INTRODUCTION

Jonathan Darby

Welcome to the latest edition of our Planning, Environment and Property newsletter. We hope that you are all well.

This week's offering includes articles from Katherine Apps and Gethin Thomas (on climate change and pensions); John Pugh-Smith and Daniel Kozelko (on Equalities Impact Assessments and the pitfalls of not undertaking them conscientiously); and – in a week when Zoom etiquette came to the forefront of everyone's minds – a very topical article from John (on lessons to be learned from 'that' Parish Council Meeting).

Contents

Series 3 of our webinar series continues apace, with Episode 2 scheduled for Tuesday 23rd February, between 2.30pm and 3.30pm. The episode will focus on leisure, hospitality and holidays after the Covid Lockdowns, looking at the planning provisions which may help or hinder the leisure, hospitality and holiday sectors as they look to recover from Covid. It will consider caravan and camping sites; leisure and tourist attractions; holiday lets and AirBnB; the hospitality sector, outdoor events and street licensing. The speakers are Richard Harwood QC; Celina Colquhoun; and Nick Laister (Operational Director, RPS).

In other news, we were delighted to announce on 26 January that Juan Lopez joined Chambers. Juan joins from Francis Taylor Building with a highly established planning, commercial and public law practice. Lindsay Scott, Chief Executive of 39 Essex Chambers, says "We are thrilled to welcome Juan. His exceptional experience is a perfect fit for 39 Essex Chambers and Juan will be an excellent addition to our existing team, as well as furthering Chambers' standout ability to offer our clients a full, cross-practice area service". For the full details and to see Juan's profile, please click here.

CLIMATE CHANGE AND PENSIONS

Katherine Apps and Gethin Thomas

On 27 January 2021 the Government published its long awaited response to the consultation, *'Taking action on climate risk: improving governance and reporting by occupational pension schemes'*, which ran from 26 August 2020 to 7 October 2020 in parallel to the final passage of the pension Scheme Bill, passed through Parliament on 19 January 2021.

In earlier drafts of the Bill it had been envisaged that trustees and scheme manager's substantive fiduciary and investment duties would change, requiring investment strategies to address climate change. However, during its passage, the nature of the duty changed, instead creating a power to make regulations addressing governance imposing duties to publish information.

The Government has now published two sets of draft regulations implementing the proposals, and launched a further consultation on the draft legislation and draft statutory guidance that would enact the policy proposals. This consultation closes on 10 March 2021.

The two draft statutory instruments are:

a) The Occupational Pension Schemes (Climate Change Governance and Reporting) Regulations 2021, ("Climate Change Regs ") and;

b) The Occupational Pension Schemes (Climate Change Governance and Reporting) (Miscellaneous Provisions and Amendments) Regulations 2021 ("Misc Regs").

The Government has explained that the long-term objective of the climate change risk powers set out in the Pensions Scheme Bill is to *'to protect members' benefits against the physical risks of climate change and ensure that scheme trustees and managers are properly taking into account the risks and opportunities associated with the transition to a lower-carbon economy'*.

The proposed implementation timetable of the new regulations is speedy (for the pensions context). The first duties they impose will apply from 1 October 2021 in relation to "earmarked schemes" with relevant assets equal to or exceeding £5bn (Climate Change regs 2(1)-(2)).

In summary, four broad categories of climate change governance requirements are proposed to be imposed under part 1 to the Schedule:

a) **Governance:** Trustees must establish and maintain oversight of the climate-related risks and opportunities which are relevant to the scheme. In particular, trustees must establish and maintain processes for the purpose of

satisfying themselves that any person who: (i) undertakes governance activities of the scheme (other than as a trustee) or (ii) advises or assists the trustees as to governance activities (other than a legal advisor), takes adequate steps to identify, assess and manage climate-related risks and opportunities which are relevant to the scheme, in respect of which they are undertaking, advising or assisting.

b) **Strategy:** Trustees must identify and assess, on an ongoing basis, climate-related risks and opportunities which they consider will have an effect over the short term, medium term and long term on the scheme's investment strategy and where the scheme has a funding strategy, the funding strategy. Notably, trustees must, as far as they are able, undertake scenario modelling to analyse at least the impact of certain increases in global average temperature on the scheme.

c) **Risk management:** Trustees must establish and maintain processes for the purpose of enabling them to identify, assess and manage climate-related risks which are relevant to the scheme. Trustees are required to integrate the management of those risks into their overall risk management of the scheme.

d) **Metrics and targets:** Trustees must calculate a number of metrics in respect of the scheme's impact on the climate, set targets based on those metrics, and assess the performance of the schemes against those targets. These metrics include: (i) the total greenhouse gas emissions of the scheme's assets, and (ii) the total carbon dioxide emissions per unit of currency invested by the scheme.

'Climate-related risks' are not currently specifically defined in the draft regulations.

The trustees of a trust scheme to which the Occupational Pension Schemes (Climate Change Governance and Reporting) Regulations 2021 apply would be under a duty to produce a climate change report each scheme year, which contains the information specified in Part 2 of the schedule. In particular, it must describe how the trustees have complied with the governance requirements prescribed by the regulations. The report must be published on a publicly available website, free of charge. Schemes will have seven calendar months from the scheme year end date to do so (Climate Change Regs reg 3, sch part 2).

The Pensions Regulator would have enforcement powers to ensure compliance with the governance requirements which would be imposed by the regulations.

