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Case No: AC-2025-LON-002853

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/07/2026

Before:

TIM SMITH
(sitting as a Deputy High Court Judge)

- -

Between:

THE KING (on the application of LUKE NATHAN DAVIS)	**Claimant**
- and –	
ISLE OF WIGHT COUNCIL	**Defendant**
- and –	
SUNNY OAKS RENEWABLE ENERGY PARK LIMITED	**Interested Party**

- -

Mr Andrew Parkinson (instructed by **Setfords LLP**) for the **Claimant**
Mr Jack Parker and Ms Hannah Taylor (instructed by **Isle of Wight Council**) for the **Defendant**
Mr Richard Turney KC (instructed by **CMS Cameron McKenna Nabarro Olswang**) for the **Interested Party**

Hearing date: 6th May 2026

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Approved Judgment

This judgment was handed down remotely at 10.00am on 08/07/2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR TIM SMITH (sitting as a Deputy High Court Judge):

Introduction

1. Was it unlawful for a local authority's planning officer privately to seek from the applicant for planning permission, and then incorporate, comments on her draft report to the Council's Planning Committee?

2. That is the question at the heart of this claim. It entails questions about the fairness of the decision-making procedures adopted in relation to the planning application, about the applicable principles of natural justice, and about the requirements of openness and transparency in the planning system. A subsidiary ground of challenge relates to whether (and, if so, how) the applicant's comments on the draft report should have been recorded as being part of the background information informing the case officer's report to Committee.

3. The development in question is for a "renewable energy park" involving an array of solar panels, battery storage (BESS) and associated infrastructure, to be constructed on a 32.5 hectare site at Whiterails Road, Wootton, on the Isle of Wight. The development is promoted by Sunny Oaks Renewable Energy Park Limited ("the Interested Party").

4. The planning application was submitted to the Isle of Wight Council as local planning authority ("the Council"). It proved to be controversial. Indeed a previous grant of planning permission pursuant to the application was quashed with the consent of the parties following a legal challenge brought by the same claimant who now challenges the permission for a second time. The planning permission under challenge now is the product of the Council's redetermination of the application after the original permission had been quashed.

5. The Claimant, Mr Davis, is the owner of a nearby copse. He makes no secret of the fact that he is a long-standing opponent of the scheme. His participation in the planning process as an objector to the application is equally long-standing. He has submitted substantial objections to the application, both in his own name and through the action group which he founded.

6. The redetermination was a decision delegated to members of the Council's Planning Committee ("the Committee"), as was the first decision. A report was prepared for the Committee ("the Report") by Ms Wilkinson, a Planning Development Manager in the Council's Planning Department who became the case officer for the planning application following the remittance of the application back to the Council after the original permission had been quashed. The Report summarised the relevant background facts, the applicable policy, and consultation responses on the application. In light of all of this it then offered Ms Wilkinson's analysis of the application against policy and other material considerations, culminating in a recommendation that planning permission be (re-)granted.

7. Prior to the application being reported back to the Committee for redetermination, Ms Wilkinson agreed to the Interested Party's request to share a draft of the Report.

8. The Interested Party reviewed the draft of the Report and responded with comments. Some were incorporated into the final version of the Report, others were not.

Meanwhile Ms Wilkinson had sent an email to the Interested Party's representatives seeking clarification on some additional points for inclusion in the Report, which the representatives responded to.

9. Ms Wilkinson uploaded to the electronic planning case file background documents relied upon in drafting the Report, as required by section 100D of the Local Government Act 1972. The list did not include either the marked-up draft of the Report nor the subsequent exchange of emails.

10. The Claimant was at the time unaware that a draft of the Report had been shared with the Interested Party. The sharing was only revealed on 24th July 2025, after the date the planning permission was granted, through the release of documents forming part of the Council's response to a Freedom of Information Act request by the Claimant. The Claimant was similarly unaware of the exchange of emails in which further information about the application was sought and provided.

11. The Claimant contends that this process was unfair. The nature of the unfairness, and of the prejudice he says he suffered by reason of it, is explored in more detail below. The Claimant also contends that the unfairness means that the planning permission must not be allowed to stand. He therefore submits that the planning permission was granted unlawfully and should be quashed once again.

Background facts

12. The planning application for the development was submitted on behalf of the Interested Party to the Council in September 2022. It was then considered for the first time by the Committee a year later, in September 2023, when a resolution to grant planning permission was passed in line with the recommendation in the officer's report (written on that occasion by Ms Braid, a senior planning officer). Planning permission was then granted in April 2024.

13. The grant of planning permission was challenged by the Claimant. The grounds of challenge are not relevant to the present proceedings, although I note that they were substantive (as opposed to procedural) grounds. The parties agreed to the quashing of the permission by consent. A Consent Order was approved and sealed by the court, leading to the permission being quashed.

14. The quashed permission was then remitted back to the Council to be redetermined, again by the Committee. For this purpose a draft of the Report was prepared by Ms Wilkinson in December 2024.

15. On 3 April 2025 Ms Wilkinson provided a draft of the Report to Mr Murphy, a senior project manager at the Interested Party's parent company, for comment. It is common ground that this was at the request of the Interested Party. The draft was provided with a covering email from Ms Wilkinson which stated as follows:

> "Please find attached the draft report as promised.
>
> You will see that the draft is missing the planning balance section at the end and the conditions have not been updated, but I will work on this next week, as drafts are not due to my manager until the 10th.

> You will notice yellow highlighted bits. These are just for me, to remind me to either check a condition(s) is included or to add a figure, so please ignore. There is one part highlighted blue, which I need to you confirm [sic.] whether this is possible. It responds to NE's comments on loss of hedgerow.
>
> Please be mindful that this is a first draft.
>
> Ann *[that is to say Ms Ann Braid, the author of the previous report to Committee]* will catch up with you on Monday and I will be back in the office Thursday, but am hoping to be able to check emails while in London"

16. Ms Wilkinson has provided a witness statement in these proceedings to supplement the contemporaneous documentary evidence. In paragraph 10 of that statement she explains the reason why she was willing to share a draft of the Report with Mr Murphy as follows:

> "In this instance, bearing in mind the interest from third parties and the fact that a previous decision by the council had been quashed, we shared a draft version of the committee report with the interested party to seek to ensure that the report was factually accurate in its content and that all relevant considerations were addressed. The draft of the report did not include any conclusions or the section outlining the planning balance"

17. On 7th April 2025 Mr Murphy replied by email to Ms Braid, copying Ms Wilkinson. The reply stated as follows:

> "Thank you for the draft committee report provided last week, we appreciate that this is in draft form and not yet complete. Please find attached a copy containing some thoughts and factual points, which don't alter the view of the scheme, and are for [the Council] to consider as your drafting progresses"

18. The attachment returned with that email was the draft of the Report upon which members of the Interested Party's team had marked some comments. Some of these were proposed amendments to the text itself shown by tracked changes, some were in separate comment boxes in the margin. In the hard copy that is available the tracked changes do not identify the author of the proposed amendments. The comment boxes identify the authors of the comments only by their initials, but it is evident that there were at least three contributors ("JM", "DL" and "DH").

19. Mr Parkinson calculates 46 separate comments and nearly 200 "individual additions and deletions" from the draft text. In his skeleton argument Mr Parker has helpfully scheduled all of the comments that were made to the draft Report and returned to Ms Wilkinson, and added his commentary on their individual significance. Most of them attract a comment from Mr Parker that they were "Minor textual corrections/amendments" or "Additional factual detail" but there are others that are more substantive.

20. In his skeleton argument for the Claimant, Mr Parkinson emphasised five of the comments made. In oral submissions he added a sixth comment. He accepted that

these were what he considered to be the most egregious individual comments, but submitted also that it is the cumulative effect of these and all other comments on the final report which need to be looked at.

