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Case No: CO/2415/2023
AC-LON-2023-002012

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 January 2024

Before :

MRS JUSTICE LANG DBE

- -

Between :

THE KING	**Claimants**
on the application of	
(1) JOE COOK **(2) JOHN PICKETT**	
- and -	
ROYAL BOROUGH OF KENSINGTON AND CHELSEA	**Defendant**
THOMAS'S LONDON DAY SCHOOLS	**Interested Party**

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- -

James Maurici KC and Richard Moules (instructed by **Town Legal LLP**) for the **Claimants**
Meyric Lewis KC (instructed by **Bi-Borough Legal Services**) for the **Defendant**
Neil Cameron KC (instructed by **Clyde & Co LLP**) for the **Interested Party**

Hearing dates: 5 & 6 December 2023

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Approved Judgment

This judgment was handed down remotely at 10 am on 16 January 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mrs Justice Lang :

1. The Claimants seek judicial review of the decision of the Defendant ("the Council"), made on 18 May 2023, to grant the Interested Party ("Thomas's") planning permission to develop Atlantic House, 1 St Albans Grove, London W8 5PN ("Atlantic House") as a new site for its Kensington school ("the School"), for children aged 4 to 11 years old.

2. Both Claimants live near Atlantic House. The First Claimant owns 3 St Albans Grove, London W8 5PN and the Second Claimant owns 10 Douro Place, London W8 5PH. Both Claimants objected to the planning application and raised concerns about the impact of significant noise from the outdoor play areas at Atlantic House which would affect their enjoyment of their properties.

3. In summary, the Claimants' grounds for judicial review were as follows:

4. **Ground 1**: The Council misinterpreted local and national noise policies, and the planning officer gave significantly misleading advice to the Planning Committee in the Officer's Report ("OR").

5. **Ground 2**: The Council acted irrationally in failing to secure mitigation, by way of additional double or triple glazing, for the property at 11A Douro Place. Further, the Council acted irrationally in failing to make sufficient enquiries as to whether additional double or triple glazing could mitigate the Significant Observed Adverse Effect Level ("SOAEL") noise affecting other properties near Atlantic House.

6. **Ground 3**: The Council acted irrationally by granting planning permission without securing a school street, which would restrict vehicle access during school opening and closing times.

7. On 14 September 2023, Eyre J. granted permission on the papers on Ground 1, and refused permission on Grounds 2 and 3. The Claimants filed a renewed application for permission on Grounds 2 and 3, and an application for an expedited hearing as Thomas's refused to defer implementation of the planning permission pending the disposal of the claim. On 12 October 2023, I granted the application for expedition, and ordered that the renewed application for permission on Grounds 2 and 3 should be heard on the same occasion as the substantive hearing on Ground 1.

Planning history

8. Thomas's currently operates the School at premises at 21 St Albans Grove, 17-19 Cottesmore Gardens and 39 – 41 Victoria Road. It wishes to consolidate the School at two locations: Atlantic House and 21 St Albans Grove. It proposes to vacate 17-19 Cottesmore Gardens and 39 – 41 Victoria Road and convert those premises back to residential use. On 4 March 2022, Thomas's made four linked planning applications to the Council to give effect to this proposed scheme.

9. This claim concerns Atlantic House which is an unlisted building within the De Vere Conservation Area. It was originally a large 19th century house (Lytham House), which was adapted for use as the Kensington High School for Girls in 1896. After the High School's closure, Atlantic House was rebuilt for the College of Estate Management and

later utilised by the University of Richmond as International Student Housing. It has been empty since April 2021.

10. Atlantic House consists of two main elements. Lytham House is the older part of the building and the newer part of the building comprises two storeys plus a basement, and a roof extension. Within the site, there are three outdoor areas.

11. Atlantic House is surrounded by residential buildings, including high rise mansion blocks to the west, and town houses to the east on Victoria Road, to the north in Douro Place and to the south on St Albans Grove.

12. St Albans Grove is a two way street, but it is so narrow that opposing traffic can only pass by waiting at junctions or gaps in the kerbside parking, and there is no space for vehicles to wait, or make deliveries, without blocking the road. The footway is also narrow.

13. The grant of planning permission for Atlantic House is in the following terms:

> "Change of use of Atlantic House from Class C2 (student accommodation) to Class F1a (education). Minor alterations and additions to Atlantic House including the provision of a subservient glazed link building bridging the gap between the original Lytham House Villa and the Atlantic House building, demolition of existing metal fire escape stair on the side elevation and provision of a new fire egress stairway to the rear of the building, replacing existing western car park in place for school outdoor play space, installation of a canopy to the rear for early years play, demolition of existing rooftop plant and replacement with concealed rooftop plant in a partial extension to match the existing roofline, new and improved landscaping to all boundaries including secure fencing along St Albans Grove and partial demolition of poor quality additions to the rear (northern facade) refurbishing to match the original building form and character of Atlantic House……"

14. Potential noise impacts have been identified from three external areas (OR/6.44):

    i) The main playground area, which is proposed to be located on the existing car park.

    ii) A secondary play area, described as a "Quiet Natural Play" area, which is proposed for the north of the site.

    iii) At the northeast of the site, a covered play area is proposed at basement level.

15. Thomas's application for planning permission was supported by an acoustic consultant's report from Bickerdike Allen Partners ("BAP"), dated 11 February 2022, with a full noise assessment of the impact from children using external play areas at the School. On 21 June 2022, BAP provided an Addendum Report, appending the Noise Management Plan and commenting on other reports. In summary, BAP concluded that, on a worst case scenario, noise levels were generally below the SOAEL guideline for

all properties except for 11A Douro Place where the predicted noise levels exceeded the SOAEL guideline by a significant margin of 4dB. It was reasonably practicable to mitigate the level of noise by replacing the windows with high acoustic replacement glazing. Ventilation could be achieved by opening windows on the north facing façade.

16. BAP did not agree with the view expressed by the Council's Environmental Health Officer ("EHO") that other neighbouring properties would be severely impacted and so it advised that the glazing proposed for 11A Douro Place need not be extended to other properties.

17. On 12 April 2022, the Council's EHO provided his initial consultation response to the proposed development, and he subsequently provided a further response, which was undated. The EHO listed "significant concerns" about noise generated by playground use, and from more than 500 pupils arriving and departing the School each day. He suggested that the School was inappropriate for the predominantly residential area. He considered that the "new" noise would have a significant impact in an area where existing noise levels are low and the hard surfaces were very "reverberant". The acoustic fence would only benefit residents on the ground floor. He was critical of the BAP report which he described as "basic" and which did not fully reflect the significant impacts of the playground use on neighbouring residents. The methodology averaged sound levels over a 30 minutes period, masking the peaks of noise. In his view, use of the playground would fall within SOAEL. He did not specifically identify the properties affected, but he advised that the noise "will significantly impact on the amenity of the neighbouring residents" and the use of the playground should be avoided. His conclusion was that, if planning permission were granted, it should be subject to a condition which prohibited use of the external space as a playground.

18. Mr Peter Rogers, an acoustic consultant, provided acoustic reports on behalf of the Second Claimant on 27 May 2022, 27 July 2022, and 13 December 2022. He advised that, even with the mitigation and management measures proposed, there would be a significant adverse impact affecting the amenity of the residents in 10, 11, and 11A Douro Place, St Albans mansion block and the houses on St Albans Grove. The noise impact of pupils arriving and departing the school was likely to cause serious disruption to residents. He therefore recommended that planning permission should be refused. He largely agreed with the views expressed by the EHO and disagreed with the views expressed by BAP.

19. BAP disagreed with Mr Rogers' recommendation, in his report of 27 May 2022, that planning permission should be refused because of the noise impacts.

20. Thomas's submitted a paper to the Council giving details of the proposed use of Atlantic House. It included the following points:

    i) Pupils will attend the School for 170 days (34 weeks) of the year, from Monday to Friday.

    ii) Arrival and dispersal will be strictly supervised to and from the entrance in St Albans Grove. Pupils will arrive between 8.25 am and 8.35 am. Dispersal times will be staggered according to the age group; the latest time is 4.00 pm. There are afternoon clubs between 16.00 and 17.00.

iii) Pupils will have a mid-morning and a lunch time break when they are allowed outside. Different year groups have different break times. Use of the playground will be supervised and timetabled to allow a maximum of two year groups to play together, so as to limit noise levels.

iv) The playground will be used for mid-morning sports lessons. In the afternoons, sports activities will take place at local parks and sports venues instead.

v) The Reception classes will use the basement area in the north east of the site, not the playground.

vi) The current site at Victoria Road has outdoor space at the front and rear of the building where pupils can play. At the Cottesmore Gardens site, a condition prevents use of the garden for play, to safeguard the amenities of neighbours.

vii) The School is currently limited to 400 pupils. The proposed move to Atlantic House will increase the overall space in the School by 50%. Therefore the School intends to increase the number of pupils gradually, to 500 pupils.

