Neutral Citation Number: [2025] EWCA Civ 259

Case No: CA-2024-001169

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT
His Honour Judge Jarman KC (sitting as a Judge of the High Court)
[2024] EWHC 1035 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/03/2025

Before :

LORD JUSTICE PETER JACKSON
LADY JUSTICE ASPLIN
and
LADY JUSTICE ANDREWS

- -

Between :

STEVEN THOMAS	**Claimant/ Respondent**
- and -	
CHELTENHAM BOROUGH COUNCIL	**Defendant/ Appellant**
- and -	
CIGNAL INFRASTRUCTURE LIMITED	**Interested Party**

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Ryan Kohli and **Jack Barber** (instructed by **One Legal**) for the **Appellant**
The Respondent acted **in person**
The Interested Party took no part in the proceedings

Hearing date: 19 February 2025

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Approved Judgment

This judgment was handed down remotely at 10.am on 13th March 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Andrews:

INTRODUCTION

1. This appeal comes before the Court in unusual circumstances. The Claimant, Mr Thomas, challenged a decision by the Defendant local planning authority ("the Council"), dated 26 May 2023, that prior approval was not required for a proposed development of electronic communications equipment (comprising a 15m high mobile phone mast and ancillary apparatus) on a site located within Cheltenham's Central Conservation Area. The application to the Council had been made by CK Hutchison Networks (UK) Ltd., ("CKH") which operates under the trading name "Three". A company named Cignal Infrastructure UK Ltd., whose relationship with CKH was unclear, was named as Interested Party, but took no part in the proceedings in the Planning Court or in this appeal.

2. Mr Thomas complained that the Council's Planning Officer, whose report ("the OR") and recommendation were adopted by the Council, had failed to address specific concerns raised by Mr Thomas and by another person about the effect of exposure to radiofrequency electromagnetic fields ("EMFs") on medical implants such as pacemakers and hearing aids.

3. Lefroy Court, a residential building for people aged over 55, is situated at or within a 100 metre radius of the proposed site of the mast (the precise distance of the building from the site was not resolved by His Honour Judge Jarman KC ("the Judge")). The other person articulating those concerns was one of the residents of Lefroy Court, who was fitted with a pacemaker.[1] In a representation to the Council that person said:

> "Strong EMF can interfere with the function of metal implants such as
> this and could seriously put my health at risk, making me very anxious.
> I strongly urge you not to consider this anywhere near my flat."

4. Mr Thomas won the battle, but lost the war. The Judge decided that the Planning Officer erred in his approach, but refused to grant relief on the basis that the outcome would not have been substantially different had he gone about things in the right manner, applying section 31(2A) of the Senior Courts Act 1981. Unusually, it is the Council, which was the successful party, that sought and was granted permission to appeal against that decision.

5. Mr Thomas was refused permission to cross-appeal, among other matters against the Judge's ruling that section 31(2A) applied. Unfortunately for him, that precluded the Court from considering many of the submissions that he made at the hearing of the appeal, either himself or (with the Court's permission) through his McKenzie friend Ms Karen Churchill. I am, however, grateful to them both for the courteous and succinct manner in which they raised the points they wished to raise.

6. A proposed appeal by a successful litigant to the Court of Appeal usually encounters two formidable obstacles. First, the jurisdiction of the Court of Appeal is statutory. In this case the appeal was from the High Court. By virtue of section 16 of the Senior

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[1] A third representation from a person living closer to the proposed site of the mast and articulating similar concerns was not received until after the decision was made.

Courts Act 1981, appeals are against orders and judgments of the High Court, and not against findings made en route to the judge's ultimate determination. If the decision of the lower court on the issue it has to try (or the judgment or order of the court in relation to that issue) is one which a party does not wish to challenge in the result, it is not open to that party to challenge a finding of fact simply because they do not like it: see *Cie Noga d'Importation et d'Exportation SA v Australia and New Zealand Banking Group Ltd* [2002] EWCA Civ 1132; [2003] 1 WLR 307 ("*Cie Noga")* per Waller LJ at [27]. However, as that case established, if the order of the court records the finding that someone wishes to challenge (e.g. by making a declaration), that will suffice to engage the Court of Appeal's statutory jurisdiction.