- First, the Pensions Regulator may issue a compliance notice if it is of the opinion that: (i) a person has not complied with those requirements, or moreover, (ii) a third party was responsible for another person's non-compliance. The compliance notice would direct the person to take, or refrain from taking, certain steps, with a view to remedying the non-compliance, within a certain period of time (Climate Change Regs reg 4).
- Secondly, the Pensions Regulator may issue a penalty notice. It may do so either where they are of the opinion that the person has: (i) failed to comply with a compliance notice, or (ii) contravened a provision under Part 2 of, or the Schedule to, the Regulations. Equally, the Pensions Regulator must issue a penalty notice where a person has failed to publish a climate change report, on a publicly available website free of charge. The amount of the penalty must not exceed £5,000 if imposed against an individual, or £50,000 against a corporate body. A penalty notice must be issued to all the trustees of the scheme and specify their joint and several liability for the penalty. Any penalty required by a penalty notice is recoverable by the Pensions Regulator. Penalty notices are subject first to internal review then appeal to the FTT (and occasionally directly to the UT).

The scope of the regulations raises a number of unresolved questions, in particular:

1) The Supreme Court has recently emphasised in *R (on the application of Palestine Solidarity*

Campaign Ltd) v Secretary of State for Housing, Communities and Local Government [2020] UKSC 16 that trustees have primacy in investment decisions, and it is not for the government to direct trustees to sell or buy certain assets. The Government has stated that its view is that these proposals do not create any expectation that schemes must divest or invest in a given way. Rather, it contends that the climate change risk powers in the Pension Schemes Bill can only be used to secure that there is effective governance of occupational pension schemes with respect to the effects of climate change and to require associated disclosures. However, how the regulations will, in practice, interrelate with the fundamental fiduciary duty of the managers and trustees will remain to be seen. Although the Pension Schemes Bill was amended to remove a provision which expressly altered that fiduciary duty – will these new changes, which are focussed on "how" not "what " make it more likely that certain investments will no longer be held (eg fossil fuels)?

2) Might the new publicity and reporting requirements lead to greater challenges from active or deferred members or unions? Might environmental charities, or interest groups start to use these powers and duties as a basis for commercial pressure, or legal challenges?

3) Pursuant to the Pensions Scheme Bill, the Pensions Regulator will be equipped with a more coherent set of investigative powers, as well as a power to impose a hefty fine where a person has knowingly or recklessly provided false or misleading information to it. The draft regulations provides a new front on which the Pensions Regulator will be required to scrutinise the management of schemes. Might these open up a new front of challenges to the regulator?

Katherine Apps and Gethin Thomas regularly act in pensions matters.

EQUALITIES IMPACT ASSESSMENTS AND THE PITFALLS OF NOT UNDERTAKING THEM CONSCIENTIOUSLY

John Pugh-Smith and Daniel Kozelko

Introduction

Insufficient Equalities Impact Assessments ("EqIAs"), as a stone that can fell a giant, are currently in the news. On 20th January 2021, in the case of *R (United Trade Action Group Ltd & Ors v Transport for London & Mayor of London* [2021] EWHC 72 (Admin) ("the UTAG case") the High Court upheld judicial review challenges brought by the London taxi trade against Transport for London's (TfL's) *Streetspace* Plan, its Guidance and a specific scheme on Bishopsgate (A10). Whilst TfL has now lodged an appeal, and seeks an expedited hearing, for now, the judgment of Mrs Justice Lang is essential reading for all concerned with EqIAs ; for it highlights the fundamental problems that arise when proposals, not just street schemes, engage the requirements of Section 149 of the Equalities Act 2010 and the Public Sector Equality Duty ("PSED"). The *UTAG* case also follows another recent High Court judgment on 11th January 2021, in *R (Fraser) v Shropshire Council* [2021] EWHC 31 (Admin) on the same subject-matter though with a happier outcome. This article looks at the issue of EqIAs in the planning context, as well as both cases, and seeks to make some suggestions as to the resulting legal pitfalls can, hopefully, be prevented.

The PSED obligation

Local authorities are under a duty not to discriminate, as both service providers and exercisers of public function for purposes of the Equality Act 2010.[1] Disability discrimination, arises if, say, a disabled person is treated unfavourably because of something arising from their disability (irrespective of whether the

1 S.29(1) and (6) Equality Act 2010.

treatment is because of particular prejudice towards the disabled). Indirect discrimination occurs when a neutral policy or practice puts people with a protected characteristic at a particular disadvantage compared to those who do not have it. As with disability discrimination but unlike direct discrimination, indirect discrimination is susceptible to a proportionality justification, hence the particular significance of the EqIA in the scheme development and decision-making processes.

In addition to this substantive duty not to discriminate in the exercise of its functions, local authorities are subject to the public sector equality duty ("PSED"),[2] w hich imposes a procedural requirement when the authority exercises its functions, including those pertaining to its own meetings, to have due regard to three aims (or arms), namely, the need to:

- Eliminate unlawful discrimination, harassment and victimisation and other conduct prohibited by the 2010 Act.
- Advance equality of opportunity between people who share a protected characteristic and those who do not.
- Foster good relations between people who share a protected characteristic and those who do not, including tackling prejudice and promoting understanding.[3]

The 2010 Act explains that 'having due regard for advancing equality' involves:

- Removing or minimising disadvantages suffered by people due to their protected characteristics.
- Taking steps to meet the needs of people from protected groups where these are different from the needs of other people, including steps to take account of disabled persons' disabilities.
- Encouraging people from protected groups to participate in public life or in other activities where their participation is disproportionately low.[4]

The Act also states that meeting different needs involves taking steps to take account of disabled people's disabilities. It describes fostering good relations as tackling prejudice and promoting understanding between people from different groups. It states that compliance with the duty may involve treating some people more favourably than others.[5]

Accordingly, Section 149 requires a local authority to have due regard to the need to, *inter alia,* eliminate discrimination and advance equality of opportunity between persons who share a protected characteristic and persons who do not share it. Section 149(3) provides specificity to advancing equality of opportunity, including minimising disadvantage suffered by that person, and encouraging them to participate in public life. In *R (Law Centres Federation Limited t/a Law Centres Network) v Lord Chancellor* [2018] EWHC 1588 (Admin), Mrs Justice Andrews considered the requirements of s.149 as follows:[6]

> *The duty is personal to the decision maker, who must consciously direct his or her mind to the obligations; the exercise is a matter of substance which must be undertaken with rigour, so that there is a proper and conscious focus on the statutory criteria and proper appreciation of the potential impact of the decision on equality objectives and the desirability of promoting them. Whilst there is no obligation to carry out an EIA, if such an assessment is not carried out it may be more difficult to demonstrate compliance with the duty. On the other hand, the mere fact that an EIA has been carried out will not necessarily suffice to demonstrate compliance.*

2 The general equality duty is set out in s.149 of the 2010 Act

3 S.149(1) Equality Act 2010.

4 S.149(3) and (4) Equality Act 2010.

5 See further Equality and Human Right Commission website: https://www.equalityhumanrights.com/en/corporate-reporting/public-sector-equality-duty

6 Para. 96

As to the proper approach to be taken by the court in considering compliance with the duty, this was considered by Lord Justice Elias in *R (Hurley) v Secretary of State for Business Innovation and Skills* [2012] EWHC 201 (Admin) at para 78:

> *The concept of "due regard" requires the court to ensure that there has been a proper and conscientious focus on the statutory criteria, but if that is done, the court cannot interfere with the decision simply because it would have given greater weight to the equality implications of the decision than did the decision maker. In short, the decision maker must be clear precisely what the equality implications are when he puts them in the balance, and he must recognise the desirability of achieving them, but ultimately it is for him to decide what weight they should be given in the light of all relevant factors.*

By way of further judicial consideration, the case of *Bracking v Secretary of State* [2013] EWCA Civ 1345[7] now sets out the relevant principles, including:

- that the duty must be fulfilled before and at the time when a particular policy is being considered;
- that it must be "exercised in substance, with rigour, and with an open mind" (it is not a question of "ticking boxes);
- that the duty is non-delegable; that it is a continuing one; and
- that it involves a duty of inquiry.

The *Bracking* principles were approved by Lord Neuberger in *Hotack v Southwark* LBC [2015] UKSC 30, who added:

> *"75. As was made clear in a passage quoted in **Bracking**, the duty "must be exercised in substance, with rigour, and with an open mind" (per Aikens LJ in R (Brown) v Secretary of State for Work and Pensions [2008] EWHC 3158 (Admin), [2009] PTSR 1506, para 92. And, as Elias LJ said in Hurley and Moore, it is or the decision-maker to determine how much weight to give to the duty: the court simply has to be satisfied that "there has been rigorous consideration of the duty". Provided that there has been "a proper and conscientious focus on the statutory criteria", he said that "the court cannot interfere … simply because it would have given greater weight to the equality implications of the decision"."* [Emphasis added]

However, a necessary gloss was subsequently added by the Court of Appeal in *R (Ward) v London Borough of Hillingdon* [2019] EWCA Civ 692, that even where express reference is made to the duty that is not, of itself, sufficient to demonstrate compliance. There, a failure to discharge the duty of inquiry led to a breach of the duty.[8]

In essence, an Equalities Impact Assessment ("EqIA") is the procedural exercise by which the PSED is assessed in the particular context in which it is engaged. Governmental guidance [9] describes the EqIA as *"a systematic and evidence-based tool, which enables us to consider the likely impact of work on different groups of people."* Accordingly, such assessments need to be based on good evidence which includes listening to the views of the people who are likely to be affected.

The Previous Planning Cases

In the planning context, and, given the judicial nuances set out above, we take up the timeline [10] with *R (Buckley) v Bath and North East Somerset Council* [2018] EWHC 1551 (Admin) There, BANES had granted outline planning permission for the redevelopment of a housing estate comprising the demolition of up to 542 homes and the provision of up to 700 new homes, resulting in the loss of 204 affordable houses. The developer was a registered social housing provider which owned

7 Per McCombe LJ @ para.26

8 See also *R (JM) v Isle of Wight Council* [2011] EWHC 2911 (Admin), in which Lang J. held that the council had not gathered sufficient information to enable it to discharge the PSED

9 https://www.gov.uk/government/publications/equality-impact-assessments-2011

10 See earlier cases cited at Para. P70.37 of the Planning Encyclopaedia

the majority of the properties proposed to be demolished. The claimant, a long-term resident of the estate, sought judicial review of the decision Lewis J held that BANES had failed to comply with its s.149 duty. The fact that the application was for outline permission and that certain reserved matters were to be considered at a later stage in the process did not prevent the duty applying; that in deciding whether to grant the outline planning permission BANES had been obliged to have due regard to the impact of the demolition of existing homes and adapted dwellings on elderly and disabled residents but it had failed to do so.