21. In the OR, which was issued on 3 January 2023, the planning officer considered the issue of noise from within the building and recommended conditions to contain it. She then went on to consider noise from use of the external areas for play and outdoor activities. She identified the following mitigation and management measures:

i) an effective noise management plan restricting the number of pupils using the outdoor areas;

ii) restrictions on the times that the external areas could be used (08.00 – 15.00, Monday to Friday only);

iii) staggered use of external areas;

iv) staggered arrival and departure times at the beginning and end of each school day;

v) an acoustic fence;

vi) the playground would not be located directly in front of 11A Douro Place; instead that space would be used for "quiet natural play" with vegetation planted around it;

vii) additional travel plan measures by Thomas's, to reduce the ratio of car drivers to students to 12% and increase the number of school bus services;

viii) a traffic management plan;

ix) a limit on the number of pupils.

22. Thomas's also proposed replacement of existing windows at 11A Douro Place with either double or triple glazed windows, on the recommendation of its acoustic consultant BAP. Although the planning officer considered that this could not be made

the subject of a condition, because it related to a different property, it was "reasonably expected that the school would carry out their offer" (OR/6.48).

23. The planning officer identified the challenges presented by the arrival and dispersal of parents and pupils at the beginning and end of the school day, which would require a revised traffic management plan to be approved by the Council (OR/6.73 – 6.95).

24. At OR/6.76 – OR/6.78, OR/6.103, the planning officer referred to the advice of the Council's Transport Officer to the effect that a school street should be introduced in a section of St Albans Grove, as part of an acceptable traffic management strategy. The planning officer strongly recommended this measure, but advised that a school street has to be implemented by a traffic order made by the Council's highways authority under highways legislation. The agreement under section 106 Town and Country Planning Act 1990 ("TCPA 1990") would require Thomas's to fund the cost of a school street consultation, and to fund a school street, if it is implemented.

25. In the light of the mitigation and management measures, the planning officer concluded that level of noise and disturbance to neighbours would be "reasonably minimised and mitigated" and the harm caused would be outweighed by the provision of the School (OR/6.59).

26. Under the heading "Issues and balancing", the planning officer concluded as follows:

> "6.123 The proposed change of use to a school would result in the loss of the existing student accommodation in Atlantic House. However, the adopted RBKC Local Plan 2019 does not specifically protect student accommodation. Considering the significant overall net increase in social and community floorspace that would result from the proposals; the benefits of operating Thomas's School from a single site; and the fact that the existing student accommodation has been vacant since April 2021, on balance, the benefit to the borough associated with the proposed change of use would outweigh the negative impact associated with the loss of student accommodation and the conflict with Local Plan Policy CH1. Therefore, the principle of the proposed change of use and loss of student accommodation at Atlantic House would therefore be considered to be acceptable in this case. The proposal would comply with policy CK1 of the Local Plan.
>
> ……
>
> 6.125 The proposed development would impact on levels of amenity presently enjoyed within the neighbouring properties, however it is considered that the proposed mitigation measures - including an effective noise management plan restricting number of pupils using the outdoor areas, staggered use of outdoor areas, proposed acoustic fence, staggered arrivals and departures times, and the time restrictions on the use of the outdoor areas- would together be sufficient to ensure that the level of noise and disturbance that the neighbouring properties would experience

would be reasonably minimised and mitigated. The impact caused by the development would be outweighed by the provision of the school and subject to the recommended conditions, the proposal would comply with policies CL5 and CE6 of the Local Plan, S3 and D13 of the London Plan and NPPF. Given the existing context of the site, boundary treatment, vegetation, distances between the site and neighbouring properties, the proposed development would not be overbearing and reasonable standards of daylight and sunlight would be retained. Therefore, with the impacts suitably mitigated, the degree of residual impact would not be sufficient to justify a refusal of permission for noise reasons under policy CL5 in this context.

6.126 Given the constrained location of the application site, there is a criticality to the effective operation of measures to positively influence travel demand and to manage residual motorised traffic. Accordingly, any approved travel plan or traffic management plan would need to be routinely monitored by the Council. An ongoing commitment to fund, man and manage a school street- if implemented- during pick up and drop off times (covering all significant arrival and departure times at the school) would be necessary. So too are highway improvements (footway widening) and changes to parking, waiting, and loading restrictions in the vicinity of the school. The school street would ideally be implemented, however the travel management plan which should include the following:

- Staggered school opening and closing times

- Drop-off areas for children that are away from the school gate where pupils are received by teachers

- Clearly defined 'park and stride' arrangement based on availability of parking in the area

- Agreed vehicle routes to and from the school including no driving through or stopping along St Alban's Grove

- School bus management

- Details on how such arrangements will be enforced by the school

and further details submitted with a travel plan would control and mitigate the impact of the new location of a larger school. Subject to these and other mitigations, listed below (section 7.1), the proposal to locate a 500-student school at this accessible (PTAL 6a) and generally lightly trafficked location would be consistent with NPPF paragraph 111, London Plan Policies T1 B, T2 D, T4 and Local Plan Policy CT1 and CR4."

27. The Planning Committee considered the application at its meeting on 12 January 2023 and decided to grant planning permission, subject to conditions and planning obligations. The recommendations of the planning officer were accepted, save that the proposed limit on the number of pupils was reduced from 500 to 400.

28. Planning permission was granted on 18 May 2023 after the completion of a section 106 TCPA 1990 agreement on 16 May 2023. The relevant conditions imposed were as follows:

    i) Condition 19 requires a scheme of landscaping to be submitted by Thomas's and approved by the Council.

    ii) Condition 26 limits the use of external areas by pupils to 08.00 – 15.00 on Monday to Friday.

    iii) Condition 29 requires a noise management plan to be submitted by Thomas's and approved by the Council.

    iv) Condition 35 limits the number of pupils to 400.

    v) Condition 36 requires a travel plan to be submitted by Thomas's and approved by the Council.

    vi) Condition 37 requires a traffic management plan to be submitted by Thomas's and approved by the Council.

    vii) Condition 38 requires an acoustic fence to be erected.

29. The Claimants relied upon the following comments made at the meeting and recorded in the transcript:

    i) During Thomas's opening presentation, the BAP consultant confirmed that "For one dwelling [11A Douro Place], we have a noise level which exceeds the significant observed adverse effects level and for that dwelling additional mitigation in the form of high acoustic performance double glazed windows will be offered".

    ii) Cllr Zvedeniuk asked the BAP consultant for a response to the EHO's advice to avoid the external playground part of the proposed development. The consultant explained the evolution of the mitigation proposed and said that the EHO still had concerns. Cllr Zvedeniuk said she would ask the officers about this point.

    iii) Cllr Bennett noted that Thomas's documentation mentioned "double glazing for all…basically all the properties overlooking the playground". He asked Thomas's representatives "So are you or would you be willing to offer to pay for double or triple glazing of all properties overlooking the playground including those in Kensington Court?". On behalf of Thomas's, Mr Tobyn Thomas replied saying: "The answer is if it was the make or break on the application -yes".

    iv) Cllr Hargreaves asked for clarification as to why the recommendation of the EHO was not being followed and Cllr Zvedeniuk also sought clarification on

the EHO's final position in light of Thomas's further information about noise. The Council's case officer, Ms Drzewicka, confirmed that the EHO "is still objecting".

v) Cllr Bennett asked Ms Drzewicka "So we think it might cause significant harm but we're balanced – I just want to be clear, the balancing is relevant?" Ms Drzewicka replied "That's correct".

Legal framework

Judicial review of local planning authority decisions

30. In a claim for judicial review, the claimant must establish a public law error on the part of the decision-maker. The exercise of planning judgment and the weighing of the various issues are matters for the decision-maker and not for the Court: *Seddon Properties Ltd v Secretary of State for the Environment* (1981) 42 P & CR 26. A legal challenge is not an opportunity for a review of the planning merits: *Newsmith v Secretary of State for the Environment, Transport and the Regions* [2001] EWHC 74 (Admin).