7. Secondly, although it has a discretion to do so in cases that raise issues of wider public importance, this Court will rarely entertain an appeal which is academic. Appeals by a successful party will generally fall into that category, though the Court retains an exceptional jurisdiction to entertain them. An example of the exercise of that jurisdiction in the specific context of an appeal by a successful party is *Floe Telecom Ltd (In Liquidation) v Office of Communications and another* [2009] EWCA Civ 47; [2009] Bus LR 116. In that case Ofcom, which had won in the Tribunal below, contended that the Tribunal had decided points of law that were unnecessary for the determination of the appeal by Floe, and that its unnecessary rulings were both legally wrong and had wider ramifications which were perceived to create uncertainty, potentially prejudicing Ofcom's future regulatory obligations. The Court of Appeal decided that those were valid concerns and that Ofcom's criticisms were well-founded.

8. Mummery LJ, who gave the leading judgment in that case, observed that the Court of Appeal was not bound to entertain an appeal that it should not hear, merely because permission to appeal had been granted. Strictly speaking, that is correct; appeals quite often only become academic after permission is granted, and in such circumstances the Full Court must be able to decide for itself whether to allow the appeal to proceed.

9. In the present case, the Judge's order contained a recital in these terms:

> "AND UPON the Court finding that the Claimant's grounds of challenge succeed insofar as they allege that the Defendant erred in failing to consider the potential impacts of EMFs on those with medical implants"

That recital formed part of the Order and sufficed to engage the Court's appellate jurisdiction (applying the reasoning in *Cie Noga,* above).

10. Lewison LJ, who was well aware that the proposed appellant had succeeded in the lower court (and who cited *Cie Noga*), granted permission to appeal against that finding on the basis that the grounds had a real prospect of success and raised an important point of principle. In the light of that assessment, and bearing in mind the specific circumstances of this case, there was nothing to be gained by further debate about whether it was "exceptional" in the sense explained by Mummery LJ in *Floe Telecom* at [24], and the Court proceeded to consider the arguments on their merits.

11. The Council appealed because it was concerned that the judgment might be interpreted as laying down a general principle that the potential impact of EMFs on medical implants is *always* a material consideration, in the sense that no rational decision maker

could properly leave it out of account, and a failure to address it would inevitably result in the decision being treated as legally deficient.

12. Mr Kohli, who appeared with Mr Barber on behalf of the Council, made it clear in the course of oral argument that the Council accepted that these matters *might* be regarded as a material consideration, depending on the facts and circumstances of the particular case and the evidence put before the decision-maker prior to the decision being taken. However, he submitted that they did not fall within the category of being so obviously material according to the *Wednesbury* irrationality test that a failure to take them into account in any application of this nature would make the decision unlawful.

13. The Council's concerns are legitimate, but in my judgment they are based on an unduly wide interpretation of the Judge's decision. Properly understood, the Judge's finding recorded in the recital turns on a much narrower point which was specific to this case, namely, that the Planning Officer approached the matter on the mistaken assumption that his discretion and/or his planning judgement was fettered by a combination of paragraph 118 of the version of the National Planning Policy Framework ("NPPF") which was then in force, and the self-certification by the applicant that the proposed equipment and installation was fully compliant with the requirements of the International Commission on Non-Ionising Radiation Protection ("ICNRP"). In consequence, the Planning Officer never properly addressed his mind to whether the prospective impact of EMFs on medical implants, either generally or as regards the residents of Lefroy Court, was material (i.e. relevant) to the decision whether to dispense with prior approval, and if so what (if any) weight should be ascribed to it.

14. Seen from this perspective, the judgment is entirely orthodox and turns on its own facts. I do not understand the Judge to have been seeking to lay down any principle of wider application, and in fairness to Mr Kohli, the highest he put his submissions was that this was to be "inferred" from looking at the judgment as a whole. However, I accept that the way in which the Judge expressed his reasons and his conclusions might be open to misinterpretation. I understand why the Council is concerned about that possibility, and I therefore consider that it is appropriate that this Court should clarify the position so that there is no longer any danger of the judgment being misunderstood or cited as authority for a proposition for which it does not stand.