21. The six comments emphasised by Mr Parkinson were as follows, giving his comments on them:

	Where found	Mr Parkinson's comment
1.	In the "Reason for Planning Committee consideration" section	Querying a reference in the draft report that the application "raised marginal and difficult policy issues" as a reason why a Committee decision was required here, which is an attempt to influence the officer's evaluative comment about conducting the planning balance.
2.	Para 7.47	Suggesting an addition that the proposed vegetation screening would reduce the level of harm "to an acceptable level" is an evaluative comment.
3.	Para 7.144	Adding in a reference to additional hedgerow mitigation proposed by the Interested Party through a revised hedgerow assessment, the mitigation being in the form of reducing the length of hedgerows lost.
4.	Para 7.168	Asking the Council to include reference to other experts as supporting the officer's opinion regarding potential interference by the development with bats.
5.	Para 7.220	Seeking an additional comment that officers are satisfied that the issue of fire-water run-off had been addressed. Text is suggested to be added in relation to the response of the Environment Agency and the Fire Service, to the imposition of a planning condition, and with the final suggested text that "… accordingly officers are satisfied that the matter is addressed". This is an evaluative comment.
6.	Sub-heading "Heritage considerations" and para 7.233	A comment against the sub-heading which reads "As a starting point, the site is not within a Conservation Area nor does not [sic.] contain any Scheduled Ancient Monument, Listed Buildings or Designated Heritage Assets. This is important within the context

		of the NPPF, section xx. Any potential assets would be non-designated heritage assets". Proposed addition to the end of para 7.233, regarding a Grade II listed building c. 480 metres from the site: "… and no impact on its significance by reason of any contribution that setting may make to it". This is an evaluative comment.

22. On 11th April 2025 Ms Wilkinson wrote again to Mr Murphy by email ("the 11th April email"). That email was ostensibly to seek additional information related to the planning application, although it began with the words:

> "I have been working through the comments on the report and will change those parts that we are happy need to be amended. Although not identified by yourselves, having regard to the JR being associated with comments from third parties, I am concerned that the comments of the forestry commission are not covered in enough detailed [sic], so am adding to this section accordingly, as well as responding to their latest comment"

23. The latter part of the email then asked the following questions:

    a) Whether the Interested Party was willing to accede to a request from Natural England to retain part of the hedge that was proposed to be removed and insert a break in it, and

    b) How the Interested Party would respond to concerns regarding (i) temperature increases from solar glare, (ii) the risk of cathode interference with the battery storage and pipeline elements of the scheme, and (iii) kinetic energy associated with pluvial flows

24. Later that same day Mr Murphy responded to the questions in the 11th April email, replying by adding text directly below the questions asked.

25. The application was due to be redetermined by the Committee at its meeting on 29th April 2025. Ms Wilkinson finalised the Report and it was made available publicly. The recommendation at the end of the Report was that planning permission be granted subject to conditions.

26. Having seen the published Report, on 24th April 2025 the Claimant submitted a 35-page critique of the Report to the Council. This document covered a substantial number of topics; the Contents Page alone ran to two and a half pages. On 25th April the Claimant submitted a further 3-page supplemental objection dealing with flood risk and the sequential test which applied to it. Finally on 29th April 2025 – the day of the Committee – the Claimant wrote a further 7-page letter directly to members of the Committee reinforcing his objections on four relevant topics.

27. The Council elected to withdraw the planning application from the agenda for Committee on 29th April, deferring it to the agenda for the Committee scheduled for 8th July instead.

28. Ms Wilkinson updated the Report after the application had been withdrawn from the April Committee. A revised version of the Report was prepared ahead of the July Committee meeting. No party was given the opportunity to comment on the revised Report whilst it was still in draft. The updated version of the Report was published in early July. Some new sections had been added in response to the submissions made most recently by the Claimant – for example in relation to flood risk. The recommendation, that planning permission be granted subject to conditions, remained unchanged.

29. Between withdrawal of the application from the April Committee and the new Committee date on 8th July, the Claimant sent several additional representations to the Council. These included, on 30th May, a 5-page analysis by the Claimant of the Interested Party's flood risk assessment.

30. On 8th July – the day of the rearranged Committee meeting – the Council published an update paper to accompany the Report. This update paper included a consideration of representations received from the Claimant since the deferral from the April Committee (including the 30th May commentary on the flood risk assessment).

31. Also on 8th July, after publication by the Council of its update paper, the Claimant sent three further documents to the Council. These were:

    a) A 53-page document described as a "critical review of officer's report" commenting on issues in the Report under sixteen separate headings,

    b) A 7-page report entitled "changes to the officer report" highlighting what were said to be additions, omissions and "embellishments" by officers to the material produced by or for the Interested Party, and

    c) A further 9-page critique of the flood risk assessment and sequential test undertaken by the Claimant's consultants, Fernbrook Consulting Engineers

32. Also on 8th July the Claimant again sent directly to members of the Committee a five and a half page email with a further three and a half pages of submissions in an Appendix.

33. The Committee meeting went ahead on 8th July 2025. The Claimant spoke against the application at the meeting. Members of the Committee nevertheless resolved to grant planning permission for the development in line with the officer's recommendation in the Report.

34. Planning permission was granted on 15th July 2025.

35. Neither the comments on the draft Report in April 2025 nor the exchange of emails on 11th April came to the attention of the Claimant until after the grant of planning permission. Neither document had been placed on the public planning register and

neither document was otherwise listed as a "background paper" to any version of the Report. However, on 24th July 2025 a number of documents were disclosed by the Council in response to a request made by the Claimant under the Freedom of Information Act back in November 2023. Both the marked-up draft of the Report and the 11th April email formed part of that disclosure.

36. On 27th August 2025[1] the Claimant challenged the grant of planning permission by way of judicial review. The claim cited two grounds, of which ground 1 had two separate but related limbs. The grounds of challenge may be summarised as follows:

A) Ground 1: that the involvement of the Interested Party in the drafting of the Report resulted in unlawfulness in that:

a) The approach adopted by the Council was a breach of the principles of natural justice by giving an opportunity exclusively to the Interested Party to influence the drafting of the Report, as a result of which the Claimant had suffered prejudice; and

b) In breach of the requirements of section 100D of the Local Government Act 1972, neither the marked-up draft of the Report nor the exchange of emails on 11th April 2025 were uploaded to the Council's electronic planning register nor otherwise listed as "background papers" in the Report, despite meeting the definition of such found in section 100D(5); and

B) Ground 2: that the Report contained a material error of fact in relation to flood risk and members of the Committee were significantly misled by it

37. The claim was considered on the papers by Timothy Corner KC (sitting as a Deputy High Court Judge). By his Order dated 15th January 2026 Mr Corner KC granted permission for both limbs of ground 1 but refused permission for ground 2. Ground 2 is no longer pursued.

38. On this basis the claim came before me for hearing.

Relevant Law

39. Section 100D of the Local Government Act 1972 ("the 1972 Act") provides (so far as is material to this case) as follows:

"**100D - Inspection of background papers**

(1) Subject, in the case of section 100C(1), to subsection (2) below, if and so long as copies or the whole of part of a report for a meeting of a principal council are required by section 100B(1) of 100C(1) above to be open to inspection by members of the public, or are required by section 100BA(1) or 100C(1A) to be published electronically-

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[1] Commencement of the proceedings was therefore technically one day late but an extension of time was granted at paper stage

(a) Those copies shall each include a copy of a list, compiled by the proper officer, of the background papers for the report or the part of the report,

(b) In relation to a principal council in England, at least one copy of each of the documents included in that list shall also be open to inspection at the offices of the council

...

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

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

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

but do not include any published works"

40. Article 35 of the Town and Country Planning (Development Management Procedure) (England) Order 2015 (the "DMPO") provides, so far as is material:

"Written notice of decision or determination relating to a planning application

35.—(1) When the local planning authority give notice of a decision or determination on an application for planning permission or for approval of reserved matters —

…

(a) where planning permission is granted subject to conditions, the notice must state clearly and precisely their full reasons—

(i) for each condition imposed; and

(ii) in the case of each pre-commencement condition, for the condition being a pre-commencement condition;

(b) where planning permission is refused, the notice must state clearly and precisely their full reasons for the refusal, specifying all policies and proposals in the development plan which are relevant to the decision;

…

(2) Where paragraph (1)(a) or (b) applies, the notice must also include a statement explaining, whether, and if so how, in dealing with the application, the local planning authority have worked with the applicant in a positive and

> proactive manner based on seeking solutions to problems arising in relation to dealing with a planning application"

41. A number of authorities have considered the importance of an officer's report in a decision to be taken by members of a local planning authority's Planning Committee. In R (Trashorfield) v Bristol City Council [2014] EWHC 757 (Admin), Hickinbottom J (as he then was) summarised the position as follows (at [13(iii)]):

> "A local planning authority usually delegates its planning functions to a planning committee of councillors, who act on the basis of information provided by case officers in the form of a report. Such a report usually also includes a recommendation as to how the application should be dealt with. In the absence of contrary evidence, it is a reasonable inference that, where a recommendation is adopted, members of the planning committee follow the reasoning of the report. The officers' report is therefore often a crucial document"

42. I turn now to consider the submissions of the parties on the two grounds of challenge which have permission to proceed.

