Neutral Citation Number: [2019] EWHC 3458 (Admin)

Case No: CO/992/2019

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

Birmingham Civil Justice Centre

Date: 18/12/2019

Before :

THE HONOURABLE MR JUSTICE STUART-SMITH

- -

Between :

The Queen on the Application of Campaign To Protect Rural England	**Claimant**
- and -	
Herefordshire Council	**Defendant**
- and –	
Withers Fruit Farm Limited	
	Interested Party

- -
- -

Paul Brown QC and Katherine Olley (instructed by **Leigh Day**) for the **Claimant**
Zack Simons (instructed by **Thrings Solicitors**) for the **Interested Party**

Hearing dates: 12th December 2019

- -

Approved Judgment

Mr Justice Stuart-Smith:

Introduction

1. The Claimant challenges the Defendant's decision, made on 29 January 2019, to grant planning permission to the Interested Party for the erection of 11 blocks of polytunnels, covering approximately 37 hectares, and accommodation in caravans for up to 350 seasonal workers. The land which is the subject of the application is in the parish of Ocle Pychard in Herefordshire and is some 145 hectares in all ["the Site"].

2. By previous order of the Court, permission was given to the Claimant to pursue three grounds. In briefest summary the grounds of challenge are:

    i) Ground 1:

        a) That members were wrongly advised that no weight could be attributed to a document, issued by the Defendant in June 2018 entitled "Polytunnels Planning Guide" ["the POPG"]; and

        b) That the POPG created a procedural legitimate expectation that the processes in it would be followed in considering and determining any planning application for polytunnels and the Defendant breached that expectation in its conduct and determination of the Interested Party's application;

    ii) Ground 3: the Officer's Report was flawed because it failed to direct the Planning Committee to:

        a) The question whether the landscape was "valued" and whether paragraph 170 of NPPF was engaged;

        b) The question of bats;

    iii) Ground 4: the Defendant was guilty of procedural unfairness because certain documents were not published on the Defendant's website until 18 January 2019 and the Clerk to Ocle Pychard Parish Council did not receive any re-consultation notification in January despite the fact that the Defendant's website says the Parish Council was reconsulted on 15 January 2019.

3. The Defendant has accepted that the POPG created a procedural legitimate expectation that the processes there set out would be followed in considering and determining a polytunnels application and that the Defendant failed to follow paragraph 5.19 of the POPG. The Interested Party makes no such concession.

The Background

4. The Interested Party is a soft fruit farmer which has an existing established soft fruit business at Withers Fruit Farm with 50ha of polytunnels, seasonal workers' caravans and packing stores. Withers Farm is about 13km from the Site. The Interested Party acquired the Site in 2017 and wishes to farm it in conjunction with the existing Withers Farm business to supply fruit to Wye Fruit Ltd based in Ledbury.

5. The Site is not within any national or local landscape designation. It is, however, visible from the Three Choirs Way, a national trail between Gloucester and Worcester via Hereford which passes through the Site, and the Ocle Pychard Conservation Area. The Site is also within an impact risk zone for the River Wye SAC/SSSI and the River Lugg SSSI.

6. To produce strawberries and other soft fruits of a consistent quality to meet the standards of national supermarkets, protection is required from wind, rain, soil, and pests. Polytunnels are translucent plastic sheets clipped into place over a framework of tubes to provide that protection. They may be permanent or seasonal. They have the potential to extend the growing season from about six weeks to about 8 months a year. The production of soft fruits in this country generally and in Herefordshire in particular has been a growth area of agricultural industry in the recent past, significantly due to the expansion of the use of polytunnels. That said, large-scale developments of polytunnels raise specific and more general issues for local planners, not least because of their potential social and environmental impact.

7. The role and purpose of the POPG is set out at [1.1]-[1.3] in terms which are central to this challenge:

> **"Role and purpose of planning guide**
>
> 1.1 With the continued increase in the use of polytunnels for agricultural soft fruit production within the county, Herefordshire Council has prepared this planning guide to help potential developers prepare their planning applications. It will also provide useful information to officers of the council and other interested parties, local residents for example, on how the council expects the many planning considerations to be addressed within applications for planning permission.
>
> 1.2 The Polytunnels Planning Guide 2018 replaces and updates the Polytunnels Supplementary Planning Document (SPD) 2008 and prior to that, a previous voluntary code of practice. It will assist in clarifying which types of polytunnel development will require planning permission and highlight the planning policy issues and requirements such proposals will be expected to address. It will expand upon and provide more detailed planning guidance on a number of relevant, but non polytunnel-specific Core Strategy policies.
>
> 1.3 This polytunnels guide will provide invaluable planning advice, however it has not been though a formal public consultation process or sustainability appraisal and therefore cannot constitute a formal SPD."

8. Section 2 of the POPG addresses the planning context of polytunnels. At [2.8] and in following paragraphs it explains that planning applications must be determined in accordance with the local development plan, unless material considerations indicate otherwise; and, at [2.14], it lists the Core Strategy Policies that could be of relevance to proposals for polytunnel development within the county. In doing so it serves to emphasise what has already been set out at [1.1]-[1.3], namely that the POPG does not purport to be a policy document but is intended to provide useful guidance to various interested parties. Section 3 provides a non-exhaustive list of planning issues that most frequently arise on applications for planning permission relating to polytunnels. The list includes economic need and impacts, landscape and visual impacts, residential amenity, water, and biodiversity. Section 4 is entitled "Detailed assessment of planning issues" and states at [4.1]-[4.2] that:

> "4.1 [Section 4] sets out in detail how the various planning issues previously outlined should be considered by the applicant at the pre-application stage and by the council once applications have been submitted.
>
> 4.2 Although there are often many planning issues that need to be considered when assessing the appropriateness of a polytunnel scheme, the two key issues which must be balanced are: economic benefits/impacts and landscape impacts. It is therefore these that are first discussed below, followed by a number of other planning considerations that must be fully addressed in order that all potential issues surrounding an application can be adequately considered. …"

9. The subsequent discussion makes clear, on any fair reading, that the considerations that may arise are infinitely variable and will be fact-specific to the application in question. Thus, for example, the economic benefits to the applicant and the wider economy will typically need to be balanced against the harm to the landscape, which in turn will be of heightened importance if the application is located in an Area of Outstanding Natural Beauty. Section 4 includes 20 short and general statements of "Planning guidelines" ranging from Guideline 1 on economic benefits ("The benefits of polytunnels in enabling the production of increased quantities and qualities of soft fruit, the sustainability benefits of reducing food miles and the positive contribution to the rural economy are all matters to which considerable weight will be accorded in the balance of considerations.") to Guideline 19 on ecology ("The local planning authority will need to be satisfied that the habitats of protected species (if any) are protected or mitigated.") and Guideline 20 on habitat enhancement ("The local planning authority will seek the creation, restoration and enhancement of habitats."). Some passages outline matters that may arise or may be considered material. For example [4.9]-[4.11], which I set out below, note that economic benefits to the local or national economy "are likely to" carry more weight in the determination of a planning application than those economic benefits to individual businesses; and point out that additional employees may increase pressures on local services and infrastructure or may support those local services by helping to keep them economically viable. The passage concludes with the sentence "The positive or negative influence of an increase in local populations whether temporary or permanent, should be addressed as part of the assessment of the economic effects that polytunnel proposals may have on localities." Other passages provide information about other agencies: for example

[4.50]-[4.54], which is in a section on Water Resources and refers to the Environment Agency: see [11] below.

10. Section 5 is entitled "Planning Application Requirements". [5.1] makes clear that the level of information that may be required of an applicant is likely to vary, dependent upon the size, scope and nature of the application. This variation of approach is illustrated by [5.6] and [5.7] which, under the heading "Landscape or visual impact assessments" state:

> "5.6 All applicants will be expected to fully address the landscape impacts of a polytunnel proposal, both individually and in the context of other similar developments within visual proximity of the proposal site.
>
> 5.7 A landscape impact assessment will be necessary for the vast majority of planning applications since it is the potential harm to the landscape of an area which is one of the key planning considerations in such schemes."

11. The Claimant relies on the following extracts from Sections 4 and 5:

> **"Wider benefits to the rural or national economy**
>
> 4.9 In addition to the commercial/business economic benefits of producing crops under tunnels, there may also be economic benefits to both the economy of the wider rural community and the agricultural economic prosperity of the country as a whole. It is those benefits to the local or national economy that are likely to carry the more weight in the determination of a planning application than those economic benefits to individual businesses. Therefore properly evidenced statements of such advantages should be an important component of any planning application.
>
> *Employment and the rural economy*
>
> 4.10 The soft fruit industry is labour intensive compared to many other parts of the agricultural sector. Temporary staff are taken on to work on fruit farms where polytunnels extend the growing season and can be employed for longer parts of the year than was previously the case before the introduction of tunnel growing. Much of the labour used is temporary foreign labour. During harvesting, these seasonal workers are brought in to a growing area. At this time they make some contribution to the local economy by spending money in local shops and businesses and make use of local services, for example. In addition soft fruit enterprises will purchase goods and services from elsewhere both locally and in the UK, helping to support jobs in supplier companies.
>
> *Impact on local services.*

4.11 The number of additional employees required to work on fruit farms has resulted in an increase in inward migration to rural areas. In some areas this has increased pressures on local services and infrastructure such as schools, police and doctors' surgeries. Conversely, it can be said that local services are better supported (buses, shops, pubs, schools etc.) and that such support is helping to keep these services alive in rural locations, where they have previously struggled to remain economically viable. The positive or negative influence of an increase in local populations, whether temporary or permanent, should be addressed as part of the assessment of the economic effects that polytunnel proposals may have on localities.