THE LEGAL FRAMEWORK IN OUTLINE

15. Directive EU 2018/1972 of the European Parliament and of the Council, (which is part of EU retained law since the UK withdrew from the European Union) established the European Electronic Communications Code. The Directive contains in Annex 1 a long list of conditions which may be attached to general authorisations for electronic communications networks. They include "measures for the protection of public health against electromagnetic fields caused by electronic communications networks in accordance with Union law, taking utmost account of Recommendation 1999/519 EC".

16. Article 3 of the Town and Country Planning (General Permitted Development) (England) Order 2015/596 ("the GDPO"), as amended in 2022, grants planning

permission for certain types of development specified in Schedule 2.[2] These include in Class A of Schedule 2, part 16, the installation of any electronic communications apparatus by or on behalf of an electronic communications code operator for the purpose of the operator's electronic communications network in, over or under land controlled by that operator.

17. Paragraph A.3(4) of Schedule 2 provides as follows:

> "Before beginning the development described in paragraph A.2(3), the developer must apply to the local planning authority for a determination as to whether the prior approval of the authority will be required as to the siting and appearance of the development."

This leaves open the possibility of a local planning authority deciding to require prior approval if it wishes to consider whether to impose conditions upon the siting (i.e. location) of a mobile telecommunications mast, or to refuse the application.

18. As the Judge explained at [12] of his judgment:

> "ICNIRP is a not for profit, independent scientific commission based in Germany established to provide guidance and recommendations on protection from non-ionising radiation exposure…. ICNIRP issues guidelines for the protection of humans exposed to [EMFs] which are used to enable communications equipment such as is proposed in the present case. The guidelines are highly detailed and technical."

The ICNIRP Guidelines are updated from time to time to reflect emerging scientific research. The UK Health Security Agency, which is the body responsible for public health protection in this jurisdiction, has produced guidance on mobile phone base stations and masts which advises that the ICNIRP Guidelines should be adopted for limiting exposures to EMFs from such structures.

19. The ICNIRP Guidelines for Limiting Exposure to Electromagnetic Fields in the range 100 kHz to 300 GHz in force at the time of the Council's decision were published in March 2020. Under the heading "Purpose and Scope" the authors state that the main objective of the publication is to establish guidelines for limiting exposure to EMFs that will provide a high level of protection for all people against substantiated adverse health effects from exposure to both short- and long-term, continuous and discontinuous, radiofrequency EMFs. However, they go on to explain that certain exposure scenarios are defined as outside the scope of the guidelines:

> "Medical procedures may utilize EMFs, and metallic implants may alter or perturb EMFs in the body, which in turn can affect the body both directly (via direct interaction between field and tissue) and indirectly (via an intermediate conducting object)… *radiofrequency EMFs can indirectly cause harm by unintentionally interfering with*

[2] The amendments made to the GDPO in 2022 permit much higher masts to be erected on certain types of land, but such structures always require prior approval.

> *active implantable medical devices (see ISO 2012) or altering EMFs due to the presence of conductive implants.* ICNIRP considers such exposure managed by qualified medical practitioners … as beyond the scope of these guidelines." [Emphasis added].

20. It follows that, whilst compliance with the ICNIRP Guidelines is believed to afford a high level of protection to the public at large from general health hazards resulting from exposure to EMFs, such compliance may not preclude interference with, or effects on medical devices such as pacemakers or other types of implants. Compliance with the ICNIRP Guidelines therefore tells one nothing about the specific risk of harm which may potentially be caused by EMFs unintentionally interfering with active implantable medical devices. That risk is recognised in the Guidelines, but deliberately not addressed in them.

21. The National Planning Policy Framework (NPPF) in force at the time of the impugned decision was the 2021 iteration. Although the NPPF was revised and the numbers of the relevant paragraphs had changed by the time of the judgment, the relevant text did not. References in the judgment are to the paragraph numbers in the 2021 version, and for the sake of continuity, I will refer to the same numbers.

22. Paragraph 117 of the NPPF provided as follows:

> "Applications for electronic communications development (including applications for prior approval under [the GDPO]) should be supported by the necessary evidence to justify the proposed development."