Ground 1(a) – breach of natural justice by sharing the draft Report

Claimant's submissions

43. Mr Parkinson for the Claimant submitted that the Council's approach, in sharing a draft of the Report selectively, breached the principles of natural justice.

44. In sharing the draft only with the Interested Party, an unfair advantage was conferred on it. Only the Interested Party had (to use Mr Parkinson's expression) the opportunity to shape the way in which advice on the merits of the planning application was put to members for a decision, and this opportunity arose before the Claimant or any other third party got the chance to view the Report. Whatever the rationale behind the officer's invitation to comment, the comments that were actually offered went beyond mere factual corrections and trespassed into evaluative comments.

45. The fact that an officer's report to Committee has been recognised in previous cases to be a vitally important part of the decision-making process (see Trashorfield) merely accentuated the unfairness from this selective treatment.

46. Mr Parkinson added that, in case it be said against him that the planning application process is not adversarial in nature (and therefore is to be judged less rigorously against the principles of natural justice), the Claimant had a clear and direct interest in the public law decision being taken (not least because it fell to be redetermined following a challenge which he had pursued successfully against the first planning permission).

47. Finally, although Mr Parkinson accepted that the opportunity to comment on the Report was still available to the Claimant and others after it was published, he submitted that the preferential treatment afforded to the Interested Party to shape the Report before its publication is what rendered the opportunity to do so unfair.

48. Mr Parkinson's written submissions on Ground 1(a) included complaints regarding the fairness of both comments on the draft of the Report and the exchange of views in the 11th April email. However, in oral submissions he indicated that he no longer pursued a Ground 1(a) complaint so far as the 11th April email was concerned. I have therefore confined my consideration of it to Ground 1(b).

Council's submissions

49. For the Council, Mr Parker submitted that there is no requirement of natural justice which required the Interested Party and the Claimant to be treated in the same way. The planning system is already asymmetric in how it treats applicants compared with other stakeholders in a planning decision. This is recognised, for example, in the duty imposed on local planning authorities by article 35(2) of the DMPO to engage positively and proactively with applicants with a view to finding solutions to securing sustainable development.

50. As regards natural justice, Mr Parker submitted that the cases relied upon by the Claimant all related to judicial or quasi-judicial processes. By contrast, high judicial authority has recognised that the planning system is neither of these things (see R (Alconbury Developments Ltd) v Environment Secretary [2003] 2 AC 295 and R (Lewis) v Redcar and Cleveland Borough Council [2008] EWCA Civ 746). The case-law is not therefore persuasive in the case of a planning application determined by a Planning Committee.

51. Mr Parker added that "procedural fairness" is not an absolute concept capable of codification for all purposes. It is fact-sensitive and to be judged according to the circumstances of each case, including by reference to the governing statutory code and rules of procedure. A planning determination is an executive function and the court should be slow to impose particular requirements where the statutory code has not done so.

52. In addition, submitted Mr Parker, the Claimant must establish that he has suffered material prejudice. On the facts of this case he is unable to do so. On a fair and objective analysis the Interested Party's comments on the Report that were accepted by the case officer did not, in substance, do any more than correct factual inaccuracies. Certainly none of the Interested Party's comments affected the officer's evaluation of the issues materially. Moreover, the Claimant had the opportunity to write his own critique of the Report, and he did so extensively. All of the Claimant's commentary was available to the Committee alongside the Report. Even now having the knowledge that the Interested Party provided some comments on a draft of the Report, the Claimant has not identified anything more he would have said about those comments which he did not include in his own critique for the Committee. On any analysis the Claimant had therefore been able to participate fully in the planning process regardless of the additional opportunities the Interested Party enjoyed.

53. In summary, submitted Mr Parker, the process adopted by the Council was not unfair and the Claimant cannot point to any prejudice he has suffered by reason of it.

54. Finally, even if I were not with him on the substantive grounds of defence Mr Parker invited me to exercise my discretion, under section 31(2A) of the Senior Courts Act

1981, not to quash the permission on the grounds that it was highly likely the outcome would not have been substantially different in any event.

Interested Party's submissions

55. For the Interested Party, Mr Turney KC adopted the submissions made by Mr Parker for the Council, elaborating on a few of the points made.

56. Although acknowledging that Ms Wilkinson herself is not a member, Mr Turney noted that the Royal Town Planning Institute ("RTPI")'s Code of Conduct for its members requires, amongst other things, that members "exercise fearlessly and impartially their independent professional judgement" and that they not "make or subscribe to any statements or reports which are contrary to their own genuine professional opinion". The case officer of the Council is a member of the RTPI, and so, were she not satisfied that the comments from the Interested Party were acceptable, she would be guilty of professional misconduct by including them. This, submitted Mr Turney, was further evidence that the officer had properly applied her own professional view to the suggestions made.

57. In addition to the general points made by Mr Parker regarding the adaptability of the rules of natural justice to meet specific circumstances, Mr Turney submitted that what had transpired here was similar to the process of sharing for comment draft reports following public inquiries. This was now considered to be acceptable practice.

58. Mr Turney also cited the recent judgment of Holgate LJ in the Court of Appeal case of R (Ocean One Hundred Ltd) v New Forest National Park Authority [2026] EWCA Civ 493. Whilst acknowledging that the facts were very different from those in the present case, Mr Turney nevertheless noted that, as part of an allegation of bias levelled at the officer in that case, the court had considered the proposed modifications made to an officer's report. Holgate LJ held the key determinant of lawfulness to be whether the report remains fair and balanced in dealing with all of the main issues. He submitted that, on the facts, the answer to this same question must be yes.

59. Referring to the duty on local planning authorities found in article 35 of the DMPO, Mr Turney submitted that what had happened with the Report was no more than the Council discharging its duty to be positive and proactive, and that there was nothing objectionable in providing a draft of the Report for comment as part of this duty.

60. In supporting the submissions from Mr Parker that the changes to the Report accepted by the officer were no more than factual, Mr Turney emphasised that a number of the examples of proposed changes highlighted by Mr Parker in his skeleton argument had in fact been rejected by the officer. This, he submitted, evidenced the proper exercise of independent judgement by the officer.

61. Finally Mr Turney also invited me to exercise my discretion under section 31(2A) of the Senior Courts Act 1981 if I were otherwise unpersuaded by the substantive grounds of defence.

Discussion and conclusions

62. Broadly speaking, all parties agreed that the court has not previously been called upon to decide a question on facts like these. I am therefore especially grateful to all counsel for the clarity of their written and oral submissions.

The relevance of the Ocean One Hundred case

63. Mr Turney referred to the Ocean One Hundred case as being the nearest equivalent to the circumstances pertaining here.

64. Ocean One Hundred was unusual. It concerned the revocation of a lawful development certificate, and it involved allegations of actual and apparent bias on the part of the case officer responsible for writing the report for his members recommending revocation.

65. At first blush there are some similarities with the facts of the present case. The officer in question shared a draft of his report only with one of the lead proponents of revocation, Lord Manners, and adopted one of the suggested evaluative amendments proposed by him. As is recorded by Jay J in [87] of his judgment at first instance ([2025] EWHC 953 (Admin)):

> "Mr Avery's draft of the report had said that "officers believe there is an arguable case to support the revocation of the CLU". Lord Manners changed the wording to "sound arguable case" and Mr Avery did not demur"

66. Jay J ultimately dismissed the challenge, holding that the officer's report was, overall, a fair and balanced one which was capable of supporting the decision to revoke the certificate.

67. This decision was reversed on appeal. In the Court of Appeal, Holgate LJ gave the leading judgment. It is evident that, rather than focusing on the parts of the report amended at the suggestion of the lead objector, the Court of Appeal proceeded on the basis that important omissions from the report meant that it could not be said to be fair and balanced. At [146] of his judgment, Holgate LJ concluded as follows:

> "In my judgment, the failure of the officer's report to identify and address these issues means that it was not fair and balanced. It did not enable the members of the Board, who were reliant on the briefing they received from Mr Avery, to reach independent views on issues which they needed to consider and resolve, and which were untainted by the apparent bias of Mr Avery. The process was therefore unfair and substantially prejudiced the appellant in its opposition to the revocation of the CLEUD"

68. As I read it, therefore, the conclusion in Ocean One Hundred owed much more to conventional Wednesbury considerations of whether the decision was based upon an incomplete reporting of all material considerations than it did to the fact of an objector's privileged opportunity to influence the report. That opportunity was part of the background story but it was not an influential part of Holgate LJ's reasoning. In any event Mr Turney relies on Ocean One Hundred solely for the principle that if the product of engagement on a draft report is still "fair and balanced" then the individual

actions cannot be the source of legal complaint. In my judgement he is right to confine his reliance to this point, for the reasons I have given.