And

"Water resources

4.50 Policy SD3 of the Core Strategy provides guidance on the need to protect the availability and quality of water resources. Water is an essential resource, the pollution of which can have serious effects on drinking water supplies (including private water supplies) and ecology. Inappropriate agricultural activities can be a risk to both surface and groundwater quality and quantity. In particular, groundwater requires particular protection from both contamination and over-exploitation. The availability of groundwater can be affected by changes in land use such as the increased use of large-scale agricultural polytunnels, which may restrict recharge through increases in impervious surfaces or the diversion of flows. Groundwater forms part of the base flows of watercourses and is vital to ensure the dilution of discharges, maintenance of water supplies and biodiversity. Both water efficiency and water neutrality (betterment) are key elements of the Government's climate change (reduction) agenda.

4.51 Policy SD4 of the Core Strategy provides guidance to prospective developers in respect of targets to be achieved for water quality in Herefordshire's rivers. Herefordshire SuDS Handbook provides clarity on the treatment train that is required. There is considerable potential for farmers to capture and store surplus water for future use, thereby reducing the need to abstract water from other sources, while enhancing biodiversity. The water quality of Herefordshire's main rivers and their tributaries is of strategic importance and, in particular, high levels of nutrients along parts of the rivers need to be addressed. This is important to the overall environmental objectives of the Core Strategy.

4.52 The Environment Agency, in partnership with Natural England, has developed a Nutrient Management Plan to ensure that the River Wye Special Area of Conservation (SAC)

achieves and maintains favourable conditions with respect to phosphate. A Nutrient Management Board was set up in 2015, with the principal objective of identifying and delivering action that result in the achievement of the phosphorous conservation target of the River Wye Special Area of Conservation. The primary mechanism for which is through the delivery of the Nutrient Management Plan.

4.53 In some parts of Herefordshire there are issues surrounding 'low flows' of local rivers (information is based on the Environment Agency's Catchment Abstraction Management Strategies (CAMS)), such as the potential loss of flora and fauna and changes in species distribution. Whilst many existing polytunnel businesses and applicants for new polytunnel planning permissions either already use or seek to use trickle irrigation methods, this form of irrigation is currently exempt from requiring an Environment Agency water abstraction licence. However, late in 2017, DEFRA and the Welsh government announced plans to end water abstraction licensing exemptions in England and Wales to allow regulators to manage water more effectively, following a consultation in 2016. Currently, exempt operators, primarily users of trickle irrigation for horticulture, will need to apply for a licence from 1st January 2018. It is expected that most, but not all, trickle irrigation users will be offered a licence if the abstraction is not thought to be environmentally unsustainable.

4.54 The Environment Agency does, however, seek detailed information on proposed water use and water management from prospective polytunnels developers, hence these are material considerations in determining whether or not to grant planning permission. This is particularly important in the context of both low flow problem areas and where there may be a potential detrimental impact on the water environment of SSSIs and SACs, as well as Special Protection Areas (SPAs) and Ramsar Sites (such as sedimentation, pollution or adverse impacts on biodiversity). In the case of SAC/SPA/Ramsar sites is may also be necessary for applications to include a Habitats Regulations Assessment (HRA) in line with the EC Habitats Directive (1992).

4.55 Planning applications for polytunnels on a significant scale (on sites of 1 hectare or more) should therefore detail the proposed water use in the context of the catchment area and water management techniques through the production of a detailed Water Resources Study/Audit. In cases where small scale polytunnels are not proposing to use water irrigation from low flow rivers or in areas away from SSSIs or SACs then a brief statement of water use and efficiency techniques could

suffice. (For more information on Water Resources Studies and Audits see Section 5)."

And

"Economic assessments

5.11 Economic arguments as discussed in section 4 above are often technical ones and in order for the local planning authority to assess their validity and importance adequately, they must be set out in robust manner which is fully evidenced. To simply include in the information accompanying a planning application a set of broad statements will not be acceptable.

5.12 In instances where the polytunnels proposed are on a small scale, a simple business case may suffice. It is important to clarify requirements with a development management officer prior to the submission of a planning application. The more economic information that can be provided, the better the understanding of an applicant's business venture and associated business case, and its likely impact of [sic] the local economy. Appendix 1 provides some helpful background questions which an applicant is encouraged to answer:

5.13 A comprehensive economic impact assessment or appraisal should be submitted alongside proposals for large-scale polytunnel schemes. Again, it is essential to discuss the proposal with a development management officer prior to submission of an application."

And

"Flood risk assessments

5.17 In areas particularly prone to flooding and in respect of planning applications for larger polytunnel developments (sites of 1 hectare or more), the Environment Agency will be consulted. A Flood Risk Assessment may be necessary in accordance with the requirements of the NPPF, paragraph 103. Where such a Flood Risk Assessment is deemed necessary, it should be appropriate to the scale and nature of the development and should consider:

(a) flood risk and surface water run-off implications;

(b) any increase risk arising elsewhere;

(c) measures proposed to deal with these risks and effects, e.g. restricting run- off to the Greenfield rates;

(d) explaining what attenuation measures are in place designed to the 1% with climate change standard to prevent flood risk; and

(e) how the polytunnels are designed to prevent run-off and erosion issues."

And

"Water resources studies/audits

5.18 Planning applications for polytunnels on a significant scale (sites of 1 hectare or more) should detail the proposed water use in the context of the catchment area and water management techniques through the production of a detailed Water Resources Study/Audit. The Water Audit could include the identification of a number of water efficiency measures such as, for example;

- rainwater harvesting from water run-off from the polytunnels and/or re- circulation programmes, and

- the use of buffer zones around polytunnels to help prevent chemical leaching into streams and nearby watercourses.

5.19 This Water Audit will be looked at in detail by the Environment Agency, as part of the application for approval."

And

"Ecological appraisals/nature conservation assessments

5.21 A wildlife habitat survey carried out by a suitably qualified and experienced ecologist and at an appropriate time of year will be required where a proposal affects a site which is known to have, or is suspected to have, any species protected under the Wildlife and Countryside Act 1981, Conservation of Habitats and Species Regulations 2010 or the Protection of Badgers Act 1992. This will include badgers, bats, certain reptiles and breeding birds. Should habitats or species of significance be identified, further assessment will be required to determine the impact of the development on the wildlife and proposed mitigation to minimise the impact. Applications for the development in the countryside which affect sensitive areas which must be accompanied by ecological assessments and include proposals for long-term maintenance and management.

5.22 The following list should enable potential applicants to satisfy the expected level of detail required as part of a tunnel application:

- A records centre search and extended phase 1 habitat survey, conducted at an appropriate time of year and including an assessment of the presence of protected species and, or the potential of the habitats present to support protected species must be submitted with the application. This should include maps showing phase 1 habitats present, distribution of species and the location and type of existing and proposed polytunnels. Any potential impacts on these features should be identified (Note – information on badgers, if present, should be submitted in a separate confidential report.

- Further protected species surveys at an appropriate time of year will be required for any protected species that have potential to be present or have been found. Pre-application discussion with the county ecologist is recommended to ensure clarity in regard of survey and assessment requirements. A Natural England license is required for any development that would affect a European Protected Species. In addition to protected species, the presence of any priority habitats or species and LBAP habitats and species should also be identified along with any potential impacts.

- Any European sites such as Special Area of Conservation (SAC) or Special Protection Area (SPA) or nationally designated sites such as Sites of Specific Scientific Interest (SSSIs) within a minimum of 2km of the proposal should be identified, along with any potential impacts upon them. Natural England and the Environment Agency must be consulted as to the need for Habitat Regulations Assessment where a SAC or SPA may be affected. Any locally designated sites of wildlife or geological importance must be identified along with any impacts on them. The assessment must identify and describe potential development impacts likely to affect the species and, or their habitats identified (these should include direct and indirect effects both on-site and off-site during site preparation, construction and subsequent working practices). Where harm is likely, evidence must be submitted to show:

    - How alternative designs or locations have been considered;

    - How adverse effects will be avoided wherever possible;

    - How unavoidable impacts will be mitigated or reduced;

> - How impacts that cannot be avoided or mitigated will be compensated.
>
> - In addition, in accordance with the local authority's duty under Section 40 of the Natural Environment and Rural Communities Act (2006) and the NPPF, section 11 proposals that will enhance, restore or add to biodiversity interests will be welcomed. This could include provision of bird and bat boxes/tubes as well as the planting of native species within landscaping schemes and restoration of habitats.
>
> - The retention of existing trees, hedgerows and other biodiversity features on the site should be sought. A tree survey in accordance with BS5837:2012 Trees in relation to Construction may be required. Pre-application discussion with the county ecologists is recommended to ensure clarity in regard of survey and assessment requirements.
>
> - Opportunities for creation of BAP habitats where appropriate.
>
> - All proposals will require compliance with Herefordshire Council's Core Strategy policies for biodiversity and geodiversity (SS6 and LD2) and relevant government guidance."