This should include:

> "… for a new mast or base station, evidence that the applicant has explored the possibility of erecting antennas on an existing building, mast or other structure and a statement that self-certifies that, when operational, [ICNIRP] guidelines will be met."

23. Paragraph 118 of the NPPF provided (so far as is relevant) as follows:

> "Local planning authorities must determine applications on planning grounds only. They should not … set health safeguards different from the International Commission guidelines for public exposure."

It follows that, were it to consider imposing conditions on a planning application, (e.g. if prior approval were required for the siting of a telecommunications mast) then, save in exceptional circumstances where a departure from national policy would be justified, a planning authority should not set lower (or higher) health standards than those in the ICNIRP guidelines in respect of matters covered by those guidelines. However, the possibility of interference by EMFs with medical equipment or medical implants is a different consideration from the effect of EMFs on the health of the population at large (or even from their effect on the health of those who, like the elderly, may be particularly vulnerable).

MATERIAL CONSIDERATIONS

24. The most recent guidance from the Supreme Court on the correct approach to be taken when a decision by a public body is challenged for an alleged failure to take into account material considerations was given by Lord Sales and Lord Hodge JJSC in *R (Friends of the Earth Ltd)* v *Secretary of State for Transport* [2021] UKSC 52; [2021] 2 All ER 967 ("*Friends of the Earth")* at [116] to [121]. They confirm that, in summary, there are three broad categories of information. First, information which a statute or policy expressly or implicitly requires the decision maker to consider. Secondly, information which a statute or policy expressly or implicitly requires the decision maker to disregard (even if it might otherwise appear relevant). Thirdly, information to which the decision maker *may* have regard if in his judgement and discretion he thinks it right to do so.

25. If information falls within the third category, the decision maker can decide for himself or herself whether to take it into account and if so, what (if any) weight should be ascribed to it. Those evaluations can only be impugned on the basis of irrationality. As explained in *Friends of the Earth* at [120] and [121], a decision-maker may decide not to mention something which might be considered by others to be relevant, but unless it was so obviously relevant that no rational decision-maker could leave it out of account, the failure to have regard to it will not affect the lawfulness of the decision. In a planning context, even if the decision-maker does have regard to that matter, they may decide to give it no weight, or very little weight, in the exercise of planning judgement, and again the question for the Court determining any challenge is whether that decision was rational.

26. The Council's position, at least by the time this matter reached the Court of Appeal, was that the potential impact of EMFs on medical implants was *capable* of being a material consideration, but it was a matter for the decision-maker whether to take it into account in a particular case, and if it was taken into account, it was also a matter for the decision-maker how much weight should be afforded to it. Mr Kohli submitted that the Planning Officer did take into account the potential impact of EMFs on medical implants as part and parcel of his consideration of overall health issues, but gave this factor little or no weight, and that the Judge erred in failing to recognise this.

27. I agree with the proposition that the impact of EMFs on medical implants was information falling within the third category identified in *Friends of the Earth*, but, in agreement with the Judge, I disagree with the Council's characterisation of how it was treated by the decision-maker in this particular case. The Planning Officer thought that he was precluded from taking the potential impact of EMFs on medical implants into account, and disregarded it for that reason. In other words, he treated that information as falling within the second category, not the third.

THE PLANNING OFFICER'S REPORT

28. The Judge accurately summarised the contents of the OR in paragraphs [18] to [26] of the judgment. The only passage which came close to dealing with the objections raised by Mr Thomas and the resident of Lefroy Court was paragraph 6.21 which appeared under the heading "Other Considerations". This stated:

> "A number of concerns raised by the objectors relate to potential health implications, impact on the environment and also suggest that there is

not a need for this form of equipment in this location. Whilst these concerns have been duly noted, paragraph 118 of the NPPF highlights that applications must be determined on planning grounds only; and that local planning authorities should not "set health safeguards different from the International Commission guidelines for public exposure". The applicant has submitted a pack of supporting information which includes a declaration of conformity with ICNIRP public exposure guidelines. This is sufficient to fulfil the requirement of para 118 of the NPPF in relation to self-certification. The supporting information also identifies that there is a need for coverage in this location."