In *R (Lakenheath Parish Council) v Suffolk County Council* [2019] EWHC 978 (Admin) Permission had been granted for 220 new homes in the village, and there had been a resolution to grant permission for a lot more. As the new housing was going to increase, substantially, the demand for school places, the County Council had granted permission for a new school with 420 places. The Parish Council had opposed the application, arguing that it was not the best site for the school as the village was next to a USAF airfield, that although the noise level inside the school would meet the relevant guidance, overflying aircraft would cause the exterior areas to suffer noise above the recommended level and teaching there would be affected. Experts had carried out noise tests at the site. The planning officer had listed seven potential alternative sites for the school and gave reasons why in each case it was not as suitable as the subject site. Although the officer's report had not mentioned the PSED in terms. HHJ Gore QC (sitting as a Deputy High Court Judge) rejected the Parish Council's contention that the County Council had failed to have regard to the impact of its decision on children with disabilities. He held that the requirements of the PSED had been fulfilled in substance, and that the officer's report had shown consideration of the need to encourage participation in education by those with protected characteristics.

Nevertheless, an important reminder was given by Mr Justice Swift in the case of *R (Williams) v Caerphilly County BC* [2019] EWHC 1618 (Admin). These judicial review proceedings concerned CCBC's sporting and leisure strategy. At para. 36 the Judge records that the requirement to have s.149 consideration for PSED is stronger than a standard "relevant considerations" which requires "focussed consideration". At para. 37 he goes on to hold:

> *"The public sector equality duty is directed to the decision-making process. The premise of the duty is that process is important because it is capable of affecting substantive outcomes. In the present case there is nothing that gives me sufficient confidence that compliance with the public sector equality duty would be without purpose."*

Accordingly, the Judge upheld the challenge on this ground. The subsequent appeal [2020] EWCA Civ 296 by CCBC was dismissed but for other reasons.

The UTAG case

Five grounds of challenge were brought of which one[11] dealt with the PSED aspect. In her lengthy judgment Mrs Justice Lang reminded that there is no statutory duty to undertake an EqIA, though it is generally recognised as good practice, as it encourages a structured assessment to be made. The manner in which the duty is undertaken will depend upon the particular context, and the nature of the function which is being performed.[12] Here, she held that TfL had not had proper regard for the public sector equality duty (PSED). Although an EqIA had been completed for the Bishopsgate scheme, she found that:

> *…the EqIA did not meet the required standard of a "rigorous" and "conscientious" assessment, conducted with an open mind. The mitigation entries (save for impact 13), and the implementation/explanation entries were perfunctory or non-existent and failed to*

11 In making the Plan and Guidance and the A10 Order, TfL and the Mayor failed to have proper regard to the public sector equality duty, pursuant to section 149 of the Equalities Act 2010 ("the 2010 Act").

12 Para. 185

grapple with the serious negative impacts and high level of residual risks which emerged from the assessment. The residual risk assessment was inconsistent and irrationally understated the risks. Most worryingly of all, the EqIA read as if its purpose was to justify the decision already taken.[13]

For the reasons set out above, the Judge concluded that the Mayor and TfL had not have proper regard to the PSED duty in making the Plan, the Guidance and the A10 Order. Furthermore, she held that the decision of the Mayor to pursue the *Streetspace* programme was irrational. Given the importance of this finding as well as the topicality of the subject-matter we quote the following passages:

266. *In my judgment, the flaws identified were symptomatic of an ill-considered response which sought to take advantage of the pandemic to push through, on an emergency basis without consultation, "radical changes", "plans to transform parts of central London into one of the largest car-free zones in any capital city in the world", and to "rapidly repurpose London's streets to serve an unprecedented demand for walking and cycling in a major new strategic shift" (Mayor's statements on 6 and 15 May 2020) …*

267. *The scale and ambition of the proposals, and the manner in which they were described, strongly suggest that the Mayor and TfL intended that these schemes would become permanent, once the temporary orders expired. However, there is no evidence to suggest that there will be a permanent pandemic requiring continuation of the extreme measures introduced by the Government in 2020.*

274. *In my judgment, it was both unfair and irrational to introduce such extreme measures, if it was not necessary to do so, when they impacted so adversely on certain sections of the public. The impact on the elderly and disabled who rely heavily on the door-to-door service provided by taxis is described at paragraphs 130 – 136 above. See also the adverse impacts identified in the EqIA (paragraphs 189-192 above). Taxis are a form of public transport. Travellers may wish to travel by taxi for legitimate reasons. Taxis have been valued by the NHS and vulnerable groups during the pandemic because they are safer than trains, buses and private hire vehicles …*

275. *I conclude that the decision-making processes for the Plan, Guidance and A10 Order were seriously flawed, and the decisions were not a rational response to the issues which arose as a result of the COVID-19 pandemic.*

Accordingly, the Judge concluded that quashing orders rather than declarations were appropriate because of the nature and extent of the unlawfulness which she had identified, which affects not only taxi drivers, but also their passengers. She remarked that The Plan, the Guidance and the A10 Order all need to be re-considered and substantially amended in the light of her judgment. To reduce disruption, she directed that TfL and the Mayor could turn their minds to this task now, on a provisional basis, as there would be a stay and a delay whilst they pursue their appeal. If the appeal were unsuccessful, then they could apply for further time (if required) to finalise the proposed revised Plan, Guidance and Order before the quashing orders took effect.