12. Section 6 is entitled "Planning application guidance" and deals with temporary planning permissions, obtaining pre-application advice from the Defendant and submitting whole farm plans. The POPG concludes with appendices providing further guidance on how to approach economic criteria (Appendices 1 and 2) and a list of former UDP policies not superseded by the Core Strategy (Appendix 3).

13. The Council gave a negative screening opinion on 28 July 2018, which is not challenged. The opinion stated that impacts were likely to be restricted and localised, with effects upon certain species, including bats, utilising the surrounding habitats. The opinion stated that "site impacts upon protected species can be adequately assessed with requisite ecological surveys to determine presence of, and impact upon, any protected species." It referred to the proposal for two surface water attenuation ponds and stated that "the two surface water attenuation [ponds] are not likely to have significant effects on the environment… ."

14. The application was dated 13 June 2018 and was accompanied by supporting documents, including a Planning Statement, an Ecological & Resource Protection Assessment, an Ecological Enhancement and Resource Protection Policy, a Landscape and Visual Impact Appraisal and a Flood Risk Assessment and Surface Water Management Plan. Later, a Fruit Traffic Management Statement and an updated Noise Management Plan were submitted in December 2018. It is these last two documents, whose publication on the Defendant's website occurred on 18 January 2019, that form the basis of challenge by Ground 4.

15. By a separate decision, which is not challenged, the Defendant had approved a 200,000m^3 reservoir as a permitted development. That approval provided for the relocation of c.285m of species-rich hedgerow, and a hedgerow removal notice had been granted for this purpose.

16. Objections to the application included objections based on the impact of the scheme on:

    i) The amenity of local residents as a result of traffic-noise and the behaviour of fruit-pickers;

    ii) Water supplies from local boreholes and the impact of water abstraction on watercourses in the catchment of the River Lugg and River Wye;

    iii) Protected species including bats;

    iv) A "valued" landscape;

    v) The absence of information evidencing benefits to the local economy.

Applicable legal principles

Legitimate expectation

17. It is trite planning law that national policy is a material consideration and often one that carries a great deal of weight. There are, however, many other documents or statements which may have varying degrees of significance, depending upon the circumstances of their creation or promulgation. Even formal statements of national policy or, by extension of reasoning, a local development plan are not analogous in their nature or purpose to a statute or a contract:

> "Although a development plan has a legal status and legal effects, it is not analogous in its nature or purpose to a statute or a contract. As has often been observed, development plans are full of broad statements of policy, many of which may be mutually irreconcilable, so that in a particular case one must give way to another. In addition, many of the provisions of development plans are framed in language whose application to a given set of facts requires the exercise of judgment. Such matters fall within the jurisdiction of planning authorities, and their exercise of their judgement can only be challenged on the ground that it is irrational or perverse." *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759, 780 per Lord Hoffmann.

18. An informative illustration of the different approach to be adopted to documents of different categories is provided by the decision of Lieven J in *Solo Retail Limited v Torridge DC* [2019] EWHC 489 (Admin) when considering the different status and effect of the National Planning Policy Framework on the one hand and the National Planning Policy Guidance on the other. Having rejected the submission that the NPPF required a "full" Retail Impact Statement Lieven J went on to consider whether the

provisions of the NPPG, which specified steps that should be taken when applying an impact test, meant that the Council's decision should be set aside if those steps had not been taken. At [33] the Judge said:

> "In my view the NPPG has to be treated with considerable caution when the Court is asked to find that there has been a misinterpretation of planning policy set our therein, under para 18 of *Tesco v Dundee*. As is well known the NPPG is not consulted upon, unlike the NPPF and Development Plan policies. It is subject to no external scrutiny, again unlike the NPPF, let alone a Development Plan. It can, and sometimes does, change without any forewarning. The NPPG is not drafted for or by lawyers, and there is no public system for checking for inconsistencies or tensions between paragraphs. It is intended, as its name suggests, to be guidance not policy and it must therefore be considered by the Courts in that light. It will thus, in my view, rarely be amenable to the type of legal analysis by the Courts which the Supreme Court in *Tesco v Dundee* applied to the Development Policy there in issue. "

19. The facts of the present case are not on all fours with the facts in *Solo*, because the present case concerns the proper approach to the POPG rather than the NPPG. But this passage reminds the Court of the considerations that are likely to be relevant when considering the status and effect of a document and its contents where the document is not and does not purport to be a formal statement of policy.

20. The principles that govern legitimate expectation in the sphere of planning applications are well known and settled. The justification for the principle was explained by Lord Fraser of Tullybelton in *AG of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629, 638:

> "The justification for [the principle that a public authority is bound by its undertakings] is primarily that, when a public authority has promised to follow a certain procedure, it is in the interest of good administration that it should act fairly and should implement its promise, so long as implementation does not interfere with its statutory duty."

21. In *R v Devon County Council, Ex p Baker* [1995] 1 All ER 73, 89, Simon Brown LJ said:

> "(4) The final category of legitimate expectation encompasses those cases in which it is held that a particular procedure, not otherwise required by law in the protection of an interest, must be followed consequent upon some specific promise or practice. Fairness requires that the public authority be held to it. The authority is bound by its assurance, whether expressly given by way of a promise or implied by way of established practice..."

22. Typically, a legitimate expectation may arise where there is a promise or a practice to do more than that which is required by statute or otherwise by law: see *R (Majed) v Camden LBC* [2009] EWCA Civ 1029 at [14] per Arden LJ. Only the clearest of assurances can give rise to a legitimate expectation that will be enforced by the Court: see *R v Falmouth PHA ex p SW Water* [2001] QB 445, 459B-C per Simon Brown LJ. This requirement for a clear assurance has been variously expressed as "an unequivocal assurance" and as "clear, unambiguous and devoid of relevant qualification": see *R (Bhatt Murphy) v The Independent Assessor* [2008] EWCA Civ 755 at [29] per Laws LJ and *R v Inland Revenue Commissioners Ex p. MFK Underwriting Agencies Ltd* [1990] 1 WLR 1545, 1569G per Bingham LJ.

23. A legitimate expectation that the Court will enforce may arise from unequivocal statements or practice. That said, the nature or circumstances of the "assurance" may be relevant. Thus, as indicated by Lieven J in *Solo*, formal declarations of policy or procedure issued after appropriate public consultation or pursuant to particular statutory provisions may readily be seen as giving rise to a legitimate expectation; conversely, a less formal document that merely purports to give guidance or advice may less readily be interpreted as giving rise to one. *Majed* provides an illustration of this principle: a Statement of Community Involvement pursuant to Section 18 of the Planning and Compulsory Purchase Act 2004, which had been prepared, submitted for independent examination and adopted in accordance with statutory provisions, was treated as giving rise to a legitimate expectation about how the Council would involve local communities in the consideration of planning applications; but a document entitled "Conservation Guideline", which addressed the infilling of gaps between buildings, did not and was to be treated in a less legalistic and pedantic manner.

Officers' Reports and Challenges to Planning Decisions

24. The legal principles are well known. Lindblom LJ provided a convenient and authoritative summary in *Mansell v Tonbridge and Malling BC* [2017] EWCA Civ 1314 at [41]-[42] which I gratefully adopt without setting it out in full here. The Interested Party identified certain basic principles which are not controversial:

    i) An Officer's Report must be read as a whole;

    ii) The court must not apply excessive legalism, and Officers' Reports are written for councillors and planning officers not lawyers;

    iii) Reports should not be read with undue vigour, but with reasonable benevolence;

    iv) Those councillors and planning officers will have a high degree of local knowledge;

    v) The functions of planning decision-making have been assigned by Parliament to local planning authorities and not judges;

    vi) Matters of planning judgment are for the planning decision makers and not for the courts;

vii) Unless there is a distinct defect in the officer's advice which significantly or seriously misled the members in a material way on a matter bearing upon their decision, the court will not interfere.

25. The law draws a distinction between (a) whether a factor was material, which is a question of law, and (b) what weight (if any) should be attached to a material factor, which is exclusively a matter for the decision maker. If a decision maker chooses to attach no weight to a material factor on rational planning grounds the Court will not intervene; but if the decision maker simply forgets about a factor or wrongly thinks that he is precluded from taking it into account the Court may intervene if the omission would or could have been determinative of the decision: see *Tesco Stores v Secretary of State for the Environment* [1995] 1 WLR, 759, 780E-H and 784 per Lord Hoffmann.

26. In general there is a generous margin of appreciation afforded to a planning authority in deciding what to take into account and what weight to give to those matters it does take into account. Such decisions may only be challenged on the grounds that it was irrational for an authority not to take a relevant consideration into account, or having done so, not to obtain particular information: see *R (Plant) v Lambeth LBC* [2017] PTSR 453 at [62]-[63] per Holgate J. This general proposition does not exclude the possibility that the decision maker will restrict his freedom of movement by establishing a legitimate expectation that he will take a particular feature into account or afford it particular and specified weight. However, as with any other legitimate expectation, the basis for it must be laid and its precise scope must be established so as to create the framework for relevant allegations of breach.

Ground 1: failure to apply weight to the POPG or to act in accordance with a legitimate expectation arising from it.