31. In *St Modwen Developments Ltd v Secretary of State for Communities and Local Government* [2017] EWCA Civ 1643, [2018] PTSR 746, Lindblom LJ stated:

> "7. Both the Supreme Court and the Court of Appeal have, in recent cases, emphasised the limits to the court's role in construing planning policy (see the judgment of Lord Carnwath in *Suffolk Coastal District Council v Hopkins Homes Ltd.* [2017] UKSC 37, at paragraphs 22 to 26, and my judgment in *Mansell v Tonbridge and Malling Borough Council* [2017] EWCA Civ 1314, at paragraph 41). More broadly, though in the same vein, this court has cautioned against the dangers of excessive legalism infecting the planning system – a warning I think we must now repeat in this appeal (see my judgment in *Barwood Strategic Land II LLP v East Staffordshire Borough Council* [2017] EWCA Civ 893, at paragraph 50). There is no place in challenges to planning decisions for the kind of hypercritical scrutiny that this court has always rejected – whether of decision letters of the Secretary of State and his inspectors or of planning officers' reports to committee. The conclusions in an inspector's report or decision letter, or in an officer's report, should not be laboriously dissected in an effort to find fault (see my judgment in *Mansell*, at paragraphs 41 and 42, and the judgment of the Chancellor of the High Court, at paragraph 63)."

32. The principles to be applied when considering a challenge to a planning officer's report were summarised by the Court of Appeal in *R (Mansell) v Tonbridge & Malling BC* [2019] PTSR 1452, per Lindblom LJ, at [42]:

"42. The principles on which the court will act when criticism is made of a planning officer's report to committee are well settled. To summarise the law as it stands:

> (1) The essential principles are as stated by the Court of Appeal in *R. v Selby District Council, ex parte Oxton Farms* [1997] E.G.C.S. 60 (see, in particular, the judgment of Judge L.J., as he then was). They have since been confirmed several times by this court, notably by Sullivan L.J. in *R. (on the application of Siraj) v Kirklees Metropolitan Borough Council* [2010] EWCA Civ 1286, at paragraph 19, and applied in many cases at first instance (see, for example, the judgment of Hickinbottom J., as he then was, in *R. (on the application of Zurich Assurance Ltd., t/a Threadneedle Property Investments) v North Lincolnshire Council* [2012] EWHC 3708 (Admin), at paragraph 15).
>
> (2) The principles are not complicated. Planning officers' reports to committee are not to be read with undue rigour, but with reasonable benevolence, and bearing in mind that they are written for councillors with local knowledge (see the judgment of Baroness Hale of Richmond in *R. (on the application of Morge) v Hampshire County Council* [2011] UKSC 2, at paragraph 36, and the judgment of Sullivan J., as he then was, in *R. v Mendip District Council, ex parte Fabre* (2000) 80 P. & C.R. 500, at p.509). Unless there is evidence to suggest otherwise, it may reasonably be assumed that, if the members followed the officer's recommendation, they did so on the basis of the advice that he or she gave (see the judgment of Lewison L.J. in *Palmer v Herefordshire Council* [2016] EWCA Civ 1061, at paragraph 7). The question for the court will always be whether, on a fair reading of the report as a whole, the officer has materially misled the members on a matter bearing upon their decision, and the error has gone uncorrected before the decision was made. Minor or inconsequential errors may be excused. It is only if the advice in the officer's report is such as to misdirect the members in a material way – so that, but for the flawed advice it was given, the committee's decision would or might have been different – that the court will be able to conclude that the decision itself was rendered unlawful by that advice.
>
> (3) Where the line is drawn between an officer's advice that is significantly or seriously misleading –

> misleading in a material way – and advice that is misleading but not significantly so will always depend on the context and circumstances in which the advice was given, and on the possible consequences of it. There will be cases in which a planning officer has inadvertently led a committee astray by making some significant error of fact (see, for example *R. (on the application of Loader) v Rother District Council* [2016] EWCA Civ 795), or has plainly misdirected the members as to the meaning of a relevant policy (see, for example, *Watermead Parish Council v Aylesbury Vale District Council* [2017] EWCA Civ 152). There will be others where the officer has simply failed to deal with a matter on which the committee ought to receive explicit advice if the local planning authority is to be seen to have performed its decision-making duties in accordance with the law (see, for example, *R. (on the application of Williams) v Powys County Council* [2017] EWCA Civ 427). But unless there is some distinct and material defect in the officer's advice, the court will not interfere."

33. In *R (Bishop's Stortford Civic Federation) v East Herts DC* [2014] PTSR 1035, Cranston J. observed, at [40], that local authority planners are themselves expert; they can be expected properly to have understood the legal context in which their decisions are taken.

The development plan and material considerations

34. Section 70(2) TCPA 1990 provides that the decision-maker shall have regard to the provisions of the development plan, so far as material to the application. Section 38(6) of the Planning and Compulsory Purchase Act ("PCPA 2004") provides:

> "If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts, the determination must be made in accordance with the plan unless material considerations indicate otherwise."

35. In *City of Edinburgh Council v Secretary of State for Scotland* 1998 SC (HL) 33, [1997] 1 WLR 1447, Lord Clyde explained the effect of this provision, beginning at 1458B, and went on to say:

> "Moreover the section has not touched the well-established distinction in principle between those matters which are properly within the jurisdiction of the decision-maker and those matters in which the court can properly intervene. It has introduced a requirement with which the decision-maker must comply, namely the recognition of the priority to be given to the development plan. It has thus introduced a potential ground on which the decision-maker could be faulted were he to fail to give

effect to that requirement. But beyond that it still leaves the assessment of the facts and the weighing of the considerations in the hands of the decision-maker. It is for him to assess the relative weight to be given to all the material considerations. It is for him to decide what weight is to be given to the development plan, recognising the priority to be given to it. As Glidewell L.J. observed in *Loup v. Secretary of State for the Environment* (1995) 71 P. & C.R. 175, 186:

> "What section 54A does not do is to tell the decision-maker what weight to accord either to the development plan or to other material considerations."

Those matters are left to the decision-maker to determine in the light of the whole material before him both in the factual circumstances and in any guidance in policy which is relevant to the particular issues.

…..

In the practical application of section 18A it will obviously be necessary for the decision-maker to consider the development plan, identify any provisions in it which are relevant to the question before him and make a proper interpretation of them. His decision will be open to challenge if he fails to have regard to a policy in the development plan which is relevant to the application or fails properly to interpret it. He will also have to consider whether the development proposed in the application before him does or does not accord with the development plan. There may be some points in the plan which support the proposal but there may be some considerations pointing in the opposite direction. He will require to assess all of these and then decide whether in light of the whole plan the proposal does or does not accord with it. He will also have to identify all the other material considerations which are relevant to the application and to which he should have regard. He will then have to note which of them support the application and which of them do not, and he will have to assess the weight to be given to all of these considerations. He will have to decide whether there are considerations of such weight as to indicate that the development plan should not be accorded the priority which the statute has given to it. And having weighed these considerations and determined these matters he will require to form his opinion on the disposal of the application. If he fails to take account of some material consideration or takes account of some consideration which is irrelevant to the application his decision will be open to challenge. But the assessment of the considerations can only be challenged on the ground that it is irrational or perverse."

36. This statement of the law was approved by the Supreme Court in *Tesco Stores Limited v Dundee City Council* [2012] UKSC 13, [2012] PTSR 983, per Lord Reed at [17]. Lord Reed clarified the law on the proper interpretation of planning policies at [18] – [19]:

> "18. … The development plan is a carefully drafted and considered statement of policy, published in order to inform the public of the approach which will be followed by planning authorities in decision-making unless there is good reason to depart from it. It is intended to guide the behaviour of developers and planning authorities. As in other areas of administrative law, the policies which it sets out are designed to secure consistency and direction in the exercise of discretionary powers, while allowing a measure of flexibility to be retained…. in this area of public administration as in others (as discussed, for example, in *R (Raissi) v Secretary of State for the Home Department* [2008] QB 836), policy statements should be interpreted objectively in accordance with the language used, read as always in its proper context.
>
> 19. That is not to say that such statements should be construed as if they were statutory or contractual provisions. 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 judgment 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). Nevertheless, planning authorities do not live in the world of Humpty Dumpty: they cannot make the development plan mean whatever they would like it to mean."

37. In *Hopkins Homes Ltd v Secretary of State for Communities and Local Government* [2017] UKSC 37, [2017] 1 WLR 1865, Lord Carnwath cited Lord Reed's speech in *Tesco Stores* and made the following "further comment":

> "24. In the first place, it is important that the role of the court is not overstated. Lord Reed's application of the principles in the particular case (para 18) needs to be read in the context of the relatively specific policy there under consideration ….
>
> 25. It must be remembered that, whether in a development plan or in a non-statutory statement such as the NPPF, these are statements of policy, not statutory texts, and must be read in that

> light. Even where there are disputes over interpretation, they may well not be determinative of the outcome. ….
>
> 26. Recourse to the courts may sometimes be needed to resolve distinct issues of law, or to ensure consistency of interpretation in relation to specific policies, as in the *Tesco* case. In that exercise the specialist judges of the Planning Court have an important role. However, the judges are entitled to look to applicants, seeking to rely on matters of planning policy in applications to quash planning decisions (at local or appellate level), to distinguish clearly between issues of interpretation of policy, appropriate for judicial analysis, and issues of judgment in the application of that policy; and not to elide the two."