29. The Judge went on at [25] to identify that the OR did not deal with what he described as "the specific health concerns in respect of residents of Lefroy Court with such medical devices as pacemakers or… the precise scope of the ICNIRP guidelines". He then recorded that the Council had changed its case from a contention (at the permission stage of the proceedings) that it gave no weight to these objections, to a contention (at the substantive hearing before him) that it gave them "little weight" because of the compliance with ICNIRP guidelines.

30. Although a planning officer's report is to be interpreted with "reasonable benevolence", see *Mansell v Tonbridge and Malling Borough Council* [2019] PTSR 1452 per Lindblom LJ at [42], it seems clear to me, as it did to the Judge, that the Planning Officer was labouring under the misapprehension that by reason of paragraph 118 of the NPPF, a certification of compliance with the ICNIRP Guidance was a bar to his even considering whether the concerns raised by Mr Thomas and the resident of Lefroy Court about the impact of EMFs on pacemakers and other implants were relevant and should be specifically addressed when deciding whether prior approval should be required, and that was the reason why he disregarded them. He never reached the stage of deciding whether any weight should be afforded to those matters.

THE JUDGE'S DECISION

31. At [35] the Judge said that the issue of prior approval in the present case was closely related to whether the Council "should have given consideration to potential impacts on medical implants". He then said: "Although a number of health concerns were noted, and although this particular issue was raised in the objections, on a fair reading of the officer's report as a whole, it was not given any weight". It is possible that the Judge used the expression "it was not given any weight" because of the way in which the Council's case had evolved before him. However, in context that expression was liable to cause confusion, because it seems clear from reading the paragraph as a whole that the Judge was <u>not</u> finding that the issue was regarded as material but nonetheless afforded no weight, but rather that the Planning Officer failed to give it any independent consideration from the general impact on health. That emerges from the next passage, where the Judge said that "the officer clearly took the view that the declaration of conformity with the guidelines was sufficient to deal with these concerns [i.e. concerns about the potential impact of EMFs on medical implants] and that by going any further would be to set health safeguards different to the guidelines." Were any confirmation necessary that this is the correct interpretation of the Judge's findings, it is provided by the recital to the Judge's order which I have quoted at [9] above.

32. As the Judge went on to explain, whilst it was entirely proper to approach the application from the basis that compliance with the ICNIRP Guidelines was sufficient to satisfy any general concerns about the impact on health, including anxiety about the proposed location of the mast, the guidelines expressly stated that EMFs can cause harm by interfering with medical implants, and that such issues were beyond the scope of the guidelines. He said at [39]:

> "A consideration of such an issue, for example by considering whether the proposed development in the present case should be sited further away from Lefroy Court, would not in my judgment involve setting health guidelines different from ICNIRP guidelines for public exposure so as to fall foul of [118] of NPPF. The reason for that is that the guidelines do not address the issue of potential harm caused by EMFs in relation to medical implants."

He then, for cogent reasons, rightly rejected a submission by Mr Kohli (which he did not seek to resurrect before us) that the guidelines implicitly did address that issue.

33. The Judge went on to say that that specific issue was an important one which the authority should have "grappled with" [40] and [43]. I fully accept that the manner in which the Judge expressed himself is open to misinterpretation, particularly as the reference to "grappling" was juxtaposed with a reference to the passage in Lord Keith's speech in *Tesco Stores v Secretary of State for the Environment* [1995] 1 WLR 759 at 780, where the distinction was drawn between the question of whether something is a material consideration, which is a matter of law for the Court, and the weight which it should be given, which is a matter of planning judgement for the planning authority.

34. It is that passage, in particular, which gave rise to the Council's concerns that this judgment could be read as laying down a wider principle that the potential impact of EMFs on medical implants is so obviously material that a failure to treat it as material would be irrational in the *Wednesbury* sense. As my Lord, Peter Jackson LJ, pointed out in the course of Mr Kohli's submissions, if it were material in that sense, the Planning Officer would have had to have taken it into account irrespective of whether anyone had raised it in an objection, and irrespective of whether the EMFs might affect a resident of Lefroy Court, someone living in a building closer to the site, or a pedestrian with a pacemaker who walked down the street where the mast was located.