Limb 1

27. The Claimant criticises the advice contained in the Officer's Report that the POPG "cannot be attributed weight in the decision making process." [6.14] of the Officer's Report said:

> "The Polytunnels Planning Guidance 2018 replaces and updates the Polytunnels Supplementary Planning Document (SPD) 2008 and prior to that, a previous voluntary code of practice. Its purpose is that it will assist in clarifying which types of polytunnel development will require planning permission and highlight the planning policy issues and requirements such proposals will be expected to address. It expands upon and provides more detailed planning guidance on a number of relevant, but non polytunnel-specific Core Strategy policies. ***This document*** provides some invaluable advice, but has not been though a formal public consultation process or sustainability appraisal and therefore cannot constitute a formal Supplementary Planning Document and ***cannot be attributed weight in the decision making process***. It advises that the two key issues which must be balanced are identified as economic

benefits/impacts and landscape impacts." [Emphasis added to identify criticised words.]

28. The Claimant submits that:

    i) The advice that the POPG "cannot be attributed weight" because it was not a formal SPD document is wrong in law. In oral submissions the Claimant clarified its interpretation to be that "cannot attribute weight to the document" means "cannot attribute weight to the contents of the document";

    ii) The POPG is a document to which weight can be attributed because it set out to provide useful information to officers of the council about how the Defendant expects planning considerations to be addressed in applications for permission for polytunnel developments; and to give useful information to other interested parties on how planning considerations would be addressed as a matter of practice.

29. The Interested Party submits that:

    i) The criticised comment goes only to weight, which is within the proper margin of appreciation for the decision maker: it says nothing about potential materiality as such;

    ii) When the Report is viewed as a whole and without excessive legalism, it is clear that the Officer's Report was *not* saying that the contents of and issues raised by the POPG should be given no weight. To the contrary, it is obvious that the Officer *did* place weight on matters included in the POPG, the most obvious example being that the report concentrated at length on the issues identified in the very same paragraph of the POPG as "the two key issues", namely economic benefits and impacts on the one hand and landscape impacts on the other.

30. The first question to be decided is what the criticised phrase is intended to mean, adopting a reasonably benevolent and non-legalistic approach. That approach should, as always, set the phrase that has been identified by the Claimant in its proper context. Once that is done, I think the meaning is clear. The following points emerge:

    i) The main bulk of [6.14] of the Officer's Report, up to the words "Supplementary Planning Document" immediately before the criticised words "cannot be attributed weight in the decision making process", is an almost verbatim quotation of [1.2]-[1.3] of the POPG;

    ii) In the course of that quotation, the Report makes clear the purpose of the POPG in terms which cannot be criticised and clearly imply that some of the contents of the POPG are matters that are at least relevant (and in that sense potentially material) to the preparation of applications and to identifying requirements that applications will be expected to address. However, it also makes clear (as does the POPG itself) that the document does not have the status of an SPD and has not been through the refining processes that would have been required to give it that formal status. It therefore characterises the POPG as "providing some invaluable advice";

iii) It is plain from the rest of the Officer's Report that the criticised passage does *not* mean that *the contents* of the POPG can be ignored and attributed no weight. This is clear from a number of references, of which the most obvious is the words immediately following the criticised passage. That sentence would be irrelevant and unnecessary if the POPG's advice about the key issues (which derives from [4.2] of the POPG) were automatically to be ignored as being attributed no weight. Other references are to be found in the Officer's Report at:

a) [2.5]-[2.6], which list the POPG and the NPPG as "other relevant guidance";

b) [6.17], which refers to the POPG's recognition that the Core Strategy's overall development strategy was produced in the light of the need to promote a diverse and strengthening rural economy, whilst protecting its quality landscape and making sustainable use of natural resources;

c) [6.29], which states that the POPG recognises that "the visual impact of polytunnels is often the most significant negative planning issue in connection with this type of development" at the commencement of the section of the report dealing with landscape and visual impact;

d) [6.30], which refers to the POPG acknowledging the importance of the landscape in more detail than set out at [5.3.7] of the Core Strategy;

e) [6.50], which refers to the POPG's "useful advice" about the impacts of tunnels on Public Rights of Way and, specifically, to Planning Guidance 16 in the POPG which stipulates minimum distances on either side of a Right of Way within which tunnels should not encroach;

f) [6.52], which refers to the distance of the seasonal workers' accommodation being further from a neighbouring property that the distances stipulated in the POPG as "necessary to ensure that the amenities of those living nearby are not detrimentally affected by noise and adverse visual impacts";

iv) The terms of [6.14] of the Officer's Report expressly state that the reason why the POPG is not an SPG and "cannot be attributed weight in the decision making process" is that it has not been through a formal public consultation process or sustainability appraisal. To give the document itself weight as if it had been through such a process would therefore not be justified: but it says nothing about the contents of the document which include, for example, direct references to the Core Strategy and potentially relevant Policies which may obviously be material for applicants, interested parties and the decision maker to consider where appropriate.

31. For these reasons, I reject the submission that the criticised passage meant that the contents of the POPG were necessarily to be given no weight. To give it such a meaning given the context of the rest of the Officer's Report and the terms of the POPG itself is to adopt a legalistic literalism which is quite out of place. To the

contrary, a fair reading of the passage in context, and taking into account the stated terms of the POPG itself, shows the officer's meaning with reasonable clarity: although the POPG's purpose was to assist and give guidance, the document did not have a special status as would a formal Planning Policy or SPD and which could, of itself, give the contents a materiality that they would not have had if not included in the POPG.

32. This meaning, which is rational and justified, precludes argument that a failure to comply with something appearing in the POPG *of itself* demonstrates or evidences a material breach of policy or procedure. It also means that the first limb of Ground 1 fails. However, it remains necessary to look at the second limb on its merits to see whether the contents of the POPG, given its stated and acknowledged purpose and its promulgation by the Defendant, gave rise to one or more legitimate expectations which have been breached by the Defendant so as to vitiate its decision to grant planning permission. In doing so, the terms of [1.1]-[1.3] and Section 2 of the POPG, which expressly state that it is *not* a policy document, are to be born in mind at all times as part of the exercise.

Limb 2

33. The Claimant alleges four breaches of legitimate expectation, which it alleges compendiously demonstrate that the Defendant's consideration of the application was not influenced by the POPG in any way:

    i) First, relying upon the statement in [4.9] that "properly evidenced statements of [economic benefits to the local or national economy] should be an important component of any planning application" and upon [5.11]-[5.13], which are set out above, the Claimant alleges that there were no "properly evidenced" statements (robust or otherwise) of the benefits of the scheme to the local and/or national economy;

    ii) Second, relying upon [4.11], which states that "the positive or negative influence of an increase in local populations, whether temporary or permanent, should be addressed as part of the assessment of the economic effects that polytunnel proposals may have on localities", the Claimant alleges that there was no such discussion in the Officer's Report;

    iii) Third, relying on [4.50]-[4.55] and [5.18]-[5.19], which I have set out above, the Claimant alleges that there was no Water Resources Study or Audit despite the fact that the Site falls within an impact risk zone for the River Wye SAC/River Lugg SSSI and that the Interested Party has not said where water will be sourced or in what quantities; and, separately, that the Environment Agency was not consulted;

    iv) Fourth, relying on [5.21]-[5.22], which I have set out above, the Claimant alleges that the Defendant failed to require the Interested Party to carry out habitat surveys at appropriate times of the year to ascertain the presence of bats or great crested newts even though there was evidence to support a suspicion that they were present.

34. The Interested Party responds, first, by saying that there is no legitimate expectation requiring these particular steps to be taken; and, second, that even if there were legitimate expectations, it was not irrational for the Officer's Report not to address them.

Paragraphs 4.9 and 5.11-5.13

35. I do not accept that the statements in these paragraphs, either singly or cumulatively, give rise to an enforceable legitimate expectation, for two main reasons. The paragraphs are not expressed as prescriptive policy requirements that are prerequisites to the admissibility of an application for determination and decision. [4.9] points out that benefits to the local or national economy "are likely to" carry more weight than benefits to the applicant and advises that "properly evidenced" statements of such advantages "should be an important component of any planning application." It does not seek to lay down a policy-based exclusion; nor could it, given the flexibility of the language in relation to relative weight and "likelihood". [5.11]-[5.13] on a fair reading of the POPG is also essentially advisory: broad statements are no substitute for more detailed economic information: [5.11]. The more information that can be provided, the better the understanding of an applicant's business venture and its likely impact on the local economy may be useful advice for an applicant: but it is not an exclusionary policy criterion. Appendix 1 is evidently not prescriptive as it provides "some *helpful background questions* which an applicant *is encouraged* to answer": [5.12]. The statement that "a comprehensive economic impact assessment or appraisal should be submitted alongside proposals for large-scale polytunnel schemes" lacks any useful specificity about what constitutes a comprehensive assessment and does not lay down exclusionary criteria that would fairly be required if such a general statement were to be elevated to be akin to a policy-based pre-requisite for the admissibility of an application: [5.13].

36. In summary, the paragraphs relied upon do not meet any of the criteria for the establishing of a legitimate expectation that I have summarised at [21]-[22] above. Put in other words, they are advisory and leave ample scope for planning judgment about whether the information that has been provided is sufficient or that information that is lacking is necessary for an application to succeed.

37. Even if I were satisfied that these paragraphs were capable of giving rise to a legitimate expectation as alleged, I would not hold that there had been a breach. As set out under Ground 4, it is plain that the Interested Party submitted an economic appraisal on a confidential basis. As a result, the Court has not seen it and is unable to form any view on whether it could or should have been regarded as sufficient. Since I consider that the decision to maintain confidentiality is justified, there is no basis upon which the Court could conclude that the economic information submitted to the Defendant was inadequate so as to amount to a breach of any legitimate expectation arising out of these paragraphs of the POPG.