Fairness in the planning process

69. I turn next to consider the requirements of fairness in the planning process generally.

70. Mr Parker for the Defendant accepted that the processing of a planning application necessitated fairness. He also submitted – correctly, in my view – that in the case of a planning application the statutory planning code says very little to illustrate what the general requirement for fairness entails.

71. This position is to be contrasted with the situation regarding planning appeals and third party examinations. In those circumstances, the processes to be followed very often specify exactly what must happen and when, including the scope for one party to comment on the material submitted by the other. But we are not here concerned with appeal procedure, just with application procedure.

72. I accept the submissions of Mr Parker for the Defendant, and Mr Turney for the Interested Party, that, subject to adhering to the limited procedural requirements stipulated in (for example) the DMPO and to basic requirements of natural justice, it is for the decision-maker on a planning application to set the procedure to be followed.

73. For the Claimant, Mr Parkinson rightly accepted that a breach of natural justice requires the demonstration not only of unfairness but also of prejudice. The relevant law was summarised by Holgate J (as he then was) in R (ClientEarth) v Secretary of State for Business, Energy and Industrial Strategy [2020] PTSR 1709 at [241]:

> “The relevant legal test for determining both grounds 7A and 7B is whether "there has been procedural unfairness which materially prejudiced the [claimant]" (Hopkins Developments Limited v Secretary of State for Communities and Local Government [2014] PTSR 1145 at [49]). This reflects the principle previously stated by Lord Denning MR in George v Secretary of State for the Environment (1979) 77 LGR 689 that:-
>
>> "there is no such thing as a 'technical breach of natural justice'… One should not find a breach of natural justice unless there has been substantial prejudice to the applicant as the result of the mistake or error that has been made."
>
> and by Lord Wilberforce in Malloch v Aberdeen Corporation [1971] 1 WLR 1578 , 1595 that:-
>
>> "A breach of procedure, whether called a failure of natural justice, or an essential administrative fault, cannot give him a remedy in the courts unless behind it there is something of substance which has been lost by the failure"”

74. Against this general guidance, though, all parties accepted that each case will be highly fact-sensitive. They also accepted that, when judging fairness overall, one needs to look at the process from start to finish and not become unduly fixated by one part of it. In a case like this, therefore, it is important not only to consider the evolution of the

Report (important though that document is) but to look at all opportunities afforded to the parties to make their views known.

Is determining a planning application a judicial or quasi-judicial process, or neither?

75. Some time was taken up with a discussion on whether a planning application is a judicial or quasi-judicial process. I was referred to various authorities establishing general principles as part of Counsels' submissions on this topic.

76. In R (Pathan) v Secretary of State for the Home Department [2020] 1 WLR 4506, Lady Arden JSC observed (at [36]) that:

> "It is common ground that the rules of natural justice apply to decision-makers in public law whether or not they are acting judicially"

77. Pathan was a case involving immigration and the grant of leave to remain status. But other examples closer to home were also cited by the parties.

78. In the well-known case of Alconbury Developments Limited, a case which came before the courts very shortly after the Human Rights Act 1998 received Royal Assent, Lord Slynn said (at [48]):

> "The adoption of planning policy and its application to particular facts is quite different from the judicial function"

79. And finally, in Lewis, Pill LJ, commenting on allegations of predetermination of a planning application on the part of a local authority decision-maker, said (at [69]):

> "Central to such a consideration, however, must be a recognition that Councillors are not in a judicial or quasi-judicial position but are elected to provide and pursue policies"

80. I was also referred to a number of authorities in which the lawfulness of particular decisions was considered through the lens of fairness. Two cases dealt with non-planning examples, the remainder with planning examples.

81. The first of the non-planning cases was Kanda v Government of Malaya [1962] AC 332, where Lord Denning said (at [337]):

> "… whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of another"

82. The second non-planning case was the Privy Council decision in Hart v Chin [2025] UKPC 51, a case cited by Mr Turney to illustrate the growing practice of sharing a draft report following an inquiry where a party or witness to the inquiry was to be criticised in the final report. Giving the judgment of the Privy Council, Lord Clarke summarised the evolution of the practice as follows:

> "There were then cases involving the late Robert Maxwell (In re Pergamon Press Ltd [1971] Ch 388 and Maxwell v Department of Trade and Industry [1974] QB 523) in which the Court of Appeal took the view that before inspectors condemned or criticised a person, he must be given a fair opportunity for correcting or contradicting what is said against him. However, this did not mean he had to have the opportunity to comment on a draft report. The practice then developed into what came to be known as Maxwellisation: the practice of notifying an individual (whether or not that person is a witness) of proposed adverse findings in an inquiry report and giving that person an opportunity to respond before the findings are formally made. This became part of the Inquiry Rules 2006 in England and Wales (SI 2006/1838)"

83. Mr Turney submitted that, by analogy, there can be nothing fundamentally unfair in giving the applicant for planning permission the opportunity of commenting on the officer's draft report to the Planning Committee before it is made available to members of the Committee and the public at large.

84. Turning then to the planning cases, in Broadview Energy Developments Ltd v Secretary of State for Communities and Local Government [2016] JPL 1207, Longmore LJ said (at [25] and [26]) that:

> "25. … Para 4 [of the Planning Propriety Guidance published by the Department to aid decision-making Ministers] does, however, also say that privately made representations should not be entertained unless other parties have been given the chance to consider them and comment on them ...
>
> 26. To a 21st century public lawyer this is a stark and obvious application of the principle that a decision-maker must not entertain representations from one party without finding out what other parties have to say on the matter"

85. In Jory v Secretary of State for Transport, Local Government and the Regions [2003] JPL 549, Sullivan J quashed an appeal decision because the Inspector had allowed the main parties in an appeal the opportunity to comment on a list of draft conditions but had deprived the main objectors of a similar opportunity.

86. Finally, in Fuller v Secretary of State for Communities and Local Government [2008] EWHC 3357 (Admin), in error an Inspector dealing with two linked appeals by written representations had sent to the claimants two copies of the local authority's statement of case on one of the appeals but failed to send a copy of the statement of case on the second appeal. HHJ Stewart QC (as he then was) found that the error had resulted in substantial prejudice to the appellant, who was deprived of the ability to comment on the local authority's second statement of case, and the decision was therefore quashed and remitted for redetermination.

87. Whilst noting the comments from the case-law cited by the parties, I find them to be of limited assistance in showing the way in which this case should be decided.

88. In saying that I do not doubt the good sense of the comments made in the circumstances in which they appeared. But what characterises the examples cited is that they all relate

to litigious proceedings. Kanda concerned the report of a board of inquiry recommending the dismissal of a senior police officer. Hart related to a public inquiry into a failed house-building project undertaken by a state-owned entity using public funds, and included an investigation into the chairman of that entity. Broadview, Jory and Fuller all concerned the conduct of planning appeal proceedings.

89. "Litigation" in this broadest sense involves opposing parties and so it results, by and large, in a winner and a loser. The decision-maker there is undeniably acting in a judicial (or at least quasi-judicial) capacity, and so can be expected to ensure a fair opportunity is given to both parties to present their respective cases. Moreover the litigation is conducted according to a defined set of rules, and – in each case discussed above – it was a failure to adhere to those rules, resulting in prejudice, which led to the adverse findings made by the court.

90. Although they can often give rise to objection and controversy, planning applications are not akin to litigation. They are part of a process which is designed to assemble and present factual information and opinions for the benefit of a decision-maker to help inform the decision they must take.

91. Whether it is apt to describe the planning system as quasi-judicial or not, it is undeniable that the system does not set out to treat all participants in the process equally. Mr Parker described the process as being "asymmetric" – a term which I consider apt to describe the role played by various actors in it, with the applicant for planning permission being at the fulcrum.