38. In *Barker-Mills Estate Trust v Secretary of State for Communities and Local Government* [2016] EWHC 3028 (Admin), Holgate J. emphasised the distinction between the interpretation and the application of policy, at [83] – [84] as follows:

> "83. ….Assuming that the LPA had had regard to relevant NPPF policies, where that material does not reveal any *misinterpretation* of the NPPF, the only challenge that could be pursued would be to the LPA's judgment when applying that national policy. Such a challenge may only be made on grounds of irrationality (*Tesco Stores Ltd v Dundee City Council* [2012] PTSR 983). Because of the critical difference between these two types of challenge as to the juridical basis upon which a court may intervene, a claimant must not dress up what is in reality a criticism of the *application* of policy as if it were a *misinterpretation* of policy.
>
> 84. Normally a claimant fails to raise a genuine case of *misinterpretation* of policy unless he identifies (i) the policy wording said to have been misinterpreted, (ii) the interpretation of that language adopted by the decision-maker and (iii) how that interpretation departs from the correct interpretation of the policy wording in question. A failure by the claimant to address these points, as in the present case, is likely to indicate that the complaint is really concerned with *application*, rather than *misinterpretation*, of policy."

39. The Claimants referred to the summary of relevant principles by Holgate J. in *Rectory Homes Ltd. v Secretary of State for Housing, Communities and Local Government* [2021] PTSR 143, at [43] - [45].

National and local policies concerning noise

Noise Policy Statement for England

40. The *Noise Policy Statement for England* ("NPSE") was published by the Department for Environment, Food & Rural Affairs in 2010. Its "Noise Policy Aims" are:

> "Through the effective management and control of environmental, neighbour and neighbourhood noise within the context of the Government policy on sustainable development:
>
> - avoid significant adverse impacts on health and quality of life;
>
> - mitigate and minimise adverse impacts on health and quality of life; and
>
> - where possible, contribute to the improvement of health and quality of life."

41. The Explanatory Note explains the reference to "within the context of Government policy on sustainable development" in its noise policy aims as follows:

> "2.17 …… the goal of sustainable development is being pursued in an integrated way through a sustainable, innovative and productive economy that delivers high levels of employment and a just society that promotes social inclusion, sustainable communities and personal wellbeing…."
>
> "2.18 There is a need to integrate consideration of the economic and social benefit of the activity or policy under examination with proper consideration of the adverse environmental effects, including the impact of noise on health and quality of life. This should avoid noise being treated in isolation in any particular situation, i.e. not focussing solely on the noise impact without taking into account other related factors."

42. In my view, this indicates that the policy aim is to consider adverse noise impacts together with the economic and social benefits of the development that is generating the noise.

43. The NPSE sets out and defines the following terms at 2.20 – 2.21:

    i) NOEL – No Observed Effect Level.

    ii) LOAEL – Lowest Observed Adverse Effect Level.

    iii) SOAEL – Significant Observed Adverse Effect Level.

44. SOAEL is defined as "the level above which significant adverse effects on health and quality of life occur". The NPSE advises that the SOAEL is likely to be different for different noise sources, different receptors and at different times.

45. The first noise policy aim is concerned with avoiding significant adverse impacts, whilst also taking into account the guiding principles of sustainable development (at 2.23). The second noise policy aim refers to the situation where the impact lies somewhere between LOAEL and SOAEL. It requires that all reasonable steps should be taken to mitigate and minimise adverse effects on health and quality of life but it does not mean that such adverse effects cannot occur (at 2.24).

National Planning Policy Framework[1]

46. Paragraph 174(e) of the National Planning Policy Framework ("the Framework") provides as follows:

> "174. Planning policies and decisions should contribute to and enhance the natural and local environment by:
>
> …..
>
> e) preventing new and existing development from contributing to, being put at unacceptable risk from, or being adversely affected by, unacceptable levels of soil, air, water or noise pollution or land instability…..
>
> ….."

47. Paragraph 185 of the Framework provides:

> "185. Planning policies and decisions should also ensure that new development is appropriate for its location taking into account the likely effects (including cumulative effects) of pollution on health, living conditions and the natural environment, as well as the potential sensitivity of the site or the wider area to impacts that could arise from the development. In doing so they should:
>
> a) mitigate and reduce to a minimum potential adverse impacts resulting from noise from new development – and avoid noise giving rise to significant adverse impacts on health and the quality of life;
>
> ….."

48. A footnote at the end of paragraph a) above refers to the NPSE Explanatory Note in support.

Planning Practice Guidance

49. The Planning Practice Guidance ("PPG") provides practice guidance on noise, as follows:

> "**How can noise impacts be determined**?
>
> Plan-making and decision making need to take account of the acoustic environment and in doing so consider:

[1] National Planning Policy Framework references are to the version in force at the time of the decision (20 July 2021)

- whether or not a significant adverse effect is occurring or likely to occur;

- whether or not an adverse effect is occurring or likely to occur; and

- whether or not a good standard of amenity can be achieved.

In line with the Explanatory note of the noise policy statement for England, this would include identifying whether the overall effect of the noise exposure (including the impact during the construction phase wherever applicable) is, or would be, above or below the significant observed adverse effect level and the lowest observed adverse effect level for the given situation. As noise is a complex technical issue, it may be appropriate to seek experienced specialist assistance when applying this policy.

Paragraph: 003 Reference ID: 30-003-20190722

Revision date: 22 07 2019

What are the observed effect levels?

- Significant observed adverse effect level: This is the level of noise exposure above which significant adverse effects on health and quality of life occur.

- Lowest observed adverse effect level: this is the level of noise exposure above which adverse effects on health and quality of life can be detected.

- No observed effect level: this is the level of noise exposure below which no effect at all on health or quality of life can be detected.

Although the word 'level' is used here, this does not mean that the effects can only be defined in terms of a single value of noise exposure. In some circumstances adverse effects are defined in terms of a combination of more than one factor such as noise exposure, the number of occurrences of the noise in a given time period, the duration of the noise and the time of day the noise occurs.

See the noise policy statement for England for further information.

Paragraph: 004 Reference ID: 30-004-20190722

Revision date: 22 07 2019

How can it be established whether noise is likely to be a concern?

> At the lowest extreme, when noise is not perceived to be present, there is by definition no effect. As the noise exposure increases, it will cross the 'no observed effect' level. However, the noise has no adverse effect so long as the exposure does not cause any change in behaviour, attitude or other physiological responses of those affected by it. The noise may slightly affect the acoustic character of an area but not to the extent there is a change in quality of life. If the noise exposure is at this level no specific measures are required to manage the acoustic environment.
>
> As the exposure increases further, it crosses the 'lowest observed adverse effect' level boundary above which the noise starts to cause small changes in behaviour and attitude, for example, having to turn up the volume on the television or needing to speak more loudly to be heard. The noise therefore starts to have an adverse effect and consideration needs to be given to mitigating and minimising those effects (taking account of the economic and social benefits being derived from the activity causing the noise).
>
> Increasing noise exposure will at some point cause the 'significant observed adverse effect' level boundary to be crossed. Above this level the noise causes a material change in behaviour such as keeping windows closed for most of the time or avoiding certain activities during periods when the noise is present. If the exposure is predicted to be above this level the planning process should be used to avoid this effect occurring, for example through the choice of sites at the plan-making stage, or by use of appropriate mitigation such as by altering the design and layout. While such decisions must be made taking account of the economic and social benefit of the activity causing or affected by the noise, it is undesirable for such exposure to be caused.
>
> At the highest extreme, noise exposure would cause extensive and sustained adverse changes in behaviour and / or health without an ability to mitigate the effect of the noise. The impacts on health and quality of life are such that regardless of the benefits of the activity causing the noise, this situation should be avoided.
>
> [*The PPG provides a link to its Noise Exposure Hierarchy Table*] This table summarises the noise exposure hierarchy, based on the likely average response of those affected.
>
> Paragraph: 005 Reference ID: 30-0055-20190722
>
> Revision date: 22 27 2019"

50. The Hierarchy Table sub-divides the "significant observed adverse effect level" into two: "significant observed adverse effect", and "unacceptable adverse effect". The

"action" for SOAEL is "avoid" and the action for Unacceptable Adverse Effect Level ("UAEL") is "prevent".