Paragraph 4.11

38. I have set this out in full above: see [11]. On a fair reading, it does no more than point out some of the issues that may arise and give non-mandatory advice that such matters should be addressed as part of the economic effect that polytunnel proposals may have on localities. Once again, it is not framed as either a substantive or procedural

policy requirement, failure to comply with which would render an application inadmissible. In other words, it does not purport to comply with the criteria for giving rise to a legitimate expectation that I have summarised at [21]-[22] above.

39. If I were wrong in my conclusion that no legitimate expectation arises, I would not be in a position to conclude that there had been a breach, for the same reasons as explained at [37] above.

Paragraphs 4.50-4.55 and 5.18-5.19

40. I have set out these paragraphs at [11] above. They must be read in context and bearing in mind the nature of the POPG. There is always a risk in attempting to paraphrase a passage that should be seen as a whole but, in my view, the character of these passages is reasonably clear. [4.50]-[4.52] starts by identifying the applicable policies of the Core Strategy with which applicants, must as a matter of established policy, comply. [4.53]-[4.55] then provide information about the current and developing approach of the Environment Agency and Natural England in relation to the River Wye SAC and to areas of "low flow" rivers. The paragraphs touch on the withdrawal of exemptions from the regime of abstraction licences, leading to the statement at [4.55] that "planning applications for polytunnels on a significant scale … should therefore detail the proposed water use in the context of the catchment area and water management techniques through the production of a detailed Water Resources Study/Audit."

41. Two points emerge. First, this passage identifies the policies with which applicants must comply. Second, the main thrust of the second half of the passage is to address concerns about water abstraction from "low flow" areas and to provide information about what steps the Environment Agency is likely to take – it being obvious that the POPG cannot bind the Agency to a particular course of action.

42. Turning to [5.18]-[5.19], the main thrust of [5.18] is that applications on a significant scale "should detail the proposed water use in the context of the catchment area and water management techniques", and it identifies a "detailed Water Resources Study/Audit" as the means of doing so. It also identifies that the Water Audit "could" include a number of water efficiency measures, as there set out. [5.19] states that the Water Audit will be looked at in detail by the Environment Agency. It is to be born in mind that Section 5 contemplates that applicants may be asked to provide more information if necessary, which of itself reserves a degree of planning judgment to the Defendant about what level of information is necessary or sufficient to enable it to reach a decision: see [5.1].

43. In my judgment, neither of these passages lay down prescriptive and exclusionary criteria which must be satisfied in all cases. They highlight the relevant policies and give information and advice about other areas of probable materiality; but these passages should not be read as imposing hard and fast requirements on either applicants or the Defendant. To my mind, the passages leave a high degree of flexibility that will depend upon the precise facts of any given case and the planning judgment of the Defendant about whether the information provided by an applicant is sufficient to meet concerns of the type that have been identified. In other words, I do not accept that these passages meet the criteria for establishing a legitimate expectation as summarised above at [21]-[22].

44. In any event, I accept the detailed oral submissions of Mr Simons to the effect that the information provided by the Interested Party to the Defendant met the substance of the concerns raised in these passages. The starting point is that there was no need for an abstraction licence as the Interested Party's proposed system involved gathering water and using the reservoir for which there was already permission. This was recognised by the Officer's Report, the relevant part of which was at [6.55]-[6.61]. In that section, the Report:

    i) Specifically addressed CS Policies CS3 and CS4 and concluded that the application was compliant;

    ii) Recognised that water availability is fundamental to the success of soft fruit businesses and that "therefore it is common for rainfall to be captures and recycled to ensure sufficient water is available for irrigation throughout the growing season";

    iii) Identified that pumps were to be installed in the proposed attenuation ponds to transfer water to the reservoir for irrigation;

    iv) Recorded the applicant's confirmation that the reservoir and attenuation ponds would be constructed prior to any polytunnels being installed and recommended a condition to that effect;

    v) Confirmed that the Environment Agency had been consulted about the applicant's proposals for treated foul drainage and required a bespoke permit for that operation;

    vi) Expressed the planning judgment that "the application has demonstrates [sic] that the scheme is capable of delivering sustainable water management throughout which will protect and enhance groundwater resources";

    vii) Noted the observations of the Lugg Drainage Board and the conclusion of the Defendant's drainage consultant that the scheme "is, having regard to SD3 and SD5 of the CS and NPPF section 15 principally, … acceptable and capable of being approved subject to conditions."

45. Thus, on the facts as revealed by the Officer's Report, the stipulations in [5.18] of the POPG were met. In particular, the applicant dealt with both of the bullet points in that paragraph. The planned water resourcing for the project were clearly disclosed and no abstraction licence was required. It is clear that the Environment Agency was consulted to some extent, though the terms of that consultation were not in evidence. There is no evidence before the Court to suggest that the information provided to the Environment Agency failed to disclose the plans for resourcing the irrigation. It is also apparent from the Officer's Report that Natural England were consulted, initially asked for further information about the potential impact on the River Wye and, after provision of further information, had no objection, subject to conditions: see [4.3] of the Officer's Report. The fact that the documentation provided by the applicant did not include a document entitled "Water Audit" is, to my mind, a matter of form, not substance.

46. I note the concession made by the Defendant that [5.19] gave rise to a legitimate expectation which it breached. For the reasons given above, I do not accept that such a concession was properly made in circumstances where no question of abstraction arose and no abstraction licence was required. It is no answer to say, as the Claimant did in oral submissions, that deflecting rainwater to the reservoir will affect the quantities of water reaching rivers. That is not what [5.18] or [5.19] were concerned with and it is impossible to identify a legitimate expectation that the Environment Agency would be consulted in such circumstances.

47. For these reasons, if I were wrong in my conclusion that no legitimate expectation has been established, I would conclude that no material breach has been shown.

Paragraphs 5.21-5.22

48. I have set out these paragraphs at [11] above. The Claimant relies in particular on the first two bullet points in [5.22]. Viewed on their own, these paragraphs come closest of those relied on by the Claimant under Ground 1 to giving clear and unequivocal assurances of how the question of the impact upon wildlife will be approached in practice. That said, I am not satisfied that the passages relied upon by the Claimant are sufficient to establish a legitimate expectation, breach of which vitiates an otherwise legitimate decision. I take into account the status (or, more precisely, lack of status) of the POPG, which does not purport to be a policy document or to establish binding policy. Second, I bear in mind that the main thrust of these paragraphs is to enable the Defendant to reach a rational assessment of the impact on wildlife, having due regard to the margin of appreciation that should be and is available to a decision maker. Third, I note that the introductory words of [5.22] support the view that the bullet points are not mandatory criteria to be complied with, but merely form the basis of advice about what "should" enable potential applicants to satisfy the expected level of detail required as part of a polytunnel application.

49. The Claimant counters by submitting that the Defendant invested considerable time and effort into the production of the POPG even though it is not a policy document as such; and that there is no point in it having done so if it was not going to follow its own advice and guidance. There is force in this submission, but it does not change the overall assessment whether these passages were irrevocably binding the Defendant to a particular course of action and requirements that would be demanded of applicants in all cases or, as I prefer, were providing advice that was capable of being applied or not in accordance with the Defendant's planning judgment on the facts of a given case.

50. If I were wrong in my conclusion that these passages do not give rise to an enforceable legitimate expectation, the question then arises what is meant by the words "Further protected species surveys at an appropriate time of year will be required for any protected species *that have potential to be present* or have been found" as they appear in the second bullet point. To my mind, the natural meaning of the phrase is that the protected species has been found or may be present even though it has not been found by the extended phase 1 habitat survey referred to in the first bullet point.

51. The treatment of bats by the applicant and the Defendant is relevant to this limb of Ground 1 and to the second limb of Ground 3 and I set it out here.

52. The Ecological & Recourse Protection Assessment provided by the applicant assessed the site for its ecological value in the form of an extended Phase 1 Habitat Survey to determine the presence or potential presence of protected species. It included a desk study and the extended Phase 1 Survey, which was carried out on 20 September 2017, with emphasis being placed on recording evidence of protected species (including bats) and identification of features and habitats capable of supporting such species. The desktop study identified historical evidence of bats within 1870m of the site from studies conducted between 2004 and 2011. The site survey of the buildings on site recorded that it "did not reveal any signs of roosting/resting bats" and that "the modern steel framed construction of the buildings offer low potential for roosting bats." It also dealt with foraging and commuting habitat on site "in the form of intact native hedgerows and the tree lined watercourse that forms the southern boundary of the site. Potential roost sites include mature hedgerow and in field trees." Under the heading "Summary of Significant Effects" it recorded at [6.2.4] that

> **"Bats**
>
> Proposals do not include any felling of trees which potentially could support roosting bats. Inspection of the modern farm buildings at Highway Farm and the Lodge did not reveal any signs of bat occupation and therefore it is considered that the proposed development will not have a negative impact on roosting bats.
>
> Foraging and commuting habitat may be enhanced by sympathetic management of the hedgerow network i.e. maintaining native hedgerows at a height that will provide sheltered conditions for foraging of their insect prey. Further habitat enhancements could include the provision of flower-rich plots to increase invertebrate populations and in turn food sources for foraging bats."