35. However, I do not consider that this was what the Judge intended to convey. He was saying no more than that the two objections based on the potential impact of EMFs on medical implants in residents of Lefroy Court that were received by the Council before the decision was made were different from other objections based on general health considerations, and should have been recognised as such. The Planning Officer should have appreciated that the ICNIRP Guidelines did not address *that* potential harmful effect of EMFs (particularly bearing in mind the fact that Mr Thomas had provided a link to the ICNIRP Guidelines in his objection, see the judgment at [15]). The question for the Planning Officer was whether, in the circumstances of this particular application, the specific concern expressed about the impact of EMFs on medical implants was a consideration in the evaluation of whether prior approval should be required. In other words, instead of believing that he was obliged to disregard the material before him because of his misreading of paragraph 118 of the NPPF, he should have appreciated

that he had a choice whether to take this matter into account in his determination whether to recommend a requirement of prior approval.

36. In the section of the judgment dealing with relief ([44] to [46]) the Judge went on to ask what the outcome would have been "had the specific issue of potential harm on medical impacts been considered." He went on to evaluate the evidence that was provided to the Council before the decision was taken, pointing out that there was no medical evidence as to the potential impact on a pacemaker in someone at the distance of Lefroy Court from the site of the mast, and that there was no evidence that the equipment would generate "strong" EMFs (the resident's expressed concern being about the impact of "strong" EMFs).

37. Given that the Judge was clearly alive to the fact that the weight to be given to any particular factor is a matter of planning judgement, which is not for the Court, I do not consider that he fell into the trap of substituting his own planning judgement for that of the decision maker when considering whether to refuse relief pursuant to section 31(2A). That danger would arise in any case where the Court reaches the conclusion that a planning authority has left an obviously material consideration out of account. In that situation, it is not for the Court to second-guess how the decision maker would have treated that material matter or what weight (if any) they would have ascribed to it, had they appreciated that they should have had regard to it, as that would trespass on the decision-maker's function. The appropriate course would be to send the matter back for the decision maker to re-make the decision.

38. The Judge did not take that course, which indicates that he accepted that it would have been open to the Planning Officer to have treated the potential impact of EMFs on pacemakers at Lefroy Court as immaterial and to have decided not to address it in the OR (just as had happened in *Harris v The First Secretary of State and Others* [2007] EWHC 1847 (Admin), a decision of Lloyd Jones J (as he then was) which was cited to the Judge). It seems to me that, properly understood, in that final section of his judgment the Judge was saying that if the Planning Officer had not mistakenly believed himself to be constrained from considering the potential impact of EMFs on pacemakers or medical implants in the residents of Lefroy Court, and had instead addressed his mind to the question whether that was something to which he should have regard, it is highly likely that he would have decided to leave it out of account, because in this case there was no evidence of any substance to support the concerns expressed.

CONCLUSION

39. For those reasons, I consider that the Judge was right to identify that the Planning Officer fell into error, but the error in question consisted of fettering his own discretion to evaluate whether or not he should treat as material (i.e. relevant to his decision) certain information falling into the third category identified in *Friends of the Earth*. The Judge then decided, as he was entitled to on the evidence before him, that it was highly likely that if the Planning Officer had not considered himself to be so constrained, he would have left that information out of account in any event. It is necessarily implicit in that line of reasoning that the Planning Officer would have been entitled to take that course.

40. Therefore, the Judge did not find that the potential impact of EMFs on pacemakers or other implants was material even in the circumstances of this specific case, let alone

that it would always be a material consideration in applications of this nature. For those reasons, I would dismiss this appeal.

Lady Justice Asplin:

41. I agree that the appeal should be dismissed for the reasons given by Lady Justice Andrews and further explained by Lord Justice Peter Jackson.

Lord Justice Peter Jackson:

42. I also agree. In *Harris*, Lloyd-Jones J held at [51] that, where there was the merest assertion of an indirect risk to health resulting from interference with electrical equipment and no evidence capable of demonstrating any objective justification for such fears, there was no obligation on the inspector to deal with the matter in his decision letter. In the same way, the outcome in the present case flows from the fact that the Council was not obliged to treat the issue of the impact of EMFs on medical implants as a material issue on the basis of the information that was available to it, either generally or in the form of the objections that it received. In a case where the evidence was different, the obligation on the local planning authority might also be different.