The *Shropshire* case

This provides a useful example of the way in which the PSED should be approached in the context of development management decision-making. Paula Fraser challenged the lawfulness of two separate grants of planning permission by Shropshire Council to provide extra care residential development using a property known as Pauls Moss House. While she was not opposed to the principle of redevelopment of the site to provide such specialist accommodation. She believed the scheme failed to provide adequate open space for its intended residents. Despite the relative simplicity of this concern, there were than five grounds of challenge advanced against each decision, of which Ground 4 raised direct or indirect discrimination on grounds of age or disability in respect of open space, and, Ground 5

13 Para. 193

a failure to have due regard to the PSED under the 2010 Act. Dismissing both challenges, Mr James Strachan QC, sitting as a Deputy High Court Judge remarks in relation to Ground 5 as follows:

195. *Under this ground, the Claimant submits that the Council failed to carry out its PSED and the duty is not satisfied simply by stating that the duty has been applied, as it is a duty of substance rather than form. In summary, the Claimant submits the Council did not undertake any assessment of (a) the particular needs of people with protected characteristics of age and/or disability for a specific quantity of open space; or (b) the harm that would be caused by not providing that quantity.*

196. *The Defendant and Interested Party submitted that the PSED did not apply in respect of the prospective residents of the proposed scheme because they were not being considered on account of their age or disability, but as individuals with extra care needs. They further submitted that the PSED was considered in any event.*

197. *As for Ground 4, I have reached the firm conclusion that this ground of challenge must be rejected on the facts in light of the consideration of the PSED by the Defendant evidenced by OR3 and the Additional Representation document.*

198. *I do not accept the Defendant and Interested Party's submission that the PSED was simply not engaged at all here because the Defendant was considering a scheme for extra care, and residents were being considered as individuals with extra care needs rather than on account of their age and disability. The fact, for example, that eligibility for extra care residential accommodation includes a minimum age limit itself makes this a difficult submission to pursue. But more fundamentally, the statutory terms of the PSED do not limit its application in the way suggested. It is a duty which (amongst other things) required the Defendant to have regard to the need to advance quality of opportunity between older/disabled people and persons who do not have those protected characteristics, to foster good relations between persons who are disabled/older and persons who do not have those protected characteristics, and to encourage persons who share a relevant protected characteristic to participate in public life.*

199. *….. In any event, the PSED is a general duty that applies to the Defendant when carrying out its functions. It is not a duty which directs a particular outcome, but it is a duty which needs to be performed. I therefore reject the submission that the PSED was not engaged at all in the determination of the Third Application.*

200. *On the facts, however, I am satisfied that the duty was performed and performed in the way required by in accordance with the principles derived by the Claimant from Bracking (above), even though it was incorrect to suggest that it needed to be performed only out of "an abundance of caution". In paragraph 6.4.9 of OR3 the members were directed specifically to the terms of the duty itself. As I have already said, the analysis of the quality of the open space provided in fact identified benefits that are relevant to the considerations required under the PSED, such as fostering good relations and promoting integration in public life.*

Accordingly, a pragmatic and sensible outcome resulted even if Shropshire Council's approach to the PSED aspect had been, justifiably open to some though not fundamental criticism.

Conclusions

From this review we would suggest that the following key lessons can be derived. First, is the inherent danger when an authority becomes "fixated" on a specific initiative to the exclusion of the general PSED obligation or its tokenist consideration. In *Buckley* it was the problem of displacement of residents. In *UTAG* it was the fixation on Covid-19 protection measures in a way which implied that nothing else needed to be considered. The suggestion seems to be that, as the Pandemic is such an existential threat, nothing else could really matter in that analysis. However, given that it was Guidance that was being published by the Mayor last May could anything more have been sensibly done at that stage, or, should it be left to fuller assessment at the stage of specific schemes?

So, secondly, is the importance of ensuring that EqIAs are an integral part of scheme development,

no matter how pressing implementation timescales may be. Moreover, EqIAs should be genuinely used to inform the design process based on evidence-based consideration of impacts. This requires that all design decisions taken (and the reasons and evidence behind them) are documented contemporaneously, making it clear how the needs of all modes and users have been considered and how relevant policies have been taken into account.

Thirdly, is how the determining authority approaches the scheme itself and its PSED implications. In both the *Lakenheath* and *Shopshire* cases the judges were able to make robust, common sense findings because the PSED had been practically and demonstrably embraced, in contrast with *Williams* and *UTAG*. It is not a duty which directs a particular outcome. Rather, it is a duty which needs to be seen to have been performed.

Finally, legal advisers should be swift to ensure that officer reports sufficiently address how the PSED has been discharged in the particular circumstances. It is not a "tick-box" exercise or discharged simply because express reference has been s made to the duty. Rather, there must be material showing that the duty of inquiry has been fulfilled.

It is to be hoped that if these lessons are learned and applied then not only will the PSED have been discharged but also the quality of the decision-making process can be placed beyond justifiable scrutiny. Otherwise, the outcome can be somewhat surprising, even for London's taxi drivers.

John Pugh-Smith and Daniel Kozelko are currently jointly engaged in a High Court challenge to the outworkings of the Streetspace programme within the London Borough of Hounslow and its effects on Chiswick High Road.

LESSONS TO BE LEARNED FROM 'THAT' PARISH COUNCIL MEETING

John Pugh-Smith

Introduction

Described in the media as the worse ever "Zoom meeting" the release of the footage on 4th February 2021 of the embattled Handford Parish Council's deliberations on 10th December 2020 introduced a moment of bizarre "Lockdown laughter", a claimed global sensation,[14] as well as a "new normal" for how bad it can get. The attention on the common sense and perseverance of the "moderator", Jackie Weaver, also introduced a new, quintessentially modest, national figure in the same week that the Country paid its respects to Captain Sir Tom Moore (dec'd). Nonetheless, while providing a fresh democratic benchmark, remarked upon even in the House of Commons, the Parish Council's Meeting exposes a number of legal issues that are of wider consideration and reflection. This article seeks to embrace some of them.

The Background

Prior to its recent notoriety Handforth's claim to fame was being home to one of Britain's biggest M&S superstores and its proximity to Manchester Airport. It lies to the north of Wilmslow. The village, 'a fast-growing community connecting Cheshire to Greater Manchester', 'is also surrounded by villages inhabited by millionaire footballers' known as "the golden triangle".[15] Cheshire East has also been a planning battleground for several years since the National Planning Policy Framework introduced fresh emphasis on a five-year housing land supply in 2012,[16] and, the encouragement of Neighbourhood Development Plans (NDPs), including for Handforth, by the then Planning Minister.[17]

Accordingly, it is, perhaps, unsurprising that tensions have been rising, according to subsequently released footage from 2017,

14 Handforth Parish Council goes global: actors line up for 'biopic' and merchandise goes on sale (telegraph.co.uk)

15 https://www.dailymail.co.uk/news/article-9227485/Jackie-Weaver-admits-DOESNT-KNOW-authority-chaotic-Handforth-Parish-Council.html

16 See e.g. *Cheshire East Council v (1) Secretary of State for Housing, Communties & Local Government (2) Graham Kirkham (3) Angela Mary Kirkham* [2018] EWHC 2906 (Admin)

17 Then Rt Hon Nick Boles MP: Neighbourhood planning - GOV.UK (www.gov.uk) (Ministerial Statement 10.07.2014)

amongst the Parish Councillors. The row started several months beforehand between two warring camps with four on one side and three on the other. One councillor, Jean Thompson, was dismissed as she had not attended meetings for six months, leaving a split with three councillors on each side: Brian Tolver, Aled Brewerton and Barry Burkhill versus John Smith, Cynthia Samson and Susan Moore. However, it was the continuing failure of the Chairman, Brian Tovey, to attend for six months because he did not consider them to be legitimate, that led to the December "showdown" as to who, in effect ran the Parish Council. At the request of two councillors from one faction Jackie Weaver, Chief Officer of the Cheshire Association of Local Councils, was asked to "host" the extraordinary meeting. It was also the second time Mr Tolver was acting as "the chair" having previously been evicted from the earlier 7pm Planning and Environment committee call.

At the 7.30pm extraordinary meeting, Mr Tolver tells Ms Weaver to 'stop talking', and added: 'You have no authority here.' In response, Ms Weaver removes Mr Tolver from the Zoom call and places him in a virtual waiting room. After Mr Tolver's "eviction", his ally Councillor Aled Brewerton is shown angrily shouting at Ms Weaver when she tries to elect a new chairman: 'No they can't because the vice chair is here! I take charge! Read the standing orders. Read them and understand them!' An irate Mr Brewerton then yells off camera: 'We're trying to have a Teams meeting you fool!' He was also later ejected. At this stage, it also needs to be noted that the row had come weeks after another brutal meeting where Ms Weaver had ejected Mr Tolver from the Zoom call. The meeting then resumes with a new elected chairman (from the other faction), Cllr John Smith wearily saying 'Welcome to Handforth,' to which Ms Weaver responds: 'It's nothing if not lively'.

The Legal Context [18]

In England, there are 9,000 parish and town councils in England, with around 80,000 councillors. Their main responsibilities involve what are sometimes called "hyper-local services", such as hedge trimming, maintaining local benches, public clocks, parish halls and some public toilets. While they can make representations on planning matters to the relevant district or borough council, which have to be considered, they cannot make decisions themselves on planning matters save in the formulation of a NDP.

A parish council[19] must in every year hold an annual meeting and at least three other meetings. A community council must hold the annual meeting and "such other meetings" as the council may determine.[20] A meeting of the council may be held either within or without the council's area but must not be held in premises which at the time of such a meeting may be used for the supply of alcohol under the provisions of the Licensing Act 2003, unless no other suitable room is available either free of charge or at a reasonable cost.[21] The use of remote meetings, by Zoom or Microsoft Teams, has been permitted during the Pandemic.[22]

The chairman of the council must be elected annually by the council from among the councillors.[23] The first business at the annual

18 See Chapter 28 of Shackleton on the Law and Practice of Meetings 15th Edn. (2020): https://www.sweetandmaxwell.co.uk/Product/Company-Law/Shackleton-on-the-Law-and-Practice-of-Meetings/Hardback-and-eBook-ProView/42804837

19 Local Government Act 1972, Sch.12 para 7(1), In this chapter, unless the context otherwise requires, the term "parish council" or "council" should be read as applying equally to a community council in Wales.

20 Schedule 12 paras 23(1), 24(1).

21 Schedule 12 paras 10(1), 26(1) (as amended). See also s.134 as to the use of a schoolroom or other room maintainable out of any rate.

22 Section 78(1)(d) of the Coronavirus Act 2020 provides that the relevant national authority may, by regulations, make provision relating to the manner in which persons may attend, speak at, vote in, or otherwise participate in, local authority meetings. Section 78(2) continues that this includes *"provision for persons to attend, speak at, vote in, or otherwise participate in, local authority meetings without all of the persons, or without any of the persons, being together in the same place"*. On the basis of s. 78 the Government published the Local Authorities and Police and Crime Panels (Coronavirus) (Flexibility of Local Authority and Police and Crime Panel Meetings) (England and Wales) Regulations 2020 (the "CV Regulations"), which came into force on 4 April 2020, and apply to all local authorities in England and police and crime panels in England and Wales. They are subject to a sunset provision applying them to meetings held, or required to be held, before 7 May 2021.

23 Sections.15(1), and 34(1). From a date to be appointed, the chairman of a parish council can only be appointed from amongst the elected councillors: s.76(1) of the 2007 Act.

meeting of the council is the election of the chairman.[24] The chairman, unless he resigns or becomes disqualified, continues in office until his successor becomes entitled to act as chairman.[25]

The council may appoint a member of the council to be vice-chairman of the council.[26] The vice-chairman, unless he resigns or becomes disqualified, holds office until immediately after the election of a chairman at the next annual meeting of the council.[27] Subject to any standing orders made by the council, anything authorised or required to be done by, to or before the chairman may be done by, to or before the vice-chairman.[28] During their terms of office, the chairman and vice-chairman continue to be members of the council, notwithstanding the provisions relating to the retirement of parish councillors.[29]

Notice of council meetings must be given publicly by affixing a notice in some conspicuous place,[30] and individually by leaving at or sending by post to his usual place of residence a summons to each member.[31] Three clear days' notice is necessary. Want of service of the notice does not affect the validity of the meeting.[32] The summons to each member must specify the business proposed to be transacted, and be signed by the proper officer of the council.

The chairman of the council may call an extraordinary meeting of the council at any time.[33] If the chairman refuses to call a meeting after a requisition for that purpose signed by two members of the council has been presented to him, or if without so refusing the chairman does not call a meeting within seven days after such requisition has been presented to him, any two members of the council, on that refusal or on the expiration of those seven days, as the case may be, may forthwith convene an extraordinary meeting of the council.[34]

At a meeting of a parish council the chairman of the council, if present, or in his absence the vice-chairman, presides. Should both the chairman and the vice-chairman be absent from a meeting of the council, such councillor as the members of the council present choose presides.[35]

No business can be transacted at a meeting of a parish council unless at least one-third of the whole number of members of the council is present, provided that in no case can the quorum be less than three members.[36] If more than one-third of the members is disqualified, the quorum is calculated in relation to those remaining qualified, subject to there being a minimum of three.[37]

The mode of voting at meetings of a parish council is by show of hands, unless the council's standing orders otherwise provide, and on the requisition of any member of the council the voting on any question must be recorded so as to show whether each member present and voting gave his vote for or against that question.[38] If there is an equality of votes, the person presiding has a second or casting vote.[39]

24 Sections 15(2), and 34(2).
25 Sections 15(4), and 34(4).
26 Sections 15(6), and 34(6).
27 Sections 15(7), and 34(7).
28 Sections 15(9), and 34(9).
29 Sections 15(8), and 34(8).
30 Schedule 12 paras 10(2)(a), 26(2)(a). *See West Ham Corp v Thomas* (1908) 73 J.P. 65.
31 Schedule 12 paras 10(2)(b), 26(2)(b).
32 Schedule 12 paras 10(3), 26(3). For "clear days" see para.5-10.
33 Schedule 12 paras 9(1), 25(1).
34 Schedule 12 paras 9(2), 25(2).
35 Schedule.12 paras 11, 27.
36 Schedule 12 paras 12, 28.
37 Schedule 12 para.45.
38 Schedule 12 paras 13, 29.
39 Schedule 12 para.39(2).

Standing orders may allow a period of time to be set aside at each council meeting for questions by members of the public.

The Parish Clerk is the "Proper Officer" of the Council[40] and as such is under a statutory duty to carry out all the functions of a council's Proper Officer, and in particular to serve or issue all the notifications required by law. The Clerk is responsible for ensuring that the instructions of the Council in connection with its function as a parish council are carried out. They are expected to advise councillors on, and assist in the formation of, overall policies to be followed in respect of the council's activities, and in particular, to produce all the information required for making effective decisions and to implement constructively all decisions. The Clerk is also the Responsible Financial Officer and accountable for all financial records of the Council and the proper administration of its finances.

The Clerk is accountable to the Council for the effective management of all its resources and will report to them as and when required.

Because of the complexity of modern local government and volume of relevant material most parish councils now appoint a paid, and, experienced parish clerk. They are "an independent and objective servant" who take their instructions from the council as a corporate body and must recognise that the council is responsible for its decisions.[41] Their expertise can be invaluable particularly on practice and procedure for meetings as well as acting as a conduit for correspondence; and much of what the parish clerk does is simply based on good practice as well as common sense.[42] In an emergency (for example to cover a temporary vacancy) a councillor can fulfil the role of clerk but cannot receive payment and cannot take up such a new role until they have been resigned from the elected position for at least 12 months.[43]

Conclusions

While knowledge of the granular detail of the Handford situation is not essential, given the exceptional nature of the events, what becomes clear is that without a strong independent clerk matters can swiftly get out of hand. Here, it seems that Jackie Weaver really acted as an umpire, having failed as a mediator; and even if she had been the "proper officer" the role of parish clerk, like the constitutional monarch, is to counsel and advise rather than dictate. That said, given that the district or borough council has governance oversight of a parish council, recourse should always be sought sooner, whether through its Monitoring Officer or higher officer, if a situation becomes out of hand. Indeed, if meetings are not taking place even during the Pandemic then a particular level of enquiry and scrutiny should be activated and swiftly. While parish councils cannot be formally placed into "special measures", so far as I am aware, that effect should be initiated. Perhaps, they tried in the instant circumstances? Who knows? Only the re-opening of the ballot box in May 2021 may tell of better stories and outcomes from Handford Parish Council.

John Pugh-Smith is the Joint General Editor of Shackleton on the Law and Practice of Meetings. The production of this practitioner work, now into its latest 15th Edition (2020) received assistance from a 39 Essex Chambers team comprising Tom Tabori (Assistant Editor) and James Burton, Jon Darby, Gethin Thomas and Nicholas Higgs (Chapter Editors).

40 Section 112 (1) of the Local Government Act 1972
41 Part 2: Governance Toolkit – …ask your council
42 SLCC | The 2019 edition of The Clerks Manual has landed!
43 Sections 112(5) & 116 of the LGA 1972

CONTRIBUTORS

John Pugh-Smith

john.pugh-smith@39essex.com

John is a recognised specialist in the field of planning law with related environmental, local government, parliamentary and property work for both the private and public sectors. He is also an experienced mediator and arbitrator and is on the panel of the RICS President's appointments. He is a committee member of the Bar Council's Alternative Dispute Resolution Panel, an advisor to the All Party Parliamentary Group on ADR, one of the Design Council's Built Environment Experts and a member of its Highways England Design Review Panel. He has been and remains extensively involved in various initiatives to use ADR on to resolve a range of public sector issues. To view full CV click here.

Katherine Apps

katherine.apps@39essex.com

Katherine's practice spans public and human rights law, disciplinary/ regulatory, EU, employment and commercial law. She has particular expertise in appellate advocacy and in domestic and international equality law. Described as *"incredibly bright," "very good with clients"* and a *"pleasure to deal with"* who *"gives solid advice,"* Katherine has been appointed to the Attorney General's A Panel of Counsel and the EHRC B Panel of Counsel. She is an arbitrator for Sports Resolutions panels on Commercial Disputes, Integrity and Discipline, Discrimination and the National Safeguarding Panel. Katherine works for a wide range of clients: from Government Departments, HMRC and local authorities to Trade Unions; individuals to multinational companies and Receivers. Katherine was shortlisted for Public Law Junior of the Year at The Legal 500 UK Bar Awards 2019. To view full CV click here.

Jonathan Darby

jon.darby@39essex.com

Jon is ranked by Chambers & Partners as a leading junior for planning law and is listed as one of the top planning juniors in the Planning Magazine's annual survey. Frequently instructed as both sole and junior counsel, Jon advises developers, consultants, local authorities, objectors, third party interest groups and private clients on all aspects of the planning process, including planning enforcement (both inquiries and criminal proceedings), planning appeals (inquiries, hearings and written representations), development plan examinations, injunctions, and criminal prosecutions under the Environmental Protection Act 1990. Jon is currently instructed by the Department for Transport as part of the legal team advising on a wide variety of aspects of the HS2 project and has previously undertaken secondments to local authorities, where he advised on a range of planning and environmental matters including highways, compulsory purchase and rights of way. Jon also provides advice and representation in nuisance claims (public and private), boundary disputes and Land Registration Tribunal matters. To view full CV click here.

CONTRIBUTORS

Gethin Thomas
gethin.thomas@39essex.com

Gethin has a broad planning and environmental law practice. Gethin is ranked as one of the *'Highest Rated Planning Juniors Under 35'* by Planning Magazine (2020). His recent instructions include acting as junior counsel to Richard Wald QC, on behalf of Natural Resources Wales, in a successful 4 week inquiry concerning proposed byelaws to protect salmon and sea trout stocks in Wales. He was also instructed by the Government Legal Department in the judicial review challenge to the Heathrow third runway. He regularly advises on a diverse range of planning and environmental issues. For example, he has advised in relation to the Environmental Information Regulations, on the prospects of appealing a refusal of planning permission to develop a site within the Green Belt, and in relation to issues arising from the removal of permitted development rights by planning conditions. Gethin has been instructed in relation to judicial review claims as sole and junior counsel. Gethin also has experience of enforcement matters. To view full CV click here.

Daniel Kozelko
daniel.kozelko@39essex.com

Daniel has a mixed practice incorporating planning, environmental, and public law. His instructions have included: acting in proceedings to obtain a certificate of lawfulness of existing use or development; advising on material changes of use of land in the context of retail developments; and, work on matters involving damage to utilities and highways. Daniel has also recently returned from a secondment at the Supreme Court of the United Kingdom, where he was judicial assistant to Lord Carnwath and Lady Arden. In the course of that secondment Daniel worked on a number of cases raising planning and environmental issues, including *R (on the application of Samuel Smith Old Brewery (Tadcaster) and others) v North Yorkshire CC* [2020] UKSC 3 and *Dill v Secretary of State for Housing, Communities and Local Government and another* [2020] UKSC 20. To view full CV click here.

KEY CONTACTS

Andrew Poyser
Deputy Senior Clerk
andrew.poyser@39essex.com
Call: +44 (0)20 7832 1190
Mobile: +44 (0)7921 880 669

Elliott Hurrell
Practice Manager
elliott.hurrell@39essex.com
Call: +44 (0)20 7634 9023
Mobile: +44 (0)7809 086 843

39 Essex Chambers is an equal opportunities employer.

39 Essex Chambers LLP is a governance and holding entity and a limited liability partnership registered in England and Wales (registered number OC360005) with its registered office at 81 Chancery Lane, London WC2A 1DD.

39 Essex Chambers' members provide legal and advocacy services as independent, self-employed barristers and no entity connected with 39 Essex Chambers provides any legal services. 39 Essex Chambers (Services) Limited manages the administrative, operational and support functions of Chambers and is a company incorporated in England and Wales (company number 7385894) with its registered office at 81 Chancery Lane, London WC2A 1DD.