The report concluded that "the polytunnel development will not have an adverse impact on protected species. No BAP habitats will be lost on the site except for a section of species poor hedgerow at the entrance to Highway Farm, which will be replaced with a new species-rich native hedgerow."

53. The Ecological Enhancement and Resource Protection Policy from the same authors stated (at [2.2]) that "the risk of disturbance to protected species such as … bats is considered to be low." It identified works that would create additional habitat and wildlife corridors, benefitting bats and farmland birds. Table 1 identified targets of improvements to hedgerows, one of the objectives being to enhance corridors for commuting bats. Section 4 set out prescriptions for enhancing works. These measures were put before the Defendant's ecologist who responded on 9 October 2018. In doing so he referred to "issues raised by members of the public". The Defendant's ecologist supported the proposals, subject to the imposition of conditions to ensure that the proposed enhancements were carried out in order to ensure that all species were protected and to comply with the relevant Herefordshire policies, which were LD2 and LD3 and to comply with the NPPF.

54. The Claimant relies upon the fact that objections had specifically referred to bats, as follows:

    i) An objection submitted on 11 July 2018 by a local resident who said that bats were present in the area and at Lower Castleton (some 600 m from the site) and who referred to a survey of bats and birds at Lower Castleton in 2016: it is not clear that the survey was included with the objection;

    ii) An objection submitted on 19 July 2018 by a local resident who included that bats fed around Highway Farm and the surrounding areas;

    iii) An objection submitted on 16 October 2018 by a local resident who included that there were 7 species of bats (and other wildlife) in the area and that monoculture would affect insects and lead to pathogen build up;

    iv) A further letter of objection from the local resident who had previously objected on 11 July 2018. This letter was sent on 22 January 2019, the day before the committee meeting and attached a survey of bats at Monckton Farm (which is adjacent to the site) carried out in November 2018. The survey found evidence of "a smaller number" of roosting bats at Monckton Farm.

55. The Officer's Report recorded the substance of these objections at [5.4]. It referred expressly to there being evidence of bats at Lower Castleton and recorded the criticism that the applicant's reports were of insufficient depth and out of date. As a separate criticism it recorded the objection that the polytunnels would reduce breeding grounds for bats.

56. The Officer's Report addressed the impact of the proposals on ecology and biodiversity at [6.62]-[6.70]. [6.62]-[6.63] summarised the relevant provisions and policy objectives of policy LD2 (on biodiversity and geodiversity). After a brief description of the site, [6.66]-[6.67] addressed the reports and summarised some of the proposed enhancement works. [6.68]-[6.70] concluded the section by saying:

> "6.68 Results from an extended phase 1 habitat survey are presented within the Ecological and Resource Protection Assessment and identify species within the vicinity from the record search and desktop study. The Councils Planning Ecologist has agreed with the findings of the reports in that the proposed development will not have an adverse impact on protected species and that no BAP habitats will be lost on the site except for the section of hedgerow at the entrance, however there is proposed landscaping through reinforcement and additional hedgerow planting which will outweigh this small loss.
>
> 6.69 Representations raised the issue of the presence of badgers in the locality. Legislation seeks to protect Badgers from harm and is therefore different to the way in which other species are protected in legislation. Officers have taken steps to aid protection by not disclosing the size and location of any potential setts into the public domain such as the website, as

> this provides information to persons that may wish or seek to cause them harm. This is best practice. Nonetheless, officers have fully considered the matter, and the applicant has also taken steps to address the issue. Officers have also raised the issue with Natural England, no objections are raised and an informative is suggested.
>
> 6.70 The ecological enhancement through the proposed landscaping is outlined in the LVIA and design and access statement. The Councils Ecologist has examined the submitted documents and raised no objection subject to a condition relating to a habitat protection and enhancement scheme which can be conditioned. I consider there is no conflict with policy LD2 of the CS and am satisfied that there has been detailed consideration to the natural environment to allow the scheme is capable of being delivered in compliance with polices LD2 and LD3 of the CS."

57. I consider that the Officer's approach to ecology and biodiversity was rational and reasonable. The objections were noted and a summary of the evidence available to the decision makers was provided, albeit at a high level of generality. Bats were not mentioned expressly. Badgers were, but that was because of the need to aid their protection by not disclosing their location and to confirm that the officers had not disclosed that information. Otherwise, the report treated all species at a high level of abstraction. On a fair reading, however, the report contained the essentials that were required to identify the issues raised by the objectors and the reasons why the Reporting Officer considered that the proposals were compliant with the relevant policies, LD2 and LD3. That was a rational opinion for the report to express, particularly given the support of the ecological consultant. I reject the submission (based upon *R v Cornwall CC ex p Hardy* [2001] Env LR 25) that further information was required to enable the Defendant to decide what conditions to apply: the need was to protect habitat for foraging and commuting bats, and the Defendant had sufficient information to enable such conditions to be formulated, as they were.

58. It is also material to consider what the outcome would have been if more detail of the objections had been given. In substance, they were to the effect that there were bats in the area. However, there was no information that tended to contradict the finding that there were no bats roosting in buildings on the Site; and there was no good reason to question that adequate provision away from buildings would remain and would, if anything be enhanced, for commuting and foraging bats or for any bats that might be roosting in trees. It therefore appears that the Claimant's current submissions miss the point, because the objections on which they rely would not have altered or undermined the conclusions to be drawn from the evidence which the Defendant had about provision for foraging and commuting bats and the absence of any intention to fell trees.

59. For these reasons, in my judgment, even if the materials upon which the Claimant relies had been included in greater detail in the Officer's Report, it should have made no difference to the recommendations in the report and it is highly likely that the outcome of the application both would and should have been the same.

Conclusion on Ground 1

60. For these reasons the challenge under Ground 1 fails.

Ground 3: failure to take into account material considerations

61. There are two limbs to this ground:

    i) First, the Claimant alleges that the Report failed to direct the Planning Committee to the landscape being a "valued landscape" within the meaning of [170] of the NPPF, which would have required heightened support to be given to the protection of the landscape;

    ii) Second, the Claimant alleges that the report failed to deal with the question of bats, despite some objectors having raised it specifically. The Claimant alleges that the Interested Party should have been required to carry out surveys at appropriate times of the year.

62. The Interested Party responds that there was no legal error with regard to the weight to be attributed to the value of the landscape and that it was not required to give further or better reasons in relation to bats.

Limb 1 – Valued landscape

Principles

63. [170] of the NPPF provides:

> "170. Planning policies and decisions should contribute to and enhance the natural and local environment by:
>
> (a) protecting and enhancing valued landscapes, sites of biodiversity or geological value and soils (in a manner commensurate with their statutory status or identified quality in the development plan)"

64. The words "valued landscapes" are not susceptible to precise definition, legal or otherwise. It is customary to refer to the Guidelines for Landscape and Visual Impact Assessment: Third Edition 2013 ("GLVIA3") which are guidelines and not a prescriptive set of rules. GLVIA3 defines "landscape value" as "the relative value that is attached to different landscapes by society. A landscape may be valued by different stakeholders for a whole variety of reasons." This advice was apparently prepared before but published after the NPPF. It affords no guidance on what level of value should attract what level of protection.

65. What is clear, however, is that for a landscape to qualify as "valued", it is not enough to show that individuals subjectively value the landscape. In *Stroud DC v SSCLG* [2015] EWHC 488 (Admin) Ouseley J accepted that designation as a "valued landscape" should be dependent upon some demonstrable physical attribute rather than just popularity: see [14]-[16]. GLVIA3 may be said to adopt a hybrid approach

in assessing landscape value by reference to landscape quality (condition), scenic quality, rarity, representativeness, conservation interests, recreation value, perceptual aspects and associations.

66. The limitations of [170(a)] of the NPPF and its interrelationship with other policy requirements was considered by Lindblom LJ when referring to its predecessor paragraph in *Preston New Road Action Group v SSCLG* [2018] Env LR 18, at [39]-[40]:

> "39. Paragraph 109 of the NPPF is a broad statement of national planning policy for the "natural and local environment". The introductory words declare what the "planning system" should do – that it "should contribute to and enhance the natural and local environment". The objective with which we are concerned is also expressed in general terms – "protecting and enhancing valued landscapes". The means by which the planning system is to achieve that objective are not stated. But the two ways in which it obviously might do so are plan-making and the determination of planning applications and appeals in accordance with the relevant provisions of the development plan (unless material considerations indicate otherwise). As Lord Clyde said in *Alconbury* (in paragraph 140 of his speech), "[national] planning guidance can be prepared and promulgated and that guidance will influence the local development plans and policies which the planning authorities will use in resolving their own local problems". This seems to me a good description of the policy in paragraph 109 of the NPPF. Dove J. recognized this.
>
> 40. In Lancashire, for minerals development, there are development plan policies that do what the "planning system" is encouraged to do by paragraph 109. They are Policy CS5 of the minerals core strategy and Policy DM2 of the minerals local plan. It is in those policies that the county council, as mineral planning authority, has provided for the protection and enhancement of the landscape in decision-making on proposals for minerals development, including a landscape that is locally "valued". If a scheme complies with those policies, as the inspector and the Secretary of State concluded here, it is difficult to see how it could be regarded as being in conflict with national policy in paragraph 109."