92. The DMPO reinforces this asymmetry in a number of ways. It is selective in the third parties it requires to be consulted on a planning application (article 18), on the requirements to publicise the application (article 15), and on the duty of the local planning authority to explain whether (and, if so, how) it has engaged positively and proactively with an applicant for planning permission "based on seeking solutions to problems arising in relation to dealing with a planning application" (article 35(2), which I have set out in full above).

93. Despite the submissions of Mr Parker and Mr Turney, it is not correct to interpret article 35 as imposing an absolute duty on the local planning authority to assist an applicant for planning permission. This much can be seen in the requirement to explain "whether, and if so how …" assistance has been provided. The wording therefore contemplates that it might not have been. But, importantly, the wording also contemplates that it might, with the obvious implication that providing assistance can be permissible. But despite this refinement to the submissions of the parties, the significance of the article 35 example in particular is clear: the expectation is that the local planning authority, in helping to find solutions that may lead to the grant of planning permission, may well treat an applicant for planning permission more favourably than (for example) an objector to the application.

94. There is, as always, a balance to be struck. Asymmetry means that one is not looking for a wholly level playing field. But it does not equate to a licence to adopt procedures which are fundamentally unfair.

95. For the Claimant, Mr Parkinson sensibly accepted that the system as a whole displays asymmetry in favour of an applicant for planning permission. His submission was that

this asymmetry narrowed the closer one got to an actual decision, and that at this point the favouritism shown to the Interested Party resulted in unfairness.

96. I accept Mr Parkinson's characterisation of the asymmetry at the point a decision is reached. But the fact remains that there is still some asymmetry seen even there. It can typically be seen in, for example, the standing orders adopted by many local planning authorities which often give an applicant more air-time than third parties when addressing a Committee meeting, and sometimes the right of reply to presentations made by objectors against the grant of permission.

97. Recognising that there is an asymmetry in the planning process all the way up to when a decision is made, and that this of itself is not illustrative of unfairness, how then should considerations of fairness and natural justice treat the selective sharing of a draft report to Committee (as happened here)?

98. The expressed intention behind Ms Wilkinson sharing the draft Report with the applicant in this case was not sinister. I have quoted from Ms Wilkinson's witness statement above. The passage quoted indicates that the intention in sharing a draft of the Report was two-fold: to ensure that it was factually accurate, and to ensure that all relevant considerations were addressed. The objective was therefore to ensure that members of the Committee who were to make a decision did so based on a report which contained neither errors of commission nor of omission. That there had been a successful legal challenge against a previous grant of permission merely underscored the good sense of being able to do so.

Guidance on sharing draft reports

99. When considering in general terms whether sharing a draft report with the applicant can be appropriate there are, in theory, two extreme positions at opposite ends of the spectrum. One is that sharing a draft is <u>always</u> to be permitted without the need for any safeguards, the other is that sharing a draft is <u>never</u> to be permitted no matter what safeguards are put in place.

100. All parties sensibly disavowed the two extreme positions. In my judgement they were right to do so.

101. In <u>Jory</u>, Sullivan J – having recorded the suggestions made by Counsel for the Secretary of State about what would be fair or unfair when excluding one party from being able to comment on a list of draft conditions in a planning appeal – said this (at [26]):

> "These were simply examples of the kind of factors that one should take into account in deciding whether or not the procedure adopted by the Inspector in a particular case was at the fair or the unfair end of the spectrum. I am happy to proceed on the basis that there is indeed such a spectrum. What fairness requires is bound to depend on the circumstances of each particular case"

102. I respectfully agree with that analysis, and consider that it is apt to apply it equally where the document shared is a draft report ahead of a Planning Committee meeting.

103. In oral argument, Mr Parkinson for the Claimant accepted the proposition I put to him that sharing a draft report with the applicant could, in principle, be acceptable as long as there were suitable safeguards in place. But he maintained the position that such safeguards as were put in place here were insufficient to make the sharing of the draft report acceptable.

104. Once one recognises – as previous cases have done frequently – that considerations of fairness are inherently fact-sensitive, it must also be the case that there can be no bright lines dictating when it is permissible to share a draft report and when it is not. As Sullivan J identified in Jory, there is a spectrum based on the facts and circumstances. What is important is therefore to consider what safeguards need to be applied in any given case to ensure that the activities are at the lawful end of the spectrum.

105. Testing the above legal principles against the present facts, I consider that it would be imprudent to try and define an exhaustive set of guard rails for determining when it will be fair or unfair to share a draft report to Committee selectively. That said, there are factors which I do think it relevant to note when considering this specific question.

106. As I see it, relevant considerations include at least the following:

a) Firstly, and most importantly, it should be non-negotiable that the officer responsible for the report has exercised some independent judgement in relation to any input received. Plainly, an officer who allows the applicant to draft the report to Committee and then accepts it without review would be abdicating their professional responsibility entirely. One would hope that no case before the court ever asks for a ruling on behaviour as deficient as this. But it is much more likely that, as here, the officer is asked to consider comments made on a pre-existing draft report. Whatever the fact pattern, some active engagement with the suggestions must be demonstrated by the author. Mere passive or unthinking acceptance of the comments will not be sufficient;

b) An officer's exercise of discretion might be revealed in how he or she receives and acts upon comments. That may be clear on the face of the evidence, for example if suggestions have been made but have demonstrably been rejected. It may also be explained in a witness statement from the officer in question, applying the requisite degree of scrutiny over such *ex post facto* evidence (see Ermakov v Westminster City Council [1995] EWCA Civ 42 and R (United Trade Action Group) v Transport for London [2021] EWCA Civ 1197 ("UTAG"));

c) At a more granular level, whether the officer's view was arrived at unprompted by any comments may also be a relevant factor. To illustrate the shades of grey involved in such an exercise, in oral argument I posited with Counsel two hypothetical scenarios that are closely linked but different. In the first scenario the officer shares a draft report with the applicant, noting about one aspect of it "This is a relevant issue. I propose to tackle it like this. What do you think?". In the second scenario the request from the officer is "This is a relevant issue. How do you think I should tackle it?". I do not suggest that one approach is always permissible and the other not, but equally one can see that the former is preferable to the latter in evidencing unprompted thought on the part of the officer;

d) The substance of the comments accepted will also be a relevant factor. Some may be inconsequential, some may be pivotal. Although not an exhaustive list, comments might be offered on the following aspects of a report (in ascending order of significance): (i) correcting typographical errors, (ii) correcting internal inconsistencies clear on the face of the report, (iii) correcting factual inaccuracies which are readily ascertainable from the application documents themselves, (iv) introducing additional material not found amongst the application documents but which is readily ascertainable from public sources – for example ONS data, (v) evaluative comments on particular issues (having regard also to how significant the issue is in the determination of the application), (vi) comments on how the officer conducts the planning balance required by section 70(2) of the Town and Country Planning Act 1990 and section 38(6) of the Planning and Compulsory Purchase Act 2004, and (vii) comments on the substantive recommendation being made to members of the Planning Committee; and

e) The greater the degree of transparency around the assistance obtained, the less arguably unfair its use will be. Revealing that the draft report was shared for comments will go so far, but revealing the comments actually received and showing how many of them were accepted will be better

107. Having considered the effect (both individually and cumulatively) of comments on a draft report, there is also – as Mr Parkinson rightly submitted – a need to take a step back and look at the fairness of the decision-making process as a whole. This will entail a number of additional considerations, a non-exhaustive list of which includes:

a) Whether third parties had their own opportunity to comment on the report prior to it being considered by the decision-maker, and

b) Whether third parties had additional opportunities to influence the decision-maker on the decision to be taken (for example, were they afforded the opportunity to make a presentation at the Planning Committee meeting?)

Applying these principles to the facts of the present case

108. Having listed what I consider to be the relevant considerations above, how then are they applied to the facts of the present case?

109. In relation to the first and second considerations taken together – the importance of the officer's exercise of independent judgement, and evidence that it had been applied to the suggestions made - in this case one can see it strongly evidenced. Ms Wilkinson having invited comments for the twin purposes of confirming factual accuracy and ensuring that all relevant considerations were covered, it is arguable that some of what she received back as comments went beyond these categories. However, what is abundantly clear is that independent judgement was exercised by Ms Wilkinson. Some

of the comments were accepted, others were not. As she puts it in her witness statement in these proceedings:

> "As can be seen through the difference between the comments and the final officer report, not all comments were incorporated into the report and some content that the applicant suggested should be deleted was retained"

110. That, it seems to me, is an accurate record of what happened.

111. I digress slightly at this point to address a supplementary submission from Mr Turney regarding the importance of independent judgement and evidence of it having been exercised. He drew attention to the requirements of the RTPI's Code of Professional Conduct, something to which all members of the RTPI are subject.

112. The current version of the Code (effective from 1st February 2023) has four separate paragraphs all grouped together under the sub-heading "Independent Professional Judgement". Of these it seems to me that paragraphs 11 and 12 are the most relevant to the subject-matter of Ground 1(a) in these proceedings.

113. Paragraphs 11 and 12 provide as follows:

> "11. Members must exercise fearlessly and impartially their independent professional judgement to the best of their skill and understanding.
>
> 12. Members must not make or subscribe to any statements or reports which are contrary to their own genuine professional opinions, nor knowingly enter into any contract or agreement which requires them to do so"

114. Mr Turney relied upon the existence of the Code, and its applicability to Ms Wilkinson, as a basis for inferring that she must have exercised the requisite degree of independence in assessing and assimilating the comments made on the Report.

115. I do not accept the premise underlying Mr Turney's submissions. I say so for two reasons. Firstly, the mere fact that the Code states what an RTPI member should do does not mean that this is what they will have done. Secondly, the consequences of a failure to observe the Code are felt primarily by the RTPI member in their individual capacity, not by the decision-making body they serve. It may well be that in a particular case evidence of such a breach of the Code by the member affects, collaterally, the lawfulness of the corporate decision-making by the Council, but conversely a finding that the member properly discharged their professional duty does not automatically mean that the resulting decision will always be lawful.

116. Having set out all of the above in abstract terms, I wish to make clear that – as should be obvious from my findings in this judgment - I see nothing in Ms Wilkinson's conduct in this case which could reasonably have supported a complaint of a breach of paragraphs 11 or 12 of the Code even if she had been a member of the RTPI.

117. I return to the list of general considerations I have set out above.

118. As to the third consideration – whether the officer's views in the Report were unprompted or prompted by comments received – in this instance it was a full draft of the relevant sections of the Report that was shared with the applicant, and so Ms Wilkinson's provisional views were already set out. Furthermore the draft that was shared omitted the section dealing with conclusions and the planning balance, hence it is clear that this section (upon which the applicant had no opportunity to comment) was demonstrably Ms Wilkinson's own work.

119. As to the fourth consideration – the nature of the comments received – the various comments touched upon a number of different aspects of the Report. Not all of them were accepted. Mr Parkinson identified six individual amendments which were made with which he particularly took issue. I set these out in tabular form above. Both Mr Parker and Mr Turney offered their own interpretation of the significance of the comments received from the applicant's team on these passages.

120. I have reflected on the submissions made by the parties on those amendments. In short, I accept the submissions from Mr Parker and Mr Turney that the comments on the Report which were accepted by Ms Wilkinson do not reveal anything unlawful or improper. Having repeated in the table below what Mr Parkinson's comments were, I have set out my own conclusions on them in the additional right-hand column:

	Where found	**Mr Parkinson's comment**	**My conclusions**
1.	In the "Reason for Planning Committee consideration" section	Querying a reference in the draft report that the application "raised marginal and difficult policy issues" as a reason why a Committee decision was required here, which is an attempt to influence the officer's evaluative comment about conducting the planning balance.	References to "marginal and difficult policy issues" detail why the previous planning application (which led to the grant of permission that was quashed) was referred to the Planning Committee. As such, as Mr Parker submits, this was not an evaluative comment at all but rather a factual comment on the planning history. The form of words deleted from the Reasons section was in any event retained at para 4.1 of the July report.
2.	Para 7.47	Suggesting an addition that the proposed vegetation screening would reduce the level of harm "to an acceptable level".	Read properly in context, this addition corrects what was a potentially misleading impression that the proposed screening would be <u>completely</u> effective, as opposed to effective to an

			acceptable degree. This is clear on its face, and verified by the accompanying comment from the author of the proposed change: *"Note: the proposal does not have complete and wholesale screening, but the screening reduces the harm to an acceptable level"*.
3.	Para 7.144	Adding in a reference to additional hedgerow mitigation proposed by the Interested Party through a revised hedgerow assessment, the mitigation being in the form of reducing the length of hedgerows lost.	This is doing no more than supplementing the factual basis on which the analysis by officers is then conducted. The analysis itself is in para 7.145, and no amendments were proposed to that paragraph.
4.	Para 7.168	Asking the Council to include reference to other experts as supporting the officer's opinion regarding potential interference by the development with bats.	No new text was proposed but the comment applying to the entire paragraph suggests: "When referring to Officers, is the IOWC able to refer to relevant experts as well as officer opinion". This comment was a query as to whether the officer felt able to refer to other expert opinion on the topic. It was not even suggesting what that expert opinion might be, it was merely asking whether there were other opinions that should be referred to on the topic.
5.	Para 7.220	Seeking an additional comment that Officers are satisfied that the issue of fire-water run-off had been addressed. Text is suggested to be added in relation to the response of the Environment Agency and the Fire	This is a suggested evaluative comment but most of the new text suggested comes substantially from elsewhere in the report – partly at para 6.17 (a summary of the views of the Environment Agency as

		Service, to the imposition of a planning condition, and with the final suggested text that "… accordingly officers are satisfied that the matter is addressed".	consultee on the planning application) and partly at para 7.214 (the proposed means of addressing rain or firewater run-off, both in physical and legal terms). The final suggestion regarding officers' satisfaction is made subject to the specific comment "IOWC to confirm", signalling the need for an exercise of independent judgement by the author of the report before including this comment in the final version. Moreover, although the text of this para in the report was amended it was not amended in the way suggested by the Interested Party's comment.
6.	Sub-heading "Heritage considerations" and para 7.33	A comment against the sub-heading which read "As a starting point, the site is not within a Conservation Area nor does not [sic.] contain any Scheduled Ancient Monument, Listed Buildings or Designated Heritage Assets. This is important within the context of the NPPF, section xx. Any potential assets would be non-designated heritage assets". Proposed addition to the end of para 7.233, regarding a Grade II listed building c. 480 metres from the site: "… and no impact on its significance by reason of any contribution that setting may make to it".	The first part of the comment made against the sub-heading is factual, and the accuracy of it does not appear to be disputed by the Claimant. The second part of the comment – a conclusion that any assets would be non-designated heritage assets – is the conclusion under NPPF policy flowing logically from the facts as recited. The proposed addition at the end of para 7.233 appears to be duplicative, since para 7.233 already includes the officer's comment that "There would be no impact on the setting of this building as a result of the proposed development …".

121. As to the fifth and final consideration it is common ground that the fact a draft of the Report was made available exclusively to the Interested Party's team for comment was not revealed until after the decision was taken by the Council. As such, self-evidently there was no transparency about the opportunity offered to the Interested Party.

122. I now step back to consider the fairness of the decision-making process as a whole, focusing in particular on the events between publication of the final Report and the Council's decision.

123. As I have noted above, in the period between publication of the Report on 24th April 2025 and the Committee meeting itself on 29 April, the Claimant, in common with all third parties, had the opportunity to comment upon it. He did so extensively in three batches. The last batch of comments was made on the date of the Committee meeting itself. The application was then withdrawn from the agenda for that Committee meeting. In her witness statement Ms Wilkinson attributes the decision to defer the application directly to the Claimant, stating that "comments received from him resulted in the application being withdrawn from the April committee meeting".

124. The deferral of the application was until the July committee meeting. In the intervening period Ms Wilkinson and her colleagues took stock of the various comments received, and revised and updated the report before publishing it ahead of the new July committee date. One can see by comparing the April and July reports side by side that the Claimant's comments themselves resulted in several changes to the content. In her witness statement, for example, Ms Wilkinson explains, in relation to the July report, that:

> "due to the extensive number of comments and documents received from the claimant in respect of the application, a separate section of the third-party comments section was dedicated to summarising his comments alone. This amounted to nearly eight pages of the committee report"

125. Following publication of the July report there was a further opportunity for people to comment on it ahead of the meeting. Again, the Claimant commented extensively, including after publication of the update report on 8th July (the day of the reconvened Committee meeting). He also spoke at the meeting.

126. In her witness statement Ms Wilkinson commented that "[t]he extensive number of emails and comments received from one individual is unprecedented in any application considered by the local authority in the 22 years I have worked for them". That may well be correct so far as this Council is concerned, although in my experience it is not unprecedented elsewhere. But however accurate an assessment this may be of the level of objection on the application, I am in no doubt that Ms Wilkinson was entirely correct when she then commented "In my view, the claimant had every opportunity to comment meaningfully on the application …". This opportunity was embraced fully by the Claimant.

Conclusions on Ground 1(a)

127. In summary, viewed as a whole, I am satisfied that the Claimant cannot be said to have been unfairly prejudiced by being deprived of the opportunity to comment on a draft of

the Report. The purposes for which the Report was shared with the Interested Party were sensible and unobjectionable. That Ms Wilkinson exercised her independent professional judgement on the suggestions made by the Interested Party's team commenting on the draft Report can be seen both from how the comments were procured and how they were adopted by Ms Wilkinson. The comments which she accepted were incorporated in the Report (either wholly or in substance), the ones which she did not were discarded. The Claimant had ample opportunity himself to influence how the application was presented to the Committee, and he availed himself fully of those opportunities. The final version of the Report presented to the reconvened committee in July was influenced significantly by the Claimant's representations. He spoke at the Committee meeting and used that opportunity to reinforce the points he had already made in writing.

128. In my judgement, all of this means that the Claimant cannot realistically point to any prejudice he has suffered as a result of the exclusive opportunity afforded to the Interested Party to comment on the draft Report. I accept that the report to committee attracts a special status in the planning process (see Trashorfield et al.), but it does not eclipse all other considerations to the point of insignificance. The most that can be said by the Claimant here is that the Committee members were left unaware of the fact that the Report they were reading included some input from the Interested Party's team. But the comments that had been offered on the Report were properly sifted by the case officer, and only the ones she was comfortable with were included. Moreover those comments were themselves diluted by content which resulted directly from the Claimant's own representations. There was asymmetry in the opportunities afforded to the two parties, but the planning system does not set out to treat all parties equally and asymmetry favouring an applicant is embedded in the process as a whole.

129. I therefore see nothing unlawful in what transpired here.

130. For these reasons Ground 1(a) fails on the merits. It is therefore unnecessary for me to consider the parties' submissions regarding section 31(2A) and the court's exercise of discretion concerning relief.

Ground 1(b) – breach of the requirements of s100D of the 1972 Act

Claimant's submissions

131. Mr Parkinson submitted that both the track changed version of the draft Report and the subsequent email exchange with the Interested Party dated 11th April were "background papers" within the meaning of section 100D. The comments on the draft Report plainly informed the content of the final report, as did the 11th April email (which provided responses to questions asked by the case officer in relation to gaps in her reporting). Each document was therefore "relied on to a material extent in preparing the report" (per section 100D(5)(b)), with a good proportion of the content informing the evaluative passages in the Report (an "important part of the report" – per section 100D(5)(a)).

132. Despite these facts, and in breach of the requirements of section 100D(1), neither document was listed as a background paper in the Report nor were copies available on the Council's electronic planning register. Indeed Mr Parkinson observed that the two documents only came to light in response to a Freedom of Information Act request

produced by the Council many months after the request was made, and after the decision to grant planning permission had been taken.

133. Mr Parkinson added that the availability of background papers to a decision was an important part of the obligation to share information allowing the public to make representations ahead of the decision in a timely manner (R (Joicey) v Northumberland County Council [2015] PTSR 622). In this case, both parts of the identified material – the marked-up draft officer's report and the email of 11th April – were prepared by third parties, not by officers of the Council. That fact, submitted Mr Parkinson, was sufficient to distinguish the present case from that of R (Juden) v London Borough of Tower Hamlets [2021] EWHC 1368 (Admin) upon which the Defendant and the Interested Party relied.

134. The 11th April email could not, in any event, be properly described as a draft of the Report. It was a self-standing document which clearly informed the content of the eventual Report, because it answered questions raised by the officer in connection with it.

Council's submissions

135. For the Council, Mr Parker submitted that the wording of section 100D(5) made it clear that the decision as to what was a "background paper" was one for the officer. The witness statement from Ms Wilkinson explained that she considered at the time both the draft Report and the 11th April email in this context but concluded that neither of them fell within the meaning of the section.

136. Mr Parker also submitted that not every piece of correspondence with a local planning authority would fall within section 100D. Describing what he called "paradigmatic examples" of background papers he referred to the cases of Hale Bank Parish Council v Halton Borough Council [2019] EWHC 2677 (Admin) (advice from environmental consultants appointed by the Council to advise it on compliance with local plan policies), Joicey (referred to above, where the document in question was a noise assessment report commissioned by the applicant for planning permission and shared with the Council), and Tesco Stores Limited v Stockport Metropolitan Borough Council [2024] JPL 755 (expert advice commissioned by the local planning authority from independent retail specialists). In each of those cases the court rightly concluded that the documents in question were "background papers" falling within section 100D, but they are all very different from the two documents at issue here.

137. Despite Mr Parkinson's submissions, Mr Parker relied on the case of Juden as authority for the proposition that drafts of reports to Committee are not background papers for the purposes of section 100D.

138. Finally, Mr Parker submitted that even if I were satisfied that section 100D had been breached I was still bound to consider whether the Claimant had suffered material prejudice as a result of that breach (R (Worcestershire Acute Hospitals v Malvern Hills District Council [2024] JPL 265), and that on the facts the Claimant could not come close to showing this in view of the opportunities which he had, and took, to comment on the points highlighted by the Report before a decision was made.

Interested Party's submissions

139. For the Interested Party, Mr Turney adopted the submissions made by Mr Parker for the Council.

140. As regards the email of 11th April, Mr Turney added that the three points on which the Interested Party responded to requests for views did not provide any "matters … on which an important part of the report is based". Instead they merely offered either factual confirmation of information already before the Council or factual information which was uncontroversial.

Discussion and conclusions

141. The purpose behind the legislative provisions in section 100D was described by Fordham J in R (Kinsey) v London Borough of Lewisham [2022] EWHC 1774 (Admin). He said this, at [37], referring in turn to the dicta of Lang J in her judgment in an earlier chapter in the same litigation:

> "Applying the principles identified in the case-law described by Lang J (First Judgment §§101-103): this approach to access to background papers promotes the statutory purpose of allowing the public to be informed; it allows effective informed participation through written representations in advance of the meeting; it allows the preparation of oral representations at a meeting; breach of the statutory duty is significant as undermining the purpose of the legal obligation conferring the right to know which puts members of the public in the position of making sensible contributions to democratic decision-making; and the failure is a significant one which in the circumstances of the present case has a vitiating consequence and warrants the quashing of the decision made at the meeting"

142. This case focuses on two pieces of information related to the officer's report to Committee: a mark-up of an earlier draft of the Report, and an exchange of emails in which the officer requested (and the Interested Party provided) additional information.

143. It must be recognised that there are multiple data points which all inform the content of a report to Committee. Kinsey is authority for the proposition that not all of these will constitute "background papers" within the meaning of section 100D. As Fordham J held (at [40]):

> "… it would have been very easy indeed for Parliament – in the design of section 100D(5) – to have prescribed that a "background paper" includes "any document whose contents are discussed in the report", or "any document on whose contents an officer has relied in preparing the report". Parliament did not do so. The phrase "relied on… in preparing the report" was used by Parliament. But that is within the second precondition in section 100D(5)(b) : documents which "have … been relied on to a material extent in preparing the report". That brings in "to a material extent". And reliance, to a material extent, is not enough. It is also necessary ("and") that the documents – relating to the subject matter of the report – are documents which "disclose any facts or matters on which …the report or an important part of the report is based" (section 100D(5)(a)). Added to all of this is the fact that Parliament spelled out that these tests involved judgment and appreciation. It is for

> the "proper officer" to form an "opinion" on each of the limbs (a) and (b). It is very clear from the structure of the statutory duty that the fact that a document is described in a report, or summarised (gisted) for the benefit of decision-making members of a committee, or relied on, does not of itself trigger the statutory duty"

144. In this case I have witness evidence from Ms Wilkinson that she did consider at the time whether either document in issue in this case was a "background document" needing to be listed as such, but she concluded that it did not.

145. Having regard to the guidance in the cases of Ermakov and UTAG, I am satisfied that it is appropriate to have regard to that part of the witness statement. The evidence is consistent with the contemporaneous records, which do not gainsay the account which Ms Wilkinson gives.

146. Mr Parkinson complains that there is no contemporaneous evidence supporting the account which Ms Wilkinson now gives, and that the documentary records are silent on the question of whether these two pieces of information were considered at the time against the section 100D duties. But Mr Parkinson can point to no subsidiary duty on Ms Wilkinson to record her thinking at the time, nor do I think it appropriate to imply one; it would be wholly impractical to expect an officer to traverse each and every document mentioned or drawn upon in a report to committee and make a written record of whether it was considered to be a "background paper" or not. The task of preparing a comprehensive report on a complex set of facts is burdensome enough without implying additional administrative responsibilities on which the statutory code is silent.

147. Having accepted, as I do, that Ms Wilkinson discharged the duty of consideration imposed upon her by section 100D, the Claimant's only place of refuge would be to show that the way she exercised her discretion was irrational.

148. Can that complaint be made out? The two documents in issue here are different in character and so it is appropriate to appraise them separately against a complaint of irrationality.

Comments on the draft Report

149. I deal firstly with the mark-up of the draft Report.

150. The parties were right to alight upon the case of Juden because it comments specifically on draft reports. In Juden, Sir Duncan Ouseley said this (at [48]-[50]):

> "48. Mr Harwood accepted that a draft of the Committee Report itself did not fall within the scope of s100D(5), although, at first blush, a draft of a report, could come within the statutory wording as disclosing facts or matters on which an important part of the final report is based and has been relied on to a material extent. Mr Harwood was right to accept that the provision should not be construed in that way. The drafts of the Report itself are not what the subsection is aimed at. The subsection is aimed at the separate papers on which the authors of the Committee Report have drawn to a significant extent or in a significant way, and not those which become part, varied or not, of the Report itself.

> 49. It is not what the section expressly provides for, and it would be contrary to the sensible operation of the decision-making processes in local authorities if draft reports at whatever stage were to be made publicly available. If that really were the intention of Parliament, I would have expected so startling a result to be provided for expressly. Nor could it add to the achievement of the purpose of the section, which is to enable Members and the public to see what material the report is based on and on which the officers have relied, rather than how their thinking evolved, and did so collaboratively. Indeed it could have a damaging effect on what officers were prepared to commit to paper when jointly preparing draft parts of a Report for later discussion. The language of s100D(5) does not fit the inclusion of a draft of a report as the source of facts or matters upon which the report is based or relied on in preparing the report. Nor does the purpose of the section, in terms of public and member knowledge of the basis for recommendations and decisions, mean that it falls within the subsection. The possible Member interest in or use of a draft document to test the evolution of views does not bring it within the purpose of the subsection.
>
> 50. Mr Harwood sought to distinguish a draft of a part of the Report prepared by the nominal author or presenter, from a draft of a part prepared by another officer, whether or not one with separate expertise. I can see no principled or textual basis for that distinction. The description of a paper as "stand alone" rather than "final" gets closer to what the officer ought to be looking for in reaching his opinion under s100D(5)"

151. Both Mr Parker and Mr Turney submitted that <u>Juden</u> is both the beginning and the end of any complaint about a failure to treat the marked-up draft Report as a background paper. Mr Parkinson submitted that this was not so, and that the identity of the authors of the comments in this case – members of the Interested Party's professional team – is sufficient to distinguish <u>Juden</u> on the facts.

152. I cannot accept Mr Parkinson's submission. Whilst it is correct that at [34]-[35] of <u>Juden</u> Sir Duncan Ouseley was commenting on a situation where the document in question was prepared as a collaboration between the author of the report and a fellow local authority officer, I see nothing in the judgment to suggest that his comments are any less applicable when the comments are drafted by a third party. Indeed, in the same way that he saw no "principled or textual basis" for applying section 100D when the part of the draft report was written by a different local authority officer from the main author, neither can I see any basis for applying it where the comments come not from an officer at all but from the applicant for planning permission.

153. The document commented upon by the Interested Party is no less a draft report just because the comments came from outside the body of local authority officers. The comments made by the Judge at the end of [48], that "The drafts of the Report itself are not what the subsection is aimed at. The subsection is aimed at the separate papers on which the authors of the Committee Report have drawn to a significant extent or in a significant way, and not those which become part, varied or not, of the Report itself", are no less applicable on the facts of the present case.

154. In my judgement, Mr Parkinson's submissions about the draft Report also fall down when one notes that section 100D(5) has two limbs, both of which must be satisfied. It

would not be enough merely to show that the report "disclose[s] any facts or matters on which, in the opinion of the proper officer, the report or an important part of the report is based". He would also have to show that they had been "relied on to a material extent in preparing the report".

155. In applying that second criterion, as it seems to me, one must step back and consider the Report as a whole. In this instance, as we have seen, most of the comments were points of confirmation or minor clarification reinforcing facts of which the author of the Report was already aware. They exhibit no material change of direction or emphasis from the draft that she had prepared. I consider that Ms Wilkinson's evidence to the following effect (in paragraph 15 of her witness statement) to be fair comment:

> "In respect of the comments on the draft report and the 11th April 2025 email, they are in my view clarificatory only. They do not represent new information or material which had not already been raised through submitted comments"

156. I note that this statement comments on the application of the statutory criteria in hindsight, and is not being offered as evidence of Ms Wilkinson's thought process at the time the Report was being finalised, but it does nonetheless chime with the conclusion I have reached myself on the offered content and the degree of influence it had on the final version of the Report.

157. In the particular context being discussed, I consider that the use of the term "relied on" in the statutory language implies something material which the author of the Report had not already alighted upon for themselves. Confirmation and reinforcement of a point already established by the author does not, it seems to me, fit within the intent of the sub-section.

158. For these reasons I reject the submission for the Claimant that the marked-up draft of the Report should have been listed as a background paper.

The 11th April email

159. I turn next to consider the email of 11th April.

160. It is clear from how the email correspondence was initiated by Ms Wilkinson that the questions she was asking at that time were prompted by her drafting the Report and realising that there were some gaps in the information. After having informed Mr Murphy for the Interested Party that she intended to supplement the section of the Report addressing the comments of the Forestry Commission (without inviting any comment on that fact), and asking whether the Interested Party was willing to change its approach to breaking the fence line to respond to comments from Natural England, Ms Wilkinson then said in terms that:

> "The only other matters that concern me, in respect of our response to third party comments relate to the following points, which are not yet addressed in the draft report"

161. She then listed the points in question as being "prolonged glare from PV panels can increase the temperature of the surrounding microclimate, heat and cooling islands",

"risk of cathode interference with BESS and IP pipeline valves", and "kinetic energy associated with pluvial flows". Mr Murphy responded with his thoughts on these points by annotating the original email.

162. The first of the two criteria in section 100D(5) provides that the 11th April email must be a "fact or matter on which … the report of an important part of the report is based".

163. In his skeleton argument for the Interested Party, Mr Turney described the email exchange as being "simply dialogue on the application". I agree with this characterisation. The information is typical of points of clarification routinely sought by case officers from an applicant during the course of considering a planning application. The Interested Party was being afforded the opportunity to clarify its position on these points of detail. Doubtless there will have been several instances throughout the Council's lengthy consideration when clarification on the application was requested. The fact that this request for clarification happened to come at a time when we know the Report was being compiled, and was prompted by the case officer drafting the Report and thereby realising that there were gaps needing to be filled, does not change the proper characterisation of the exchange. I see nothing in the statutory language to support the view that such routine exchanges between an applicant and a case officer constitute background papers, no matter when in the process they happen to be initiated. Such a conclusion would be – to borrow a word used by Sir Duncan Ouseley in Juden – "startling" indeed.

164. It follows from the above that the 11th April email does not satisfy the first of the two criteria in section 100D(5).

165. Although it is therefore unnecessary for me to go there, for the reasons I have given above Mr Parkinson faces a similarly insurmountable hurdle in showing that the content of the 11th April email met the second criterion in section 100D(5) - i.e. that it was "relied on to a material extent" by Ms Wilkinson.

166. For these reasons I conclude that the 11th April email was not a "background paper" as contemplated by section 100D.

Conclusions on Ground 1(b)

167. I have concluded that neither document was a "background paper" within the meaning of section 100D. For these reasons Ground 1(b) fails. It is unnecessary for me to consider questions of prejudice or of the court's discretion to withhold substantive relief.

Conclusions

168. For the reasons I have given above, Grounds 1(a) and 1(b) are refused. This claim therefore fails.

169. I now invite the parties to agree an appropriate form of Order consequent upon my conclusions above, failing which I will give directions for filing written submissions on any unagreed matters and will formally adjourn the hearing pending my decision on those submissions.