51. The Hierarchy Table describes SOAEL as a noise which is "Present and disruptive". Examples of outcomes are as follows: "The noise causes a material change in behaviour, attitude or other physiological response, e.g. avoiding certain activities during periods of intrusion; where there is no alternative ventilation, having to keep windows closed most of the time because of the noise. Potential for sleep disturbance resulting in difficulty in getting to sleep, premature awakening and difficulty in getting back to sleep. Quality of life diminished due to change in acoustic character of the area".

52. The Hierarchy Table describes UAEL as "Present and very disruptive". Examples of outcome are "Extensive and regular changes in behaviour, attitude or other physiological response and/or an inability to mitigate effect of noise leading to psychological stress, e.g. regular sleep deprivation/awakening; loss of appetite, significant, medically definable harm, e.g. auditory and non-auditory".

53. The distinction in the Hierarchy Table between SOAEL and UAEL does not derive from either the Framework or the NPSE.

Local Plan

54. The Council's Local Plan 2019 contains development management policies in relation to noise impacts from new development which are consistent with the approach set out in national policy.

55. Policy CE6 Noise and Vibration provides:

> "The Council will carefully control the impact of noise and vibration generating sources which affect amenity both during the construction and operational phases of development. The Council will require new noise and vibration sensitive developments to mitigate and protect occupiers against existing sources of noise and vibration.
>
> To deliver this the Council will:
>
> a…..
>
> b. resist developments which fail to meet adopted local noise and vibration standards;
>
> c. resist all applications for noise and vibration generating development and plant that would have an unacceptable noise and vibration impact on surrounding amenity;
>
> d….."

56. Policy CL5 Living Conditions provides:

> "The Council will require all development ensures good living conditions for occupants of new, existing and neighbouring buildings.
>
> To deliver this the Council will:
>
> a. require applicants to take into account the prevailing characteristics of the area;
>
> b. ……
>
> c. ……
>
> d. ……
>
> e. require that the reasonable enjoyment of the use of buildings, gardens and other spaces is not harmed due to increases in traffic, servicing, parking, noise, disturbance, odours or vibration or local microclimatic effects."

London Plan 2021

57. Policy D13 Agent of Change provides:

> "……
>
> C New noise and other nuisance-generating development proposed close to residential and other noise-sensitive uses should put in place measures to mitigate and manage any noise impacts for neighbouring residents and businesses.
>
> D Development proposals should manage noise and other potential nuisances by:
>
> 1) ensuring good design mitigates and minimises existing and potential nuisances …..
>
> 2) exploring mitigation measures early in the design stage, with necessary and appropriate provisions including ongoing and future management of mitigation measures secured through planning obligations;
>
> 3) …..
>
> E Boroughs should not normally permit development proposals that have not clearly demonstrated how noise and other nuisances will be mitigated and managed."

58. Policy S3 sets out locational, design and other criteria relating to education and childcare facilities.

Ground 1

Claimants' submissions

59. The Claimants' first submission was that the Council misinterpreted national noise policy in paragraphs 174 and 185 of the Framework, and local noise policy in Local Plan Policies CE6 and CL5, and erroneously concluded that development giving rise to SOAEL would not conflict with those policies (OR/6.59 and OR/6.125).

60. The Claimants submitted that, in the OR and at the Planning Committee meeting, the planning officer accepted the EHO's advice that, even with mitigation, there would be a SOAEL which could "severely impact on the amenity of a substantial number of neighbouring residents", not just 11A Douro Place.

61. The Claimants contended that, on a proper interpretation, the NPSE, the Framework and the PPG do not permit new development that causes a SOAEL. The policies do not focus on whether an applicant has done its best to seek to mitigate significant adverse noise impacts. This is the straightforward meaning of the references to:

    i) "avoid significant adverse impacts on health and quality of life" in the NPSE;

    ii) "preventing" unacceptable levels of noise in paragraph 174(e) of the Framework;

    iii) "avoid noise giving rise to significant adverse impacts on health and the quality of life" in paragraph 185 of the Framework;

    iv) "avoid" the effect of SOAEL by choice of sites or appropriate mitigation (paragraph 005 PPG).

62. The Claimants also contended that, on a proper interpretation, the Local Plan policies do not permit new development that causes a SOAEL. They do not focus on whether an applicant has done its best to seek to mitigate significant adverse noise impacts. This is the straightforward meaning of the references that the Council:

    i) "will resist" developments that fail to meet adopted noise standards (Policy CE6);

    ii) "will require" that reasonable enjoyment of buildings etc. is not "harmed" due to noise (Policy CL5).

63. The Claimants did not allege any misinterpretation of the London Plan 2021.

64. The Claimants' second submission was that the planning officer gave significantly misleading advice to the Planning Committee. The planning officer failed to tell Members that, given her acceptance of the EHO's advice that there would be SOAEL, the proposal conflicted with the Framework and the Local Plan policies referred to above. She misled Members by failing to inform them of the strong policy presumption against SOAEL. She erroneously advised them that noise policy was complied with:

a) because of the benefits (reuse of a building which is currently empty and the advantages to the School of consolidating the sites) (OR/6.59, OR/6.126); and/or

b) because Thomas's had reasonably minimised and mitigated the noise impact (which impact she accepted was a SOAEL, in line with the EHO's advice).

65. The Claimants submitted that national and local policies do not explicitly allow the benefits of proposed development to be weighed against the harm.

66. The Claimants contended that the planning officer should have advised the Planning Committee that the proposed scheme was in breach of local policies and the development plan as a whole. Applying section 70(2) TCPA 1990, and section 38(6) PCPA 2004, the Council would have been entitled to consider the benefits of the scheme as material considerations. However, it should have given great weight to the avoidance of SOAEL, and followed the advice of its EHO, and refused permission, either outright or granted permission for the School but without external play areas.

67. During the hearing, Mr Maurici KC accepted that he could not pursue the point in paragraph 55 of his skeleton argument that the EHO is a statutory consultee. As a Council employee, he falls outside the list of statutory consultees in Schedule 4 to the Town and Country Planning (Development Management Procedure) (England) Order 2015.

Conclusions

68. In his skilful submissions on behalf of the Claimants, Mr Maurici KC set out the ways in which the Claimants considered that the application for planning permission should have been decided, in the light of the expert opinions, and applying the relevant policies and the law. Despite the attractive clarity of his approach, I am satisfied that the Claimants are impermissibly seeking to substitute their own views for the factual assessments and exercise of judgment made by the planning officer and the Planning Committee.

69. As I have set out above, at Judgment/[30] – [39], it is well-established that it is for the planning decision-maker, not the Court, to assess the facts, apply any relevant planning policies, weigh the material considerations, and exercise its planning judgment. The Court must guard against substituting its view of the planning merits for that of the planning decision-maker, and claimants ought not to criticise the decision-maker's application of policy as if it were a misinterpretation of policy. See *Seddon Properties Ltd v Secretary of State for the Environment* (1981) 42 P & CR 26; *Newsmith v Secretary of State for the Environment, Transport and the Regions* [2001] EWHC 74 (Admin); *City of Edinburgh Council v Secretary of State for Scotland* 1998 SC (HL) 33, [1997] 1 WLR 1447; per Lord Clyde at 1458B – 1459H; *Tesco Stores Limited v Dundee City Council* [2012] UKSC 13, [2012] PTSR 983, per Lord Reed at [18] – [19]; *Hopkins Homes Ltd v Secretary of State for Communities and Local Government* [2017] UKSC 37, [2017] 1 WLR 1865, per Lord Carnwath at [24] – [26]; *Barker-Mills Estate Trust v Secretary of State for Communities and Local Government* [2016] EWHC 3028 (Admin), per Holgate J. at [83] – [84].

70. In considering the planning officer's advice, in the OR and at the Planning Committee meeting, I bear in mind that an OR is "not to be read with undue rigour, but with reasonable benevolence" (per Lindblom LJ in *R (Mansell) v Tonbridge & Malling BC* [2019] PTSR 1452, at [42(2)]) and should not be subjected to "hypercritical scrutiny" and "laboriously dissected in an effort to find fault" (per Lindblom LJ in *St Modwen Developments Ltd v Secretary of State for Communities and Local Government* [2017] EWCA Civ 1643, [2018] PTSR 746, at [7]).

71. Unless there is evidence to suggest otherwise, it may reasonably be assumed that, if the Planning Committee followed the officer's recommendation, it did so on the basis of the advice that he or she gave (per Lewison LJ in *Palmer v Herefordshire Council* [2016] EWCA Civ 1061, at [7], cited by Lindblom LJ in *Mansell*, at [42(2)]). In my view, it is reasonable to assume in this case that the Planning Committee accepted the advice and recommendations of the planning officer, save in respect of the limit on pupil numbers.

72. In my judgment, the Claimants' assertion that the planning officer accepted the EHO's advice is based on a misreading of the OR. On a fair and benevolent reading, the planning officer gave careful consideration to the EHO's advice, but ultimately she did not accept it.

73. The EHO's advice is summarised at Judgment/[17]. The key points were that use of the playground was likely to result in a SOAEL and would "significantly impact on the amenity of the neighbouring residents". He questioned whether the School was suitable for a residential area at all, but if permission were granted, it should be subject to a condition which prohibited use of the external space as a playground.

74. The planning officer:

    i) described the proposed scheme at OR/6.44 to OR/6.46;

    ii) summarised the applicant's proposed mitigation at OR/6.47 (acoustic fencing, staggered use of the play areas, staggered arrival and departure times);

    iii) identified the additional mitigation required at 11A Douro Place, and the agreement that Thomas's would facilitate double or triple glazing at that property (OR/6.48);

    iv) considered the EHO's concerns about the noise impacts, and his recommendation that no external play areas should be allowed (OR/6.49 to OR/6.52);

    v) stated at OR/6.53 that she had "very carefully considered" the noise impacts, and then she set out the reasons why her views differed from the views of the EHO, at OR/6.54 to OR/6.58. In summary, they were as follows:

        a) Any new activity on the empty site would increase the noise for neighbours.

        b) The key consideration is the extent and type of noise and what mitigation can be achieved through conditions.

c) The proposed use would be supported by Local Plan policies that seek provision of social and community uses. Use as a school is not inappropriate in principle, given that this building was a school for many years in this residential area.

d) "It would be a strange planning system that would direct schools to non-residential areas." Schools should be seen as appropriate within residential areas, with requisite measures to mitigate impacts.

e) The guidance (the Framework, NPSE, PPG and the London Plan) requires all reasonable steps to be taken to mitigate and minimise adverse noise effects.

f) This site is appropriate in size and location as a school site. There is appropriate outdoor space.

g) Although the school at Cottesmore Gardens is not permitted to use the garden for play, the other site at Victoria Road does have a small outdoor space used by pupils.

h) The most affected property would be 11A Douro Place (the only property which showed a SOAEL in BAP's noise assessment). However, it would back on to an area used for "quiet natural play" with vegetation around it. It would not back on to the noisier playground.

i) Other properties along Douro Place, Kensington Court Place and St Albans Grove would be impacted by the proposed playground. However, further noise mitigation measures going beyond Thomas's proposals - Condition 19 (landscaping); Condition 26 (restricting days and hours of use); Condition 29 (noise management plan) – would mitigate and reasonably minimise that impact.

75. The planning officer then concluded, at OR/6.59, that the mitigation "would ensure that the level of noise and disturbance that the neighbouring properties would experience would be reasonably minimised and mitigated". This was a planning judgment, which she was entitled to make, and with which the Planning Committee agreed. In my view, the phrase "reasonably minimised and mitigated" is not consistent with a finding that the noise levels, even with mitigation, would be SOAEL, and that therefore the playground should not be used. The planning officer plainly took a different view to the EHO.

76. The planning officer acknowledged that, even with mitigation, the noise impacts of the School would cause "harm to the quality of life of neighbouring properties". However, she considered that this reduced level of noise, which had been reasonably minimised and mitigated, would be outweighed by the benefit of the School. Again, this was a planning judgment which she was entitled to make, and with which the Planning Committee agreed.

77. At OR/6.125, under the heading "Issues and balancing", the planning officer reiterated the points made at OR/6.59, and concluded:

> "Therefore, with the impacts suitably mitigated, the degree of residual impact would not be sufficient to justify a refusal of permission for noise reasons under policy CL5 in this context."

This conclusion clearly departed from the views expressed by the EHO.

78. On the basis of these findings, the planning officer concluded that the proposal would comply with Local Plan Policies CL5 and CE6, Policies S3 and D13 of the London Plan, and the Framework. This conclusion is consistent with her assessment that the level of noise would be reasonably minimised and mitigated, contrary to the view of the EHO.

79. The Claimants also contended that the planning officer indicated at the Planning Committee meeting that she accepted the EHO's advice that, even with mitigation, there would be a SOAEL which could severely impact neighbours. I find it impossible to draw that conclusion from the brief exchanges relied upon, which could be interpreted in several different ways. The EHO did continue to object to the proposal, and BAP did find SOAEL (only at 11A Douro Place), but that falls far short of confirming the assertion made by the Claimants, which contradicts what the planning officer said in the OR.

80. Mr Lewis KC, for the Council, rightly pointed out that where a Planning Committee follows the advice of its planning officer, the reasons for its decision will be taken to be those set out in the planning officer's report. It is wrong to seek to attribute significance to what is said by individual members of a committee during debate, and prior to any vote: see *Scottish Widows PLC v Cherwell DC* [2013] EWHC 3968 (Admin), at [21]-[22] per Burnett J.

81. Turning now to the interpretation of the policies on noise, these were accurately summarised by the planning officer in the OR. It can be assumed that the planning officer was aware of these policies, and there is nothing on the face of the OR to suggest that she misinterpreted their terms. The starting point is that the policies were properly understood, absent clear indications to the contrary: see *Jones v Mordue* [2015] EWCA Civ 1243, per Sales LJ, at [28]. The policy against a SOAEL is obvious. I also consider that it is likely that experienced members of the Planning Committee would have been familiar with some or all of the policies from previous applications.

82. I accept the submissions by Mr Lewis KC and Mr Cameron KC that these are broad statements of policy which require an evaluative judgment by the decision-maker:

    i) The criterion in paragraph 174(e) of the Framework is whether levels of noise are "unacceptable".

    ii) The criteria in paragraph 185 of the Framework are whether the new development is "appropriate for its location" which requires an assessment of the effect of mitigating and reducing noise impacts to a minimum; and evaluating whether any noise impacts give rise to "significant impacts on health and the quality of life".

iii) The criterion in Local Plan Policy CE6 is whether the development meets "adopted local noise standards" and would have an "unacceptable" noise impact on surrounding amenity.

iv) The criterion in Local Plan Policy CL5 is whether the "reasonable enjoyment" of buildings, gardens and spaces is harmed by increases in noise.

83. What is "appropriate", "unacceptable" or "reasonable" in context is quintessentially a question for the judgment of planning officers and elected Members using "local knowledge and much common sense", per Sir Geoffrey Vos, Chancellor of the High Court, in *Mansell*, at [28]. I agree with Mr Lewis KC that Mr Maurici KC's approach to interpretation seeks to wrench words like "prevent" and "avoid" out of context, dislocating them from the important qualifications as to what must be avoided or prevented, applying the natural and ordinary meaning of the words used in the policy.

84. In applying these policies, the decision-maker will have regard to the development plan as a whole, and balance conflicting considerations. I consider that the guidance given by the Court of Appeal in *R (May) v Rother DC* [2015] EWCA Civ 610, per Lewison LJ at [15] – [19] is of assistance (despite the slightly different wording of the Framework provision then in force):

> "15. As Lord Reed observed in *Tesco Stores Ltd v Dundee City Council* [2012] UKSC 13, [2012] PTSR 983 at [19]:
>
> > "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 judgment can only be challenged on the ground that it is irrational or perverse."
>
> 16. The same is true of the NPPF.
>
> 17. The second part of the Noise Policy Statement for England says that noise impact is to be minimised "within the context of Government policy on sustainable development". In other words, it is not a free-standing requirement. Moreover as paragraph 2.3 of the Noise Policy Statement points out the statement that noise must be "minimised" cannot be taken in isolation or literally, because "noise minimisation would mean no noise at all." Rather, the policy is to be interpreted as minimising noise as far as reasonably practicable. Thus within the Noise Policy Statement itself there is a clear statement that

> the concept of "minimisation" cannot be taken literally; and that what is meant by the policy is that "all reasonable steps" should be taken to minimise noise. The Noise Policy Statement also makes it clear that considerations of noise do not trump everything else, because it says in terms that the relevant part of the policy does not mean that adverse effects from noise cannot occur. Finally the opening part of NPPF [123] describes the noise policy as an "aim" rather than as a rule (in contrast, for example, to those parts of the NPPF which require decision makers to apply a sequential test to applications for town centre uses).
>
> 18. Whether the imposition of a condition is a "reasonable step" is, in my judgment, one of planning judgment for the planning authority. As the history of this case shows it is a judgment on which reasonable people can disagree. I also consider that whether a step is a reasonable step is a judgment which may take into account both the position of the would-be developer and also the position of those who would be affected by the development. I do not, therefore, consider that NPPF [123] prohibits the decision maker from balancing conflicting considerations. Nor does policy GD 1 (ii). I also consider that policy GD 1 (ii) is an open-textured policy, rather than giving rise to a cut-off point in the way that Ms Clutten suggests. Accordingly, in agreement with the judge I do not see any material difference between NPPF [123] and policy GD 1 (ii) once NPPF [123] is read in the context of the Noise Policy Statement to which it cross-refers. As the judge put it at [48]:
>
> > "I do not accept the submission that there is a different emphasis or indeed a practical consequence to considering a proposal against the yard stick of whether adverse impacts from noise are kept to a minimum or the yard stick of whether the noise would have an unreasonable impact on amenity."
>
> 19. I agree. If, as the committee concluded, the noise was neither unreasonable nor substantial, it is difficult to see what further reasonable steps they were required to consider. In my judgment Ms Clutten's argument treats the policies with which we are concerned as if they were statutory texts. There are textual differences between the two, to be sure, but in agreement with the judge I consider that they are no more than semantic ones."

85. Consistently with the approach taken in *May*, the benefits of a proposed development, as well as the noise that it generates, may be taken into account in the overall balance when determining a planning application. The NPSE policy aim is to consider adverse noise impacts together with the economic and social benefit of the development that is generating the noise (see Judgment/[40]-[42]). The PPG's guidance on SOAEL (paragraph 005) advises:

> "If the exposure is predicted to be above this level the planning process should be used to avoid this effect occurring, for example through the choice of sites at the plan-making stage, or by use of appropriate mitigation such as by altering the design and layout. While such decisions must be made taking account of the economic and social benefit of the activity causing or affected by the noise, it is undesirable for such exposure to be caused." (*emphasis added)*

86. Thus the planning officer and the Planning Committee were entitled to have regard to the benefits of the School, at OR/6.123 and 6.125.

87. My conclusion is that the planning officer and the Planning Committee lawfully applied the relevant policies and made a series of planning judgments, evaluating the noise impacts on the Claimants and other neighbours, and the likely effect of the mitigating measures, and balancing them against the benefits of the School. I do not accept the Claimants' allegation that the planning officer's advice was "seriously misleading" in regard to the relevant policies or the evidence. There was conflicting expert evidence before them, which they had to assess. The only empirical evidence before the Council which set out predicted noise levels was in the BAP report, which found SOAEL at only one property, 11A Douro Place. The Claimants clearly disagree with the planning judgments that the Council made, but in my judgment, they have not been able to establish any error of law in the Council's decision.

88. For these reasons, Ground 1 does not succeed.

Ground 2

Claimants' submissions

89. Under Ground 2, the Claimants contended that the Council acted irrationally by failing to secure the noise mitigation by way of acoustic glazing to 11A Douro Place that it considered necessary to make the development acceptable. The Council acted irrationally in placing reliance upon an irrelevant consideration, namely that a planning condition or planning obligation under section 106 TCPA 1990 cannot require works to be carried out to a neighbour's property. It would have been perfectly lawful for the Council to secure the mitigation in other ways, for example, by imposing a planning obligation that required Thomas's to offer to fund the mitigation for the owner of 11A Douro Place.

90. The Claimants also contended that the Council acted irrationally in failing to make sufficient enquiries as to whether additional mitigation through provision of acoustic glazing could reduce or eliminate the noise at the other neighbouring properties that the EHO and Mr Rogers advised would suffer a SOAEL. It was unreasonable not to do so, having regard to the obligation to mitigate noise and avoid SOAEL under paragraph 185(a) of the Framework, and in the light of the offer made by Thomas's at the Planning Committee meeting (Judgment/[29(iii)]).

91. The Claimants submitted that they had standing to challenge the Council's decision in respect of 11A Douro Place for three reasons. First, because their properties would also

suffer a SOAEL, and the Council should have secured the same mitigation (acoustic glazing) for them, particularly as it was offered by Thomas's. Second, because the owner of 11A Douro Place supports the claim and has filed a witness statement. Third, the Claimants are not busybodies, nor can it be said that the owner of 11A Douro Place is in a better position to challenge the decision.

Conclusions

92. On the issue of standing, I agree with Eyre J. that the Claimants do not have standing in respect of the Council's decision on 11A Douro Place alone. The fact that the owner of 11A Douro Place was a signatory to the pre-action protocol letter and has filed a statement on behalf of the Claimants does not confer surrogate standing on the Claimants. The owner of 11A Douro Place could have filed a claim against the Council, but chose not to do so. However, I do consider that the Claimants have standing to claim that the Council should have secured the same mitigation (by way of acoustic glazing) for their properties as for 11A Douro Place, on the basis of their contention that the planning officer and the Planning Committee accepted the EHO's advice that their properties would continue to suffer a SOAEL even after mitigation.

93. However, this ground is unarguable in the light of my conclusion, under Ground 1, that the planning officer and the Planning Committee did not accept the EHO's advice that their properties would continue to suffer a SOAEL even after mitigation. The planning officer identified the need for acoustic glazing at 11A Douro Place only, consistently with the BAP report (OR/6.48). She was satisfied that the noise at the other neighbouring properties would be "reasonably minimised and mitigated" (OR/6.59) and "with the impacts suitably mitigated, the degree of residual impact would not be sufficient to justify a refusal of permission for noise reasons under policy CL5 in this context" (OR/6.125). It can be assumed that the Planning Committee accepted the planning officer's advice on this issue.

94. The planning officer advised, at OR/6.48:

> "In terms of the impact on no. 11a Douro Place, it is the Council's understanding that the applicant and the neighbour have agreed that replacement of the windows within the studio at no. 11a with either double or triple glazed windows, would be facilitated by the school. It would be outside the scope of a condition or s106 to require these works to a neighbour's property, but it can be reasonably expected that the school would carry out their offer."

95. I am unable to discern any arguable error of law in this advice. The Council was required to decide how best to proceed in the exercise of its discretionary judgment. At the hearing before me, all parties agreed that a condition or planning obligation requiring Thomas's to undertake works on a neighbour's property could not reasonably be imposed, as the neighbour might not consent to such works. The PPG advises, at paragraph 009, that "conditions requiring works on land that is not controlled by the applicant, or that requires the consent or authorisation of another person or body often fail the tests of reasonableness and enforceability".

96. By the time of the meeting of the Planning Committee on 18 May 2023, site meetings and discussions had taken place regarding mitigation at 11A Douro Place, and Thomas's had offered to install acoustic glazing. In those circumstances, the Council took the view that "it could reasonably be expected that the school would carry out their offer". In my view, this could not possibly be characterised as an irrational exercise of judgment by the Council, even if other options were available.

97. As to the Claimants' contention that the Council failed to make sufficient enquiries about acoustic glazing at their properties, the legal test to be applied is whether the inquiry made by the planning authority was so inadequate that no reasonable planning authority could suppose that it had sufficient material available upon which to make its decision to grant planning permission and impose conditions. See *R (Hayes) v Wychavon DC* [2019] PTSR 1163, per Lang J. at [30] – [31], applying the principles set out by Laws LJ in *R (Khatun) v LB Newham* [2004] EWCA Civ 55, at [35], to the planning context.

98. In my judgment, the Claimants do not even arguably meet that test in this claim. Members of the Planning Committee had ample information before them, including mitigation proposals from Thomas's; expert acoustic reports from Thomas's and the Claimants; and a response from its EHO. Members also had the benefit of a detailed assessment by the planning officer which concluded that the noise impact at properties other than 11A Douro Place could be "reasonably minimised and mitigated".

99. At the Planning Committee meeting, Cllr Bennett asked Thomas's representatives "So are you or would you be willing to offer to pay for double or triple glazing of all properties overlooking the playground including those in Kensington Court?". On behalf of Thomas's, Mr Tobyn Thomas replied saying: "The answer is if it was the make or break on the application -yes". Thus, the elected Members were able to consider this proposal from Thomas's when making their decision. The reasonable inference to draw is that the Planning Committee as a whole decided that it was not necessary to pursue it, in the exercise of its planning judgment. In my view, it was entitled to reach that conclusion on the evidence before it.

100. For the reasons set out above, permission to apply for judicial review is refused on Ground 2.

Ground 3

Claimants' submissions

101. Under Ground 3, the Claimants submitted that the Council acted irrationally by granting planning permission without securing a school street, which would restrict vehicle access during school opening and closing times. In the OR, the planning officer accepted the Transport Officer's advice that an acceptable traffic management strategy would need to be based around the provision of a school street and recommended that a school street be put in place. However, a school street was not secured. The Council should have prevented the development from being implemented unless and until a school street was in place.

Conclusions

102. The planning officer considered the transport issues in detail at OR/6.60 to 6.87. The Transport Officer advised that a school street should be introduced in part of St Albans Grove and that without such a measure in place the proposal would not satisfy Local Plan Policies CT1(b) and (h). However, a school street could only be implemented under highways legislation, and would include a consultation procedure (OR/6.76 – 6.78).

103. The planning officer's conclusions were set out at OR/6.97 – 6.104. The OR stated:

> "6.103 Given the constrained location of the application site, there is a criticality to the effective operation of measures to positively influence travel demand and to manage residual motorised traffic. Accordingly, any approved travel plan or traffic management plan would need to be routinely monitored by the Council. Funding would be required to this end, secured by planning obligations. These obligations would specify monitoring regimes involving robust data collection, periodic published reports, and review mechanisms. If a school street was implemented, an ongoing commitment to fund, and manage a school street during pick up and drop off times (covering all significant arrival and departure times at the school) would be necessary. Under the Town and Country Planning Act, the local planning authority cannot decide that a school street would be implemented. However, it is strongly recommended that such an arrangement should be put in place and legal agreement requires the applicant to fund consultation regarding introduction of a school street. If a school street is subsequently implemented under highways legislation, the applicant would have to pay the costs of implementation and the costs of ongoing operation/management of the school street. Highway improvements (footway widening) and changes to parking, waiting, and loading restrictions in the vicinity of the school would also be secured by a legal agreement. Subject to a legal agreement, Traffic Management Plan and Travel Plan conditions, the proposal to locate a 500-student school at this accessible (PTAL 6a) and generally lightly trafficked location would be consistent with NPPF paragraph 111, London Plan Policies T1 B, T2 D, T4 and Local Plan Policy CT1 and CR4.
>
> 6.104 Heads of terms for a planning agreement:
>
> 1. Travel plan funding mechanism to allow Council participation in a monitoring regime and a plan review mechanism.
>
> 2. School Street- A commitment to fund a consultation on a school street and, in the event a school street is implemented, a commitment to adequately staff and manage a school street for as long as it exists.

> 3. Traffic management plan funding mechanism to allow Council participation in a monitoring regime and a plan review mechanism.
>
> 4. Highway works (footway widening to a c.2m on the northern footway of St. Alban's Grove between Victoria Road and Stanford Road and parking layout changes)….."

104. Under the final heading "Issues and balancing", the OR stated:

> "6.126 Given the constrained location of the application site, there is a criticality to the effective operation of measures to positively influence travel demand and to manage residual motorised traffic. Accordingly, any approved travel plan or traffic management plan would need to be routinely monitored by the Council. An ongoing commitment to fund, man and manage a school street- if implemented- during pick up and drop off times (covering all significant arrival and departure times at the school) would be necessary. So too are highway improvements (footway widening) and changes to parking, waiting, and loading restrictions in the vicinity of the school. The school street would ideally be implemented, however the travel management plan which should include the following:
>
> - Staggered school opening and closing times
>
> - Drop-off areas for children that are away from the school gate where pupils are received by teachers
>
> - Clearly defined 'park and stride' arrangement based on availability of parking in the area
>
> - Agreed vehicle routes to and from the school including no driving through or stopping along St Alban's Grove
>
> - School bus management
>
> - Details on how such arrangements will be enforced by the school
>
> and further details submitted with a travel plan would control and mitigate the impact of the new location of a larger school. Subject to these and other mitigations, listed below (section 7.1), the proposal to locate a 500-student school at this accessible (PTAL 6a) and generally lightly trafficked location would be consistent with NPPF paragraph 111, London Plan Policies T1 B, T2 D, T4 and Local Plan Policy CT1 and CR4."

105. The Planning Committee did not adopt the planning officer's recommendation that the number of pupils should be limited to 500 pupils. Instead, condition 35 provides that the number of pupils on the School roll is limited to 400. The stated reason is to

"prevent any significant disturbance to residents of nearby properties and comply with development plan policies, in particular policies CT1 and CL5 of the Local Plan 2019".

106. The section 106 TCPA 1990 agreement dated 16 May 2023 contains covenants relating to a school street in Schedule 3. Thomas's is prohibited from commencing development until it has paid a sum of money towards a consultation on whether there should be a school street. If the Council, in its capacity as highway authority, subsequently decides to create a school street under its highways powers, then Thomas's is under further obligations to pay for the implementation and ongoing management of the school street.

107. The essence of the Claimants' challenge is that, if the Council does not create a school street, there is nothing in place to prevent the proposed development being implemented.

108. In my judgment, it was made abundantly clear in the OR that the Planning Committee did not have power to implement a school street. A school street could only be implemented under the statutory scheme provided in the Highways legislation, and would be subject to a consultation procedure. At the meeting of the Planning Committee, officers referred to the uncertainty over whether the school street would in fact be implemented. Therefore, it is reasonable to assume that the Planning Committee was satisfied that it was acceptable to grant planning permission on the basis that the school street was not secured, having regard to the conditions addressing traffic issues and the agreement under section 106 TCPA 1990.

109. Although the Transport Officer's view was stated to be that the application would not satisfy Policy CT1(b) and (h) without a school street, compliance with Policy CT1 was a matter for the Planning Committee to evaluate, with the aid of its planning officer. The planning officer expressly addressed policy compliance at OR/6.103, and advised that, subject to conditions for a Travel Management Plan; a limit on the number of pupils; and a planning obligation to secure funding from Thomas's for the school street, the proposal would be in accordance with national and local policies, including Policy CT1. The formal reasons for the proposed conditions expressly referred to Policy CT1. The planning officer did not advise the Planning Committee that it should adopt the view of the Transport Officer that the proposal would not comply with Policy CT1, if a school street was not implemented. Nor was she obliged to give such advice, as this was ultimately a matter for the Planning Committee to determine, in the exercise of its planning judgment, not the Transport Officer. The Claimants' criticism of the planning officer for not stating in terms that she was departing from the Transport Officer's view is a further example of the "undue rigour", "hypercritical scrutiny" and laborious dissection of officers' reports "in an effort to find fault" which was deplored by the Court of Appeal in *Mansell* and *St Modwen*.

110. Under condition 35, the Planning Committee limited the number of pupils on the School roll to 400, instead of the requested 500, to reduce traffic levels and to comply *inter alia* with Policy CT1.

111. The Planning Committee imposed conditions 36 and 37 which prevent Thomas's from occupying buildings at Atlantic House until a travel plan and a traffic management plan have been approved by the Council. The stated reasons for both conditions are to "ensure the safe and sustainable movement of traffic on neighbouring highways, in accordance with policies of the development plan in particular policy CT1 of the Local

Plan 2019". The OR considered in some detail the matters to be addressed in these plans. Inevitably, the traffic management plan will have to address the issue of the school street, which will give the Council a further opportunity to consider the acceptability of the traffic scheme at a later date. In my view, the use of these Grampian-style conditions indicates the importance that the Planning Committee attached to the transport issues, and also the Planning Committee's willingness to impose Grampian-style conditions where appropriate. It is reasonable to assume that the Planning Committee would have imposed a comparable condition in relation to the implementation of a school street if, in the exercise of its planning judgment, it thought it appropriate to do so.

112. I agree with Mr Lewis KC's submission that Ground 3 is another thinly-veiled challenge to the merits of a planning judgment reached by the Council.

113. For these reasons, permission to apply for judicial review is refused.

Final conclusions

114. For the reasons set out above:

i) the renewed application for permission to apply for judicial review on Grounds 2 and 3 is refused;

ii) the claim for judicial review on Ground 1 is dismissed.

115. Presumably because of the uncertainty created by the litigation, Thomas's had not taken any further steps to implement the agreement with the owner of 11A Douro Place as at the date of the hearing before me. Mr Cameron KC, on behalf of Thomas's, informed me that there was no objection or impediment to doing so. Therefore, pursuant to a directions order dated 8 December 2023, Thomas's circulated a draft planning obligation to the other parties and the owner of 11A Douro Place for comment. On 18 December 2023, Thomas's solicitors lodged with the Council a planning obligation, comprising a deed of unilateral undertaking to fund the installation of triple glazing at 11A Douro Place.