Background

67. The applicant submitted a detailed Landscape and Visual Impact Appraisal, prepared by reputable independent consultants. It offered a graduated scale of Landscape Value Criteria ranging from National Level at the top ("Landscape areas recognised at a national level eg. World Heritage Sites, National Parks, AONBs, Grade I & II* Registered Parks & Gardens, Registered Battlefields") via County/District Level, Parish/Community Level and Local Level ("Most other landscape areas are of value at a local level either as a local recreational resource or by providing a pleasant visual

outlook") to Negligible or Negative ("Some landscape areas may have little or even negative value. Eg. derelict or degraded landscapes and eyesores."). The consultants adopted the GLVIA3 suggested methodology, assessing the landscape as having medium landscape quality, and having several public footpaths and bridleways including the Three Choirs Way; and it concluded that:

> "6.3.15 None of the above indicators suggest that the local countryside should be treated as having high landscape value. Most of the indicators suggest that the local countryside is of value at a local level only, apart from perhaps the immediate setting of the Ocle Pychard Conservation Area to the east which may be of greater interest.
>
> 6.3.16 Taking account of the [GLVIA3] criteria … the local landscape in the immediate vicinity of the application site is assessed as having Local Level Value whilst the countryside in the immediate vicinity of the Ocle Pychard Conservation Area is assessed as being of Parish/Community Level Value."

68. Elsewhere in the report the consultants gave as their opinion that the overall level of effect of the proposed development on the landscape character of the site and the immediate adjoining countryside was considered to be moderate adverse reducing to minor/moderate adverse for the wider landscape: see [9.3.8].

69. The Claimant relies upon the existence of objections based on the value of the landscape:

    i) The local resident who objected on 16 October 2018 submitted that the Ocle Pychard NDP showed that the residents of the area hold the landscape in very high regard. She submitted that "91 acres of polythene and 72 caravans" do not enhance and contribute to the attributes, assets and features of the area;

    ii) An objection was lodged by Marches Planning and Property Consultancy acting on behalf of residents of Ocle Pychard Parish, which took issue with the assessment of the applicant's consultants. The central contention was that the proximity to the Ocle Pychard conservation area and the presence of the Three Choirs Way were factors that suggest the site is within a valued landscape which should be protected and enhance in accordance with paragraph 170(a) of NPPF.

The Officer's Report

70. The Officer's Report summarised relevant objections, including that the polytunnels would be a dominant feature from footpaths including the Three Choirs Way. It did not refer expressly to [170] of NPPF but evidently had it in mind because [6.31], referring more generally to section 15 of the NPPF, said that it

> "emphasises the importance planning policies and decision have in contributing and enhancing the natural and local environment. This is achieved by protecting and enhancing

> valued landscapes, sites of biodiversity or geological value and soils. …"

71. The section on Landscape and Visual Impact runs from [6.29]-[6.54], with specific sections dealing with the landscape impact of polytunnels at [6.39]-[6.45], seasonal workers accommodation at [6.46]-[6.49] and rights of way (including the Three Choirs Way) at [6.50]-[6.52].

72. Despite the failure to mention NPPF [170(a)] expressly or to express a conclusion by reference to the paragraph on whether, and if so to what extent, the landscape should be regarded as "valued" within the meaning of that paragraph, the report provides a suitably thorough and balanced review of the available evidence about the impact of the proposed development. It records that the Landscape Officer has fully considered the Landscape and Visual Impact Assessment and has made several visits to site. At [6.37] it records a clear exercise of planning judgment in disagreeing with the LVIA's assessment that the landscape has undergone considerable change; but the Landscape Officer agreed with the conclusion that the overall sensitivity impact on this undesignated landscape is medium. Having reviewed the evidence it advised that "overall it is considered that the proposed scale of polytunnel development is acceptable and appropriate for the location." Its conclusion on landscape impacts at [6.53]-[6.54] was:

> *Conclusion on landscape impacts*
>
> "The Landscape Officer has given full consideration to the magnitude of the impacts of the whole of the development. The main impact would arise from the introduction of the polytunnel coverage themselves, however polytunnels and caravans are temporary in nature and can be removed from site without resulting in the loss of elements within the landscape, as Case Officer for the application I would agree with the Landscape Officer and conclude that the impact is not significant. Consideration has been given to the visual intrusion on existing residents, and whilst there is acknowledged to be degree of harm, the result would not to a degree whereby the properties would be regarded as 'unattractive and unsatisfactorily places to live', as suggested in the representation submitted on behalf of the Ocle Pychard residents. The proposed site does benefit from both a varied topography and extensive vegetative cover in particular along the watercourse. The orchard planting, some of which is already in place, will mitigate these views further once fully established and with planting within the framework of the site these identified effects could be mitigated further.
>
> The Landscape Officer has outlined that the mitigation measures proposed in the LVIA are sufficient to offset any adverse impacts on landscape character and visual effects, with regards to both the Polytunnels and seasonal workers accommodation. There has been a considerable amount of local representations made with regards to landscape impact and all

> have been fully considered during officers assessments. However, whilst the development will be visible from the PROW's and a number of residential properties, enhancement and reinforcement of existing landscaping will mature over time and reduce the impact. Overall, officers would conclude, having regard to the above advice received and assessment above, that the proposals, with the appropriate mitigation secured by the conditions suggested, would comply with the requirements of policy LD1 and LD3 of the Herefordshire local Plan – Core Strategy, Policy OPG11 of the Ocle Pychard NDP and with the guidance contained within the NPPF."

73. In the light of the guidance provided by Lindblom LJ in *Preston*, this approach discloses no error of law. Rather, it illustrates the *Preston* approach by concentrating on and confirming compliance with applicable policies, which reasonably and rationally justifies the conclusion that there has been compliance with the guidance in the NPPF. The submission that the Court should set aside the decision for want of a more clearly expressed approach to the question of valued land appears to me to be a classic example of adopting too legalistic and technical approach to the terms of an Officer's Report. The Officer's Report evidently had the terms of [170(a)] in mind and provided a balanced assessment to enable the committee to reach a rational decision.

74. The challenge under limb 1 of Ground 3 fails.

Limb 2 - Bats

75. For the reasons set out under Ground 1 at [52] to [59], the challenge under limb 2 of Ground 3 fails.

76. The Grounds also mentioned great crested newts, but the Claimant realistically conceded that if it did not succeed by reference to bats it would not succeed by reference to great crested newts. I agree.

Ground 4: procedural unfairness

77. There are again two limbs to the Claimant's complaint of procedural unfairness and consequent prejudice:

    i) First, documents were only published on the Defendant's website on 18 January 2019, which was the Friday before the committee meeting on Wednesday 23 January 2019. It is alleged that this prejudiced neighbours who had no proper chance to review the Fruit Traffic Management Report and the amended Noise Management Plan; and it is alleged that the Clerk to Ocle Pychard Parish Council did not receive any re-consultation notification in the month of January 2019, though the Defendant's website says that the Parish Council was notified on 15 January;

    ii) It is alleged that no statement of the economic benefits to the economy of the wider rural community and the agricultural prosperity of the country were disclosed, and that they should have been because they were supporting

documents, it being apparent on the evidence that Mr Leeds, the driving force behind the Interested Party, submitted a document setting out the benefits both to the Interested Party and to the wider economy.

78. In response the Interested Party submits that:

i) There is no legal requirement for the reports to be made available more than 5 days before the meeting. There *was* a requirement pursuant to s. 100B(3) of the Local Government Act 1972 for the Officer's Report to be available five days before, and it was. The OR referred to the reports which form the subject of the first limb of this complaint and they were available if anyone wished to read them. As a matter of fact the Interested Party submits that no prejudice was caused because representations were made about the new reports and, in any event, the concerns which might have been the subject of any response to the new reports were already (and forcefully) articulated;

ii) The Interested Party's economic need assessment was commercially confidential and was rightly withheld. In any event, the economic case was debated at length in the Officer's Report at [6.15]-[6.28] and in public at the committee meeting in the presence of the Claimant's representatives. There was therefore no prejudice.

79. In relation to the second limb of Ground 4, the Claimant relies upon the statement at [4.9] of the POPG that "properly evidenced statements" of the economic benefits to wider economy should accompany the application. It submits that any such document which is relied upon by the Officers and/or Decision Maker are to be regarded as "background papers" within the meaning of s. 100D of the Local Government Act 1972 and should therefore have been made available.

Limb 1 – Late publication of reports

80. The two reports that are the subject of this limb of Ground 4 are:

i) A Noise Management Plan dated December 2018, which was a revision of an earlier version dated November 2018; and

ii) A Fruit Traffic Management Statement dated December 2018, there having been no previous version of this document.

81. This limb of Ground 4 is supported by evidence from two witnesses, Ms Julie Jones and Ms Ruth Price:

i) Ms Jones objected to the application on 19 July 2018, including objections based on traffic noise, specifically "the prediction of 2 lorries per day" which she regarded as "wholly optimistic" and referring to "2 lorries to take fruit away" and the installation of a blast chiller. She did not become aware of the Fruit Traffic Management Statement before the decision to grant permission was taken. She says that when she did become aware of it, she learned for the first time the extent that the Development would have on her home and place of business in terms of noise emissions. She refers specifically to the background noise of tractors and trailers going to the packhouse and of there

being 2 articulated HGV collections of fruit from the cold store between 9am and 6pm and to her expectation that there will need to be deliveries of packaging, such as fruit boxes;

ii) Ms Pryce wrote two letters of objection. The first raised the issue of 360 seasonal workers making a lot of noise when outside and having football matches and disturbing nose levels from traffic, the chiller units and other machinery. The second raised the question of noise pollution from machinery and from the large number of workers living in close proximity to residents. She says she was not aware of the December 2018 Noise Management Plan or the Fruit Traffic Management Statement before the committee meeting as she did not check the website frequently but depended on friends and neighbours to tell her when new documents were posted. Had she been aware of them, she says she would have written a further letter of objection. Specifically, she says that her further objections would have included objections relating to outside music and the playing of football.

82. A comparison of the November and December versions of the Noise Management Plan show that the changes were very limited:

i) In the main text the only change was in [1.4] which added a reference to a plan to the existing text. This is of no consequence for the current issue;

ii) The details of the plan were set out in a table with columns for Source, Possible effects on Impact and Mitigation to Consider. Three changes were made:

a) In relation to Outside Music, the December version introduced a limitation that "No amplified music is allowed";

b) In relation to Outside Music, the November version had an entry for location, which stated "Football pitch and farm buildings only to minimise impact on Monkton residents", which was deleted in the December version;

c) In relation to Inside Music, the hours (7am -10pm only) and the stipulation "Keep volume to a sensible level, monitor feedback from neighbours and modify volume accordingly" remained unchanged, but an entry in the November version for Live Music, which said that it should be "as above. Advise neighbours of special event in advance", was deleted from the December version.

Viewed overall, the December 2018 plan did not raise any new issues that could have generated further objections of any great substance.

83. The Fruit Traffic Management Statement was produced at the Defendant's request for additional information about details of anticipated vehicular activity in the yard area of Highway farm so that its impact on residents at Highway House could be assessed. At the time (and, so far as I am aware, now) Highway Farm was owned and occupied by members of Mr Leeds' family. The statement disclosed that picked fruit would be transported to the farmyard using internal farm tracks between about 7 am and 4 pm.

It would then enter the blast chiller and remain in cold storage until transported off site. Transport off site would require up to two articulated HGV collections of fruit in peak season, occurring between 9 am and 6 pm. Loading of chilled fruit would be undercover, in a temperature-controlled environment, directly into the lorry, which would reduce noise associated with fork-lift trucks.

84. It is plain from the content of Ms Jones' prior objection that the Fruit Management Plan contained little or nothing of substance that was new. In particular, she had already objected to the background noise of tractors and trailers going to the packhouse and of there being 2 articulated HGV collections of fruit from the cold-store between 9am and 6pm and to her expectation that there will need to be deliveries of packaging, such as fruit boxes. There may have been differences of detail in the new document; but there was nothing new of real substance. If these matters were known to Ms Jones, it is reasonable to assume that they were in the public domain and available to others too, given the contentious nature of the application.

85. It is also plain that most of the information in the Fruit Management Plan had already been foreshadowed in the applicant's planning statement. That included references:

    i) At [5.2] to the use of the existing farm buildings at Highway Farm to accommodate a blast chiller, cold store and loading bay where fruit would be stored for a short period before being transferred off site;

    ii) At [5.3] to the provision of 72 caravans for 6 workers each;

    iii) At [7.16] to the transport of fruit to the cold store and dispatch building by internal routes rather than on the public highway;

    iv) At [8.12] to the daily transport of fruit from the cold store by articulated lorry, though the suggestion at that stage was that the fruit would be transported "once per day".

86. I therefore reject the suggestion that the late availability of the two documents loaded on 18 January 2018 could have caused or did cause any material prejudice either to Ms Jones or to Ms Pryce or, by extension, to other interested parties.

87. In any event, I do not accept that publication on 18 January 2018 was procedurally unfair. There was still time for interested persons to read and respond to the documents before the Committee Meeting, had they been paying close enough attention. Ms Pryce was perfectly entitled to rely upon friends and neighbours to alert her to the appearance of new documents; but she has no grounds for complaint directed at the Defendant if they did not do so. No statutory or other time-limit was breached; and no unfairness resulted.

88. The Officer's Report, which was published within statutory time limits, set out the Environmental Health Officer's initial requirement for further information and provided a rational assessment of the position leading to a recommendation that planning permission be granted subject to appropriate mitigating conditions.

89. In summary:

i) The late publication of the reports breached no formal time-limits;

ii) The content of the reports caused no prejudice to interested parties, having been very substantially foreshadowed and the subject of prior objections;

iii) The timing of the reports caused no prejudice as there was time for any interested person to respond if they wished to do so, bearing in mind the limited nature of any new information disclosed for the first time in the reports;

iv) This limb of Ground 4 fails.

Limb 2 – Economic information

90. S. 100D of the 1972 Act provides:

> **"100D- Inspection of background papers.**
>
> (1) Subject, in the case of section 100C(1), to subsection (2) below [a time limit], 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–
>
> (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, and
>
> (b) at least one copy of each of the documents included in that list shall also be open to inspection at the offices of the council. …
>
> …
>
> (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) Nothing in this section—
>
> (a) requires any document which discloses exempt information to be included in the list referred to in subsection (1) above; or
>
> (b) without prejudice to the generality of subsection (2) of section 100A above, requires or authorises the inclusion in the list of any document which, if open to inspection by the public, would disclose confidential information in breach of the obligation of confidence, within the meaning of that subsection.

> (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."

91. S. 100A(2) of the Act provides that the public shall be excluded from meetings whenever it is likely that, if members of the public were present during that item, confidential information would be disclosed to them in breach of the obligation of confidence. By virtue of s. 100E(1) of the Act, these provisions apply equally to committee meetings such as the meeting on 23 January 2019. "Exempt information" is now defined in Schedule 12A of the Act as amended, Part I, paragraph 3 as including "Information relating to the financial or business affairs of any particular person (including the authority holding that information)."

92. I accept as a general proposition that "the clear statutory intention behind s. 100D(5) of the [1972 Act] is to ensure that documents upon which the OR is based are open to be viewed by members of the public": see *R* (*Hale Bank Parish Council) v Halton Borough Council* [2019] EWHC 2677 (Admin) at [58] per Lieven J. However, it is clear that s.100D(4) must be given proper application. In particular, the section excludes from the list of background documents that are to be disclosed "any document which, if open to inspection by the public, would disclose confidential information in breach of the obligation of confidence." The section does not provide for redaction of confidential information and part-disclosure of the remainder of the document.

93. Similar or identical issues were considered by Ouseley J in *R (Bedford) v Islington LBC* [2002] EWHC 2044 (Admin). The document at issue there was a report by DTZ, who had been appointed to assist the Council in its negotiations with Arsenal FC on land issues. DTZ's instructions mean that they had to examine the cost estimates relevant to the deliverability of the development. Ouseley J described the report as "shot through with the confidential information of third parties"; and it was clear that it contained confidential information derived from scrutiny of Arsenal FC's cost estimates and figures." The report was not listed as a background document but was referred to in the body and conclusions of the Overview Report. Ouseley J rejected the submission that the DTZ report should have been disclosed. In doing so he said:

> "97.. Here the councillors were not better off than the objectors. […]
>
> 99.. Moreover, fairness in the planning process is not confined to a consideration of the interests of the objectors. It also needs to respect the confidentiality of the applicant […] it would be

> unfair to Arsenal FC for the local planning authority to be made to reveal what was handed to its advisers in confidence in the clear expectation that it would have a very carefully restricted circulation.
>
> 100.. A planning authority needs to be able to examine matters in a confidential manner with applicants, as was done here, and for that purpose to use independent consultants to whom disclosure of the relevant information is made in confidence. This is the same process that the GLA went through. If a local planning authority cannot do that, it will be hindered in its negotiations with developers over the content of publicly beneficial packages such as the extent of affordable housing and other legitimate benefits related to the value of the development and its funding. The public interest would be harmed."

94. The evidence of Mr Leeds is that the Interested Party provided information on the commercial and economic benefits of the scheme to the Defendant on a confidential basis and with the express proviso that it was not to be published. Mr Leeds describes the information as including full details of the cropping and financial output of the existing Withers Fruit Farm and the proposed impact of the development for the combined business. The level of detail as described by Mr Leeds would fully justify the Interested Party in regarding the information as commercially sensitive and to be protected by being submitted on the basis that it would not be published. As in the Arsenal FC case, the detailed information was not made available to the individual members making the decision: the decision makers were therefore in no better position than the interested public; and the Officer's Report summarised the overall position at [6.15]-[6.28]. There is no challenge to the rationality of the Officer's assessment.

95. The Claimant submitted that on some applications the decision maker may stipulate that confidential information be disclosed as a prerequisite to consideration of the application. There are two short responses to this submission. First, it did not happen in this case. Second, if the submission is factually correct, it is not clear how such a stipulation is consistent with the terms of s. 100D: but since I have heard no argument on the point, I express no view on it.

96. I see no material distinction in principle between the facts of this case and the facts of the *Bedford* case. On the evidence, the Interested Party's economic needs assessment disclosed exempt information and, if open to inspection by the public, would disclose the Interested Party's confidential information in breach of the obligation of confidence which the Defendant assumed on receiving the information subject to the express proviso that it was not to be published. On that basis, the documents containing such information were not required to be included in the list of background documents or to be made available for inspection by members of the public.

97. For completeness, during oral submissions the Claimant did not press the complaint based on the Clerk to the Ocle Pychard Parish Council not receiving notice of reconsultation. That was, in my view, a realistic and correct position to adopt.

98. For these reasons, the challenge under Ground 4 fails.