Neutral Citation Number: [2023] EWHC 978 (Admin)

Case No: CO/1137/2022

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/04/2023

Before :

THE HON. MRS JUSTICE STEYN DBE

- -

Between :

THE KING (ON THE APPLICATION OF DEVONHURST INVESTMENTS LIMITED)	**Claimant**
- and -	
LUTON BOROUGH COUNCIL	**Defendant**

- -
- -

Scott Stemp (instructed by **Town Legal LLP**) for the **Claimant**
Wayne Beglan (instructed by **Luton Borough Council Legal Services**) for the **Defendant**

Hearing dates: 15 & 16 February 2023

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 28 April 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

THE HON. MRS JUSTICE STEYN DBE

Mrs Justice Steyn DBE :

A. Introduction

1. By this claim for judicial review, Devonhurst Investments Ltd seeks to challenge a decision made by Luton Borough Council on 17 February 2022, to issue an enforcement notice (ref: 21/00045/UBC; 'the Notice') pursuant to the Town and Country Planning Act 1990, relating to land at Shire House, 400 Dallow Road in Luton, Bedfordshire ('the Site').

2. The breach of planning control identified in the Notice was:

> "Without planning permission:-
>
> (1) the change of use of the Land from an employment use to a residential use comprising of approximately 109 self-contained residential units.
>
> (2) the erection of three two storey structures used to accommodate multiple self-contained residential units on the Land, in the approximate position shown cross-hatched black on the attached plan reference 001".

3. Section 5 of the Notice set out the remedial action required. By section 6 a time period of 6 months from 8 April 2022 was given for compliance with the requirements of the Notice. However, the claimant has appealed against the Notice pursuant to section 174 of the Town and Country Planning Act 1990 ('TCPA') and, in the meantime, is not required to take the action required by section 5 of the Notice.

4. Permission to bring this challenge was granted by HHJ Jarman KC, sitting as a judge of the High Court, on 6 October 2022, in respect of two of the three grounds raised by the Claimant, namely:

   i) **Ground 2**: Whether the Decision was taken without any, or any proper, regard to:

      a) The defendant's Public Sector Equality Duty ('PSED') arising under s.149 of the Equality Act 2010 ('the EA 2010');

      b) The best interests of children ("BIOC") residing on the Site; and/or

      c) The article 8 ECHR rights of occupants.

   ii) **Ground 3**: Whether the Decision was taken without any, or any proper regard, to the statutory test of expediency (s.172(1)(b) TCPA).

B. The facts

5. The Site was formerly the site of an office block, and it is located within a functioning industrial estate which lies within a Key Category A Area designated within the extant development plan (the Luton Local Plan 2011-2031, adopted in 2017). The buildings presently on the Site are in part two-storey and in part three-storey. The office building

now named Shire House was formerly known as Chubb House but I shall refer to it throughout by its current name.

6. On 15 April 2016, an application (reference 16/00677/COM) was made to the Council for "*Prior Approval - change of use from office(s) (B1a) to (C3) residential. (Class O) 130 dwellings*". The request for prior approval was made pursuant to the provisions of Schedule 2 Part 3 Class O and paragraph W of the Town and Country Planning (General Permitted Development) (England) Order 2015 (SI 2015/596) ('the GDPO').

7. On 15 June 2016, the Council made a formal decision that prior approval was not required ('the Prior Approval'). The Prior Approval stated:

> "The prior approval of the local planning authority is **not required** for the works specified above and accompanying information:-
>
> 1. The design and building specifications of the proposed development shall be such that noise from "commercial premises" as defined by the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended) shall be suitably mitigated to ensure where relevant that the daytime noise level within any residential unit shall not exceed 40dBLAeq (0700-2300), the night time noise level within any residential unit shall not exceed 30dBLAeq (2300-0700) and the night time LAmax shall not exceed 45dB. Full details of any required noise insulation measures shall be submitted to and approved by the Local Planning Authority before any work is commenced. The approved insulation scheme shall be completed prior to the occupation of the development …
>
> Reason: To protect the amenities of the future occupiers of the residential accommodation hereby approved. To accord with the objectives of Policy LP1, H2 and ENV9 of the Luton Local Plan and the guidance of the NPPF
>
> Notes:
>
> Development under Class O is permitted subject to the condition that it must be completed within a period of 3 years starting with the prior approval date as set out on this decision notice.
>
> <u>The development shall be carried out in accordance with the details provided in the application, and does not imply any consent is granted for any external works outside of the building</u>, including infilling the undercroft parking area, for which a separate consent may be required." (Underlining added.)

8. In around 2016 to 2017, the claimant began works to convert Shire House from offices to flats. The Council's building control records indicate that Shire House was demolished and rebuilt with an extension, and those works were completed by 12 September 2019. The claimant converted the office block into 109 residential units, rather than 130 units.

On several occasions during 2017 and 2018, the Council wrote to the claimant advising the claimant to make an application for a certificate of lawful use. The claimant chose not to do so.

9. On 7 May 2019, Clive Inwards, the Council's Joint Interim Development Management Service Manager, sent an email to Jahid Akbar, a director of the claimant company, informing him that Ms Laura Church, the Council's Director of Place and Infrastructure, had asked him to review the case "*with a view to finding a satisfactory outcome for all parties*". He asked if Mr Akbar would be available to meet him on site for a site inspection. They arranged the site visit for 17 May 2019. Following that site inspection, Mr Akbar sent a number of emails seeking an update on the position. On 22 July 2019, Mr Inwards wrote that he had "*started drafting a letter regarding [Shire] House but I will need to agree this with my Manager before it is released*". However, no such letter was ever sent.

10. On 12 July 2019, there was a telephone conversation between Mr Abkar and Mr Inwards during which Mr Inwards confirmed that, at that time, the Council had no issues with the Prior Approval in relation to Shire House.

11. On 9 August 2019, Mr Akbar wrote to Mr Inwards:

> "Can at least confirm what you confirmed over the phone that you have no issues with the development.
>
> The reason is that we are in talks with LBC and they need this assurance before they will agree to occupy.
>
> This very important as it will start to cost us money and loss of rent, I am sure that you can understand the predicament we are in.
>
> You assured me that this the top priority on our last meeting on site 3 months ago."

12. