employed by the Defendant completed the third version of the AAs. For present purposes I highlight the few differences with the previous AAs:

> "Version 3 – 3 March 2023
>
> NRW issued revised advice … in July 2022. Proposals [such as these] can be screened out of likely significant effects on the SAC provided there is no increase in livestock numbers. Planning conditions are nevertheless required to safeguard the SAC catchment, and this application is still "screened in" for further consideration through an AA.
>
> …
>
> NRW have been consulted on Version 3 of the AA on 3 March 2023. Follow up email dialogue was also undertaken with NRW on 20 and 21 March 2023.
>
> …
>
> NRW responded on 20 March 2023 to confirm they have reviewed and have raised no objections with the Authority's conclusions of Version 3 that as a result of the proposal there would be no adverse effects on the integrity of the River Wye SAC subject to conditions being attached to any grant of consent.

> NRW responded on 21 March 2023 to confirm "they have no further comments to make on the applications or the AAs.""

18. I will need to flesh out some of the detail, but at this stage I record that the AAs were checked by Ms Lisa Hughes, Principal Planning Officer, on 3 March and were authorised by Ms Davina Powell, Head of Development Management, on 21 March.

19. One aspect of Version 3 of the AAs, which save in the respects previously identified repeated word for word the earlier iterations of the document and in my view merits specific mention, is the following:

> "The proposed covered handling area and covered yard will ensure that surface water will not be contaminated with increased phosphates and silts and therefore ensure that negative impacts on water quality are avoided. This is likely to be betterment to the existing situation [an uncovered handling area with a permeable surface]."

20. The officer's reports recommending the grant of these applications subject to conditions contained the following:

> "9.3.1.4.5 An HRA Screening and Appropriate Assessment have been carried out. NRW has reviewed the AA (response 11 May 2022) and our conclusions that as a result of the proposal there would be no adverse effects on the integrity of the River Wye SAC. NRW expect the planning condition as listed in the AA be attached to any planning permission granted in order to protect the integrity of the SAC. Following the issue of updated NRW guidance the AA has been updated and sent to NRW for review. At the time of drafting the agenda the response is awaited.
>
> 9.3.1.4.6 The proposed buildings are to cover the existing areas to provide a dry area to work with the stock and it is stated that they will not be used for housing livestock. The applicants also state that the proposed buildings are not proposed to increase the size of the enterprise. NRW are therefore satisfied that a change to the existing levels of ammonia emissions is unlikely provided that there is no increase in stock numbers.
>
> The building is for the handling of livestock and is not linked to an increase in livestock numbers in accordance with NRW advice."

21. On 17 March 2023 Fish Legal, a not-for-profit organisation which fights for the protection of the aquatic environment, wrote to the Defendant voicing concerns about the May 2022 AAs and also attached a copy of the cross-compliance report. The letter stated *inter alia*:

> "We have seen the HRA/AA dated May 2022. The document does not mention at all the impact of grazing in addition to or in combination with the

hardstanding. Either the development will introduce a higher stocking which will lead to further stripping of the surface area towards the watercourses and increased amounts of nutrient rich manure and/or the hardstanding will be an additional source of run off pollution to be measured alongside the existing pollution sources.

This glaring omission alone makes the HRA so defective that it cannot be relied upon.

It is telling that NRW's guidance from January 2023 [sic[2]] has not been considered as far as we can see and NRW only appear to have commented on the site in isolation without further considerations of livestock increases and intensity.

We note that NRW have not commented on the in-combination effect of increase grazing, damaged field surface, run off erosion of silt and manure pollution in addition to the provision of drainage within the site.

The application cannot be considered until these matters are dealt with.

The AA is therefore defective as it is incomplete and cannot rule out on a sufficiently certain basis that the developments will not lead to further deterioration of water quality in the SAC or that the developments would not undermine the ability for the SAC to meet its conservation objectives.

NRW must be re-consulted and asked to look at the application again in relation to on-going cross compliance and pollution issues from the site. The AA requires careful amendment and proper consideration of impacts."

22. On 20 March at 16:43 Ms Davina Powell emailed the Fish Legal letter and the cross-compliance report to NRW. She sought confirmation that the latter was indeed a NRW document. As for the former, NRW's advice was sought in relation to in-combination effects.

23. Meanwhile, on 19 March Marches Planning emailed officers and planning committee members. The email stated *inter alia*:

> "BBNPA officers could have done so much more to prevent this environmental and welfare disaster. They could have asked why the farmer wanted a succession of big new buildings over recent years and checked what they were being used for. They could – and could still – carry out Environmental Impact and Habitats Regulations Assessment of the whole farm project. But officers have refused to do this, claiming that the shipping of thousands of lambs onto this tiny hill farm for fattening over a handful of weeks does not amount to intensive livestock production."

24. The Defendant did not provide a copy of these representations to NRW, nor was the latter sent an email from Ms Nicola Cutcher, a freelance investigative journalist, which contained a graphic account of the very poor state of the farm – likened to the

[2] The relevant advice was dated July 2022 although the advice page on the website was last updated on 12 January 2023.

Somme, with animal waste washing down impermeable slopes into a once-famed salmon river.

25. The Defendant's planning committee met to determine the applications on 21 March 2023, members having carried out a site visit the previous day. Members could see from the Officer's reports that there had been AAs in relation to the previous applications but they were not provided with copies of those nor were they provided with copies of the March 2023 versions of the AAs which were still in draft. All that they were told was that the AAs "ha[ve] been updated and sent to NRW for review. At the time of drafting the agenda the response is awaited".

26. According to paras 6 and 7 of Ms Hughes' witness statement dated 24 July 2023:

> "6. … At the time I drafted the Officer's Reports the response was awaited. I noted this factual position in para 9.3.1.4.5 but was unable to rely on or comment on the AAs in substance because they were still in draft and could well have been subject to amendment (or even complete disagreement with their conclusions by NRW).
>
> 7. It was for this reason that I was of the opinion that the draft AAs were not 'background documents' to be published in advance of the Committee meeting as I had not relied on them to any material extent in preparing the report. Once the AAs had been confirmed by NRW I would have updated the Planning Committee and the public and published them in time. If no update had been received in time for the Committee meeting, then the consideration of the AAs would have been dealt with under delegated authority from the Committee, and no permission could have been issued until such time as the updated AAs had been signed off by NRW and concluded by the Authority, under delegated powers, accordingly. This is a fairly routine occurrence if the Authority are waiting to hear from NRW."

27. During the course of the meeting an email from NRW arrived in the inboxes of Ms Powell and Ms Hughes timed at 14:38 on 21 March. Exactly what happened is not entirely clear but officers either summarised the contents of the email or read it out in full. The email provided:

> "Having had a look and discussion with others, the report is a farm cross compliance breach report which was compiled by an Environment Team Adviser in NRW which was to be supplied to RPW as evidence of a cross compliance breach following a farm inspection by the ET officer. … This is not a planning matter and is dealt with separate to the planning system or any planning application. We have no further planning comments to make on this.
>
> In reference to the [name redacted] letter and 'in combination effects' they suggest are being caused by 'the impact of grazing

> in addition to or in combination with the hardstanding. Either the development will introduce a higher stocking which will lead to further stripping of the surface area towards the watercourses and increased amounts of nutrient rich manure and/or the hardstanding will be an additional source of run off pollution to be measured alongside the existing pollution sources'. We have provided comments on both applications and in response to both AA's on the basis and understanding that the proposals were for 'Erection of a steel portal frame, standard agricultural building to cover the sheep handling system (20/18928/FUL) and Steel portal frame roofing to form covered yard in-between two buildings (20/18931/FUL) in which there was to be **no increase in stock**. We understand that these measures were to be as a betterment to the existing situation to help reduce surface soil erosion and surface water run-off which could contain nutrient rich manure. The plans submitted included a drainage plan to contain dirty water effluent in an underground dirty water storage tank and separate surface water French drain system to replace the existing soakaway."

28. My interpretation of this email is that it was not for NRW to advise on whether the proposals would lead to an increase in stock. That was a matter for the planning judgment of the Defendant and I have already referred to the material relevant to this issue.

29. The March 2023 version of the AA was not authorised by Ms Powell on 21 March until after the planning committee had resolved to grant planning permission on these applications. At 15:30 on 21 March, which I deduce was after the planning committee had reached its decisions, Ms Powell sent an email to the relevant department requesting that the AAs be uploaded onto the Defendant's website. I understand that this did not happen until 23 March. In terms of the decision-making process, the formal Notices of Decision granting planning permission on the two applications were issued on 22 March, having been signed on the Defendant's behalf by Mr Gareth Jones, National Park Authorised Officer. There is no evidence that he saw the AAs or that any decision to make in relation to the AAs had been delegated to him by the planning committee. On the other hand, it will have been obvious to the planning committee in the light of all of the foregoing, in particular the terms of the Officer's reports as well as the terms of NRW's email which were communicated during the course of the meeting that, as regards the substance of the matter at least, the AAs as "signed off" would be stating that there would be no adverse effects to the integrity of the River Wye SAC provided that the recommended planning conditions were in place.

30. More of the essential factual background insofar as it bears on Ground 4 will be set out later.

GROUND 2

The Legal Framework

The HRA Regulations

31. Regulation 63 provides:

> "**63.**—(1) A competent authority[3], before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project[4] which—
>
> (a) is likely to have a significant effect on a European site or a European offshore marine site (either alone or in combination with other plans or projects), and
>
> (b) is not directly connected with or necessary to the management of that site,
>
> must make an appropriate assessment of the implications of the plan or project for that site in view of that site's conservation objectives.
>
> (2) A person applying for any such consent, permission or other authorisation must provide such information as the competent authority may reasonably require for the purposes of the assessment or to enable it to determine whether an appropriate assessment is required.
>
> (3) The competent authority must for the purposes of the assessment consult the appropriate nature conservation body[5] and have regard to any representations made by that body within such reasonable time as the authority specifies.
>
> (4) It must also, if it considers it appropriate, take the opinion of the general public, and if it does so, it must take such steps for that purpose as it considers appropriate.
>
> (5) In the light of the conclusions of the assessment, and subject to regulation 64, the competent authority may agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the European site or the European offshore marine site (as the case may be).
>
> (6) In considering whether a plan or project will adversely affect the integrity of the site, the competent authority must have regard to the manner in which it is proposed to be carried out or to any conditions or restrictions subject to which it proposes that the consent, permission or other authorisation should be given."

The Local Government Act 1972

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[3] Which includes a local planning authority: see regulation 7.

[4] The assessment regime applies to applications for planning permission: see regulation 70.

[5] In this context, NRW

32. Section 100BA provides, insofar as is material:

> “**100BA Access to agenda and connected reports: principal councils in Wales**
>
> (1) Copies of the agenda for a meeting of a principal council in Wales and copies of any report for the meeting must be published—
>
> (a) electronically, and
>
> (b) in accordance with subsections (3) to (5).
>
> (2) If the proper officer thinks fit, there may be excluded from the copies of reports published under subsection (1) the whole of a report which, or any part which, relates only to items during which, in the officer's opinion, the meeting is likely not to be open to the public.
>
> (3) A document required to be published under subsection (1) must be published at least three clear days before the meeting, or, if the meeting is convened at shorter notice, then at the time it is convened.”

33. Section 100D provides in material part:

> “**100D Inspection and publication of background papers**
>
> (1) Subject, in the case of section 100C(1), to subsection (2) below, if and so long as copies of the whole or part of a report for a meeting of a principal council are required by section 100B(1) or 100C(1) above to be open to inspection by members of the public, or are required by section 100BA(1) or 100C(1A) to be published electronically —
>
> (a) those copies shall each include a copy of a list, compiled by the proper officer, of the background papers for the report or the part of the report,
>
> (b) …
>
> (c) in relation to a principal council in Wales, each of the documents included in that list must be published electronically, but if in the opinion of the proper officer it is not reasonably practicable to publish a document included in the list electronically at least one copy of the document must be open to inspection at the offices of the council.
>
> (2) …
>
> (3) Where a copy of any of the background papers for a report is required by subsection (1) above to be open to inspection by

members of the public, the copy shall be taken for the purposes of this Part to be so open if arrangements exist for its production to members of the public as soon as is reasonably practicable after the making of a request to inspect the copy.

(4) …

(5) For the purposes of this section the background papers for a report are those documents relating to the subject matter of the report which —

(a) disclose any facts or matters on which, in the opinion of the proper officer, the report or an important part of the report is based, and

(b) have, in his opinion, been relied on to a material extent in preparing the report,

but do not include any published works."

The Defendant's Scheme of Delegation to Committee and Officers, February 2022

34. The material provisions of this document include the following:

"**A1 General Provisions**

A1.1[6] This Scheme of Delegation is made by [the Defendant] under section 101 of the Local Government Act 1972 and all other enabling powers. Any Committee to which powers are delegated may sub-delegate them to a Sub-Committee or Officer of the Authority. Any Sub-Committee may also sub-delegate powers to an Officer. …

…

Meetings to be held in public in accordance with section 100A(4) of the Local Government Act 1972. Agenda and reports will be made available in accordance with section 100B(1) of the Local Government Act 1972[7]

A.2.2 Planning Committee Terms of Reference

The responsibilities of [the Defendant's] development management functions are undertaken by the Planning Committee. That is, all powers and duties in relation to all development management functions arising from all current and extant planning legislation, except where those powers are delegated to officers.

[6] This provision was not drawn to my attention during the course of the hearing. It provides the answer to my concerns about *delegatus non potest delegare*.

[7] I believe that this is a non-material error. The reference should be to s. 100BA which applies to principal councils in Wales.

This includes:

- Determining (that have not otherwise been delegated) development management matters, including planning applications, and any necessary decisions as to how they should be treated or handled within the requirements of the law; …

…

C2 Director of Planning and Place

2. The Director of Planning and Place is authorised to act as follows:

…

2.18 To sign off and comply with appropriate assessments under [the HRA Regulations] …"

Defendant's Planning Protocol

35. The relevant provisions of this protocol are as follows:

"5.9 Members have a duty to take into account any representations made to the Local Planning Authority as a result of consultation with interested bodies or as a result of public notice or neighbour notification. …

5.11 Where an application proceeds to Planning Committee and any new material information comes to light at the meeting, the Committee may decide:

(a) to defer consideration of the application; or

(b) to delegate the decision following any necessary re-consultation.

In other cases, where the Head of Development Management in consultation with the Director Planning and Place, considers that it is appropriate to do so, Officers may present new information verbally. However, where the information is substantial, it will usually be necessary to defer consideration by the Committee for a written appraisal to be prepared and presented to a future Planning Committee."

Section 31(2A) of the Senior Courts Act 1981

36. This provides:

"The High Court –

> (a) must refuse to grant relief on an application for judicial review, and
>
> (b) …
>
> 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."

The Claimant's Submissions

37. It is convenient to begin with what I am calling limb 2b of the Claimant's case. Limb 2a adds nothing (inasmuch as the absence of prejudice would mean that section 31(2A) applies) and limb 1 is logically subsequent to limb 2b.

38. Mr Daniel Stedman Jones' short point on limb 2b is that the planning committee was required by regulation 63(5) to ascertain whether the proposed development would adversely affect the SAC in circumstances where it was not provided with even a draft of the AAs before or during the meeting. The officer's reports had referenced the latest version of the AAs, then in draft, and they were clearly relied on at that stage, insofar as they went. Had the AAs been in final form, as they really ought to have been sufficiently in advance of the meeting in order to comply with the provisions of the Local Government Act 1972, they would surely have been provided to the committee to aid its deliberations. It follows that the planning committee was unable to make a properly considered decision on 21 March in the absence of highly relevant information. Furthermore, there is no evidence that the planning committee delegated consideration of the AAs to the officer of the Defendant who signed the notices of decision on 22 March, or indeed anyone else within the Defendant.

39. As for limb 1, a very similar analysis applies. The planning committee was required on 21 March to make a decision which directly engaged regulation 63(5). Unless it were decided that the proposed development would not adversely impact the integrity of the Wye SAC, planning permission could not be granted in this case. The same reasoning which leads to the conclusion that the members should have been provided with the AAs, whether in final form or in draft, equally leads to the conclusion that the documents at issue were "background papers" for the purposes of section 100D(5). These documents were not published online in advance of the meeting and the public was denied a voice.

40. The Claimant is well aware that it would not be sufficient to establish a technical breach of these provisions. Mr Jake Thorold submitted that the high threshold under section 31(2A) was not met. He placed particular reliance on Cranston J's decision in *R (Joicey) v Northumberland Borough Council* [2014] EWHC 3657 (Admin); [2015] PTSR 622. He emphasised that this is a controversial case which has inflamed public opinion, and that it was simply impossible to know what further representations would have been made had the correct procedures been complied with.

The Defendant's Case

41. Ms Graham Paul submitted that the Claimant has not been able to identify any flaw in relation to the AAs themselves, either procedurally or in connection with their

substance. The Claimant has failed on Ground 1, and there is nothing to gainsay the Defendant's conclusion that this project is not about increasing stock levels. Further, there is nothing to overset the Defendant's conclusion that the addition of a hardstanding would amount to betterment rather than have any adverse impact on the integrity of the River Wye SAC. Ms Graham Paul further submitted that the Claimant has not sought to assail the Defendant's decision not to put the AAs out for public consultation under regulation 63(4). She relied on all these matters, and others, in support of an overarching argument that the Claimant's case is entirely technical and the Court should refuse relief under section 31(2A).

42. As for the substance of the case, and Ms Graham Paul was inclined to take limbs 2b and 1 together, it was submitted that on the true construction of the HRA regime, once a "favourable" AA is in place, the planning committee has no independent planning judgment to exercise under regulation 63(5). By that she meant that a favourable AA should simply be envisaged as a condition precedent to the grant of planning permission. Subject to the overriding public interest considerations of regulation 64, an adverse AA is decisive against an application, whatever its planning merits in other respects, and it may proceed no further. Conversely, a favourable AA amounts to a green light on the issue covered by the AA, and there is nothing more that the planning committee need do in that regard. It accepts the expert technical advice that it has been given and then proceeds to consider the planning merits of the application in the usual way.

43. The logical consequence of this analysis is that the AA should not be treated as a "background paper" for the purposes of section 100D unless there is something in it which travels outside the scope of the regulation 63 issue. Even had the AAs been "signed off" before the meeting, no obligation to publish them would have arisen under section 100D. All that Ms Hughes was saying under para 7 of her first witness statement was that it was the Defendant's practice to publish documents of this sort in these circumstances, not that there was a legal obligation to do so.

44. Ms Graham Paul further submitted that, on the true construction of regulation 63 there was no need for the AAs to have been authorised or "signed off" before the meeting of the planning committee was concluded. The effect of regulation 63(1) and (5) is that this needs to be done before the formal grant of permission by the authorised officer. On the facts of the present case, this occurred on 22 March and by then Ms Powell had authorised the AAs. Ms Graham Paul accepted that for this submission to prevail she would also need to persuade me that there was a delegation of function to Mr Jones, the officer who signed the decision notices. In this context she relied on para 2.18 of the Scheme of Delegation and the phrase "within the requirements of the law" in section A.2.2.

45. Ms Graham Paul chose not to advance the further and separate arguments set out towards the end of Ms Hughes' first witness statement. In my judgment she was right not to.

Discussion and Conclusions

46. I have already made it clear in my sequencing of the Claimant's submissions that the correct point of departure is limb 2b of Ground 2. I express myself in these terms because the Claimant began with and majored on limb 1. Perhaps limb 2b was not

formulated quite as clearly as it might have been in the Claimant's Statement of Facts and Grounds, skeleton argument and item 4 in the Agreed List of Issues, and there is some force in Ms Graham Paul's observation that during the course of the litigation the Claimant had never stated in clear and simple terms that the Defendant acted in breach of regulation 63(5) by adopting the procedure it did. In my view, limb 2b was somewhat buried within limb 1 which was the Claimant's main argument. However, I note the use of the adverb "necessarily" in the Claimant's Statement of Facts and Grounds (see §5 above, which I have taken from that pleading) and I also note the terms of the third sentence of para 48 of the Claimant's skeleton argument. When pressed, Ms Graham Paul accepted that I would have to deal with limb 2b in this judgment, and I therefore propose to do so.

47. It is clear from regulation 63 read as a whole that a number of stages or steps are contemplated. At the first stage (regulation 63(1)) it is incumbent on the "competent authority", here the Defendant local planning authority, to determine whether an appropriate assessment is required. This is in the nature of a screening decision. The Defendant's officers may take expert advice before reaching its decision. It may, as it did here, simply draw from its experience and from NRW general guidance in reaching the conclusion that the application for planning permission was likely to have a significant effect on the River Wye SAC and consequently an appropriate assessment had to be carried out. In the circumstances of the present case the basis of that conclusion was that significant impacts would likely ensue unless planning conditions were in place.

48. At the second stage the "competent authority" carries out the appropriate assessment, the obligation to do so having arisen because the planning application or proposal had not been "screened out" of the process. Regulation 63(1) also serves to impose the duty at this second stage, and the procedural requirements are located in regulation 63(3) (mandatory) and 63(4) (permissive). Regulation 63 does not state who in the "competent authority" should carry out the appropriate assessment, and it seems to me that a local planning authority has considerable discretionary leeway in this regard. We know that in the present case the AAs were prepared by a planning ecologist, and I imagine that this is fairly standard practice up and down the country. The local planning authority could not properly ask someone who is clearly unqualified to perform this task. It is one that involves a degree of technicality and expertise.

49. In any case, the "competent authority" is also required to obtain expert advice from the "appropriate nature conservation body". That provides an additional layer of safeguard. I have pondered on the role of regulation 63(4). It is an indication that the general public could make a valuable contribution to the debate notwithstanding that the task at hand is technical. A local planning authority has a largely free hand in deciding whether or not to consult the public at large, and no issue is taken about the Defendant's decision in this case not to involve regulation 63(4). There is some force in the point that, given that there is no challenge to the regulation 63(4) decision, at first blush it appears slightly anomalous that a right to make representations should come in through a separate gateway, section 100D of the Local Government Act 1972. Regulation 63 has the appearance of setting out a comprehensive code.

50. At the third stage the "competent authority" makes a decision under regulation 63(5). Who makes that decision and what is its nature? In my judgment, a number of conclusions may be drawn from the language of the sub-regulation:

(1) the regulation 63(5) decision is based on the conclusions of the appropriate assessment but is separate from it.

(2) the regulation 63(5) decision is made in the context of deciding whether or not to grant planning permission. In practice, therefore, this decision will usually be made by a planning committee but that is not a strict requirement.

(3) planning permission cannot be granted unless the planning committee has ascertained, i.e. determined or decided, that the proposal has no adverse effects on the integrity of the SAC.

51. In my opinion, Ms Graham Paul's submission that the planning committee has no evaluative function to discharge cuts across the language of regulation 63(5) itself and, in particular, strips the verb "ascertain" of any meaning. It also cuts across the language of regulation 63(6) in a number of ways. That provision is relevant to the exercise of the regulation 63(5) function. It opens with the words "in considering". The "competent authority" must exercise what is in effect a planning judgment in deciding whether the integrity of the site may be protected by suitably worded planning conditions. It must also consider whether the manner in which the proposed works will be carried out bears on the integrity of the site. That is a factor which is capable of cutting both ways but on any view it involves a decision-making process.

52. Furthermore, Ms Graham Paul's submission is contrary to dicta in the judgment of the Court of Appeal in *R (Wyatt) v Fareham BC* [2022] EWCA Civ 983; [2023] PTSR 1952, in particular paras 9(7) and 45. In that case, the language of "evaluative judgment" is particularly illuminating. On the facts of *Wyatt* itself, it is plain that the officer's report contained a detailed analysis of the appropriate assessment in order to aid the planning committee's decision-making process. Contrary to Ms Graham Paul's contention in the present case, this is by no stretch of the imagination some sort of rubber-stamp.

53. It is unnecessary for me to reach a definitive conclusion as to whether a planning committee can lawfully disagree with conclusions of the appropriate assessment; and if so, in what circumstances. The wording, "in the light of the conclusions of the assessment" is not entirely clear but it does suggest that the conclusions have to be considered; they are not binding. In the event that the appropriate assessment is adverse, that – subject to (1) the application of sufficient stringent conditions (see regulation 63(6)), or (2) an overriding public interest consideration (regulation 64) – may well be the end of the matter. In the event that the appropriate assessment is to the effect that the proposal would not adversely affect the integrity of the site, Ms Graham Paul is entitled to submit that there cannot be an asymmetry here. I am not so sure. In my opinion, although it falls short of being a definitive conclusion because strictly speaking the point does not arise for determination in these proceedings, a planning committee exercising its own judgment on the merits and/or taking into account powerful representations from the general public and/or in consideration of regulation 63(6) matters could lawfully disagree with the conclusions of the assessment. That is what the exercise of an "evaluative judgment" requires, particularly in view of the precautionary principle.

54. Turning now to the facts of the instant case, it was an important premise of the AAs as finalised that there would be no increase in stock numbers. The planning ecologist

could not form a view about that but officers, and in due course the committee, certainly could – and had to. There were other factual matters set out in the AAs which the general public could properly dispute and members might conceivably disagree with. I cannot accept Ms Graham Paul's submission that the AAs were so complex, recondite and technical that the committee had to be obedient and the public as a whole could have nothing to say. The appropriate assessments in the *Wyatt* case were far more complex but were within the ambit of understanding of an informed member of the public. In my judgment, the AAs in the present case could be understood and contested by anyone with a basic knowledge of the local area.

55. I agree with Ms Graham Paul that the wording of regulation 63(5) – "may agree to the plan or project" – refers to the grant of planning permission, and that this did not formally take place until 22 March. By then, the AAs had been finalised and they were not adverse. By the time the meeting of the planning committee concluded it was obvious that the AAs as finalised would not be adverse. However, these considerations do not save the day for the Defendant. They would only do so if Ms Graham Paul had persuaded me that the AAs were merely some procedural pre-requisite which, once in place, demanded no application of independent judgment by the relevant committee. That is far from being the position.

56. What happened here must therefore be analysed in the following way:

(1) The AAs, then only in draft, were not provided to the planning committee.

(2) The officer's reports referred to the AAs in very general terms and stated that NRW advice was awaited.

(3) The only fair reading of paras 6 and 7 of Ms Hughes' first witness statement, and these in any event represent the law, is that had the AAs been in final form in good time their substance would have summarised in the officer's reports and they would have been published online. This was because they were relevant to the planning committee's decision-making process.

(4) Although members were aware that the AAs would, once finalised, not be adverse, they were blindsided as to the detail.

(5) The planning committee resolved to grant permission without being able to exercise an evaluative judgment on the AAs.

(6) The planning committee did not delegate the regulation 63(5) decision on the AAs to an officer. It was not suggested to them that they needed to.

(7) Mr Jones, who signed the formal decision letters on 22 March, did not apply his mind to the AAs.

57. Ms Graham Paul did seek to persuade me that step (6) above was not the position. First, she sought to rely on para 2.18 of section C2 to the Scheme of Delegation. However, that provision is concerned only with the signing off of the appropriate assessments (my stage 2). It has nothing to do with the exercise of the regulation 63(5) function (my stage 3). Secondly, she relied on the wording "within the

requirements of the law" within the first bullet under section A.2.2. But that is far too general to assist. There was no delegation in this case, and none was ever intended.

58. It is unnecessary for me to express a view on whether a lawful decision could have been made in this case had the planning committee been provided in good time with copies of the AAs in draft and had the section 100D(5) obligation been fulfilled. What I can say is that Ms Hughes' reference to "routine practice" (see para 7 of her first witness statement) is problematic. If it is to be understood as suggesting that the Defendant could circumvent the notice provisions in section 100D(5) by its planning committee delegating the consideration of the AAs until such time as they had been formally concluded I would disagree. At the very least what would have to happen is that the AAs (ideally as finalised but draft AAs would probably be sufficient provided that the final versions did not differ materially) would have to be put in the public domain in good time before the delegate reached a decision in order to enable any representations to be made and considered.

59. For all these reasons, the Claimant has demonstrated a technical breach of regulation 63(5) and what I am calling limb 2b of Ground 2 is well-founded.

60. Turning now to limb 1, that also succeeds, largely for the same reasons. Either the draft AAs were papers which (1) should have been relied on as relevant and summarised in the officer's reports, (2) should have been provided to the planning committee in good time, and consequently (3) should have treated as background papers for the purposes of section 100D and published in the same good time; or they were papers which should have been ignored altogether and the meeting of the planning committee been put off. The Defendant finds itself caught on the horns of a dilemma because it did neither of these things.

61. As I have said, Mr Stedman Jones spent rather longer elaborating his limb 1 than he did his limb 2b. It may be seen from my foregoing analysis that Ground 2 is more about limb 2b and that it takes centre stage.

62. The final issue to be addressed in the context of Ground 2 is whether the Defendant is able to show that it is highly likely that the decision would not have been substantially different had the conduct complained of not occurred. Here, one is examining the position on the hypothetical basis that at the time the resolution to grant planning permission was made (1) the AAs as finalised had been provided to the planning committee and been put up on the Defendant's website in good time, and (2) any representations made by members of the public were made available to the planning committee for their consideration. I emphasise item (2) because, in addition to the other failings which occurred in this case, the planning committee were not provided with copies of all the various representations I have summarised under §§21-24 above. For the avoidance of doubt, and in the interests of full transparency, the committee should also have been provided with a copy of the cross-compliance report.

63. The threshold under section 31(2A) is high. In *Joicey*, Cranston J considered the interplay between breaches of the notice provisions in the Local Government Act 1972 and the court's discretion whether to grant or refuse relief. That was in the context of an even more stringent test, namely whether the decision would inevitably

have been the same. At the time *Joicey* was decided the amendments to section 31 of the Senior Courts Act 1981 had not taken effect.

64. I agree with Mr Thorold that the facts of *Joicey* were somewhat stark in that the relevant document, a noise assessment report, was at least placed on the council's website some 36 hours before the meeting (see para 46 of the judgment). However, members of the public were not given the reasonable notice that section 100D required. The report was a 74 page technical document which was directed to ordinary members of the public who might wish to make representations to the planning committee. I note the terms of paras 52 and 53 of Cranston J's judgment, and the following cautionary words:

> "Finally, there is the decision-maker in this case. It was a committee of politicians where the vote was not whipped. It is a very bold person who will hazard that in such circumstances a particular result is inevitable."

65. Taking all of this on board, it seems to me that a modicum of reality needs to enter this discourse. This case has a lengthy history with two previous AAs which entered the public domain. The issues were always quite straightforward, viz: (1) stock levels; (2) whether the hardstanding would magnify the pollution levels; (3) the cross-compliance report; and (4) the need for a more wide-ranging HRA covering the entirety of this farming operation. No one has suggested that there are other issues, and the Claimant has known since October 2023 that the Defendant was relying on section 31(2A). Had the relevant conduct not occurred, is it very likely that the outcome would not have been substantially different?

66. In my judgment, it is necessary to consider this question on two ways. First of all, and ignoring any further representations from the public, would the planning committee's decision have been the same? The answer to that question is obviously, yes. We know that this was a unanimous decision and we also know that the committee at the time of making it knew that NRW was giving positive advice. This was an entirely technical breach. Further, for the reasons set out in the next paragraph, the representations from Fish Legal added nothing. Even on the old *Simplex* test, the outcome would inevitably have been the same.

67. Secondly, one needs to ask what the position would have been had the section 100D breach not occurred. Here, one predicates the giving of an opportunity for the public to make representations on the AAs and more generally. There might have been more voices adding to the chorus but it is impossible to imagine that anything new or different might have emerged. The concerns about increased stocking levels had always been at the forefront of local residents' concerns. The arguments had been volubly made and then rejected. There were, and are, sound reasons for rejecting them. The decisions of three judges are entirely clear, even if each has placed a slightly different emphasis on particular points. The concerns about the hardstanding were, in my opinion, without foundation. Both the Defendant and NRW considered that the proposals would bring about some improvement, and it is frankly impossible to disagree. The cross-compliance report does make concerning reading, and I am left wondering what has been done about what appears to be a woeful state of affairs. However, it has nothing to do with these particular applications; the report relates to the farming operation as a whole. Finally, the argument that a more wide-ranging

HRA should be undertaken does not impact on the assessment carried out in the context of these particular AAs. True it is that the Defendant had to consider in-combination effects, but if the impact of this particular proposal would be neutral (and on one view be slightly beneficial in terms of the integrity of the SAC), this turns into a zero sum game. X plus 0 always equals X. The Defendant has to focus on the 0; there is nothing to be done in the context of the Habitats Regulations that could alter what has already occurred. Mr Stedman Jones' submissions under this rubric were predicated on the second part of the equation being above 0.

68. All that Mr Thorold could do was to submit that the court must not speculate as to what further representations might have been made. However, the Claimant has had seven months in which to assemble her case on this issue. If there were some new point which everyone to date has missed, it would surely have come to light by now.

69. Despite the very high bar that the Defendant needs to surpass, I am persuaded by Ms Graham Paul's submissions that I should refuse relief in relation to Ground 2 on the basis that it is highly likely that the outcome would not have been substantially different if the conduct complained of had not taken place.

GROUND 4

70. It is not suggested that the proposed development impinges directly on the existing Footpath. The right of way is obstructed in a number of places, some of which make it impassable. The breeze blocks shown on one of the photographs, which I take it were put up by the Interested Party, fall into that category. Some of the obstructions date back to the Victorian era. There is also a 4m difference in levels at one point. The evidence is that the existing Footpath has not been used for many years but that is not a factor that can be relied on.

71. Farm vehicles cross the Footpath at a point which is shown by red hatching on one of the photographs (the red hatching covers a wider area, but the point of intersection is apparent). It is not entirely clear what the red hatched areas are designed to show, but it should be emphasised that the proposal is not to alter the nature of the surface across the Footpath itself. The Claimant says that this amounts to a "more established and formal access track".

72. According to Marches Planning's objections to the grant of planning permission:

> "The proposed development will inhibit the restoration of the footpath to its lawful line by making it difficult to reinstate ground levels. Users' enjoyment will also be significantly impeded by having to pass between farm buildings, with the resultant loss of views, and odour impacts, in addition to being put at risk by the movement of livestock and farm vehicles."

73. On 10 September 2021 Mr Eifon Jones, the Defendant's rights of way officer, commented on the proposal:

> "In essence, the proposed development does not directly affect the public footpath that passes through the farm yard.

> However, the footpath has been obstructed by previous development in the past.
>
> The applicant should note this and not undertake any further work which may have an impact on the footpath as this will exacerbate an already problematic situation."

74. Para 9.3.2.2 of the officer's reports said this:

> "Policy 49 of the LDP states: "Development that would prevent or adversely affect the use of the public right of way; … will only be permitted where an equivalent alternative path will be provided. The legal line of [the Footpath] passes between the proposed structure and the existing buildings to the east. While there appears to be some doubt that the footpath has ever followed this route and there are currently obstructions on it, these are historical and include a wall and fence. The addition of the roofed areas does not obstruct views from the footpath due [to] the existing buildings and topography of the land. The proposed building does not obstruct the footpath. BBNPA Public Rights of Way, as Highway Authority for the path have been consulted and have no objections, they do however state that no work should be undertaken on the footpath which would prevent its use by the public or make its use inconvenient. A suitably worded condition will therefore be attached to any approval.
>
> The proposal would not adversely affect a public right of way and is therefore considered compliant with Policy 49 of the LDP."

75. In the Notices of Decision Condition 10 provided:

> "No public rights of way shall be obstructed during the course of the development hereby approved and at no time should any material be placed or stored on the line of any public right of way."

76. Mr Stedman Jones submitted that Condition 10 did not precisely reflect Mr Jones' recommendation. However, Mr Jones was not drafting a planning condition and in my view nothing of substance turns on this.

77. The Claimant's arguments may be summarised as follows:

(1) The proposed development would make the Footpath difficult if not impossible to reinstate.

(2) The Defendant took into account an irrelevant consideration, namely that the Footpath had been obstructed for many years and would be difficult to reinstate in any event. The correct approach is to assume that the Footpath is being used along its legal line and is free from obstructions.

(3) The effect of grant permission on the proposal would be to authorise the vehicular use of the existing track across the Footpath.

(4) The Defendant's finding that the proposal would not create adverse effects more generally is irrational. The sight lines would be impaired and there would also be increased odour.

78. I have considered these arguments but in my view they are entirely unconvincing. My reasons, put shortly, are as follows.

79. As for the first contention, the present case is governed by PD 49 of the LDP which states that development should not prevent or adversely affect the use of an existing right of way. Although when planning judgments are made the Defendant must assume that the existing right of way is being used along its legal line and is free from obstructions, the Defendant cannot deploy this planning application as the means for compelling reinstatement or betterment of the path. In any event, there is no convincing evidence to suggest or indicate that this development would render reinstatement more difficult. That has been asserted on behalf of the Claimant but no particulars are given. The fact that the proposal would entail some excavations does not mean that the line of the Footpath will be altered, either in a horizontal or a vertical plane.

80. As for the second argument, the planning officer made a throwaway remark during the course of the planning committee meeting which in my view was not factually incorrect. That remark needs to be understood in its proper context. Ms Hughes was not saying that one should ignore the line of the Footpath as per the Definitive Map. Indeed, it is clear from her officer's reports that the Defendant proceeded on the basis that the amenity of the existing Footpath, on its existing line, should be considered on the basis that it is being used by members of the public. That analysis entailed a fiction inasmuch as the Footpath is impassable in places, but the correct legal test was applied.

81. The third contention is difficult to understand. Vehicles cross the Footpath at the moment and will continue to do so after the new buildings have been constructed. Given the Defendant's finding that the development will not entail an intensification in use, nothing will change. Walkers and farm workers are well used to showing each other basic courtesies in the context, after all, of a very short stretch of this particular right of way.

82. As for the fourth contention, the short answer to it is that the Defendant's planning judgments about the impact of the development on the Footpath cannot be said to be irrational. These judgments were predicated on there being no increase in livestock numbers and no greater odour. These proceedings do not permit me to second-guess the planning officer's assessment that sight lines would not be impaired.

83. Ground 4 therefore fails.

DISPOSAL

84. This claim for judicial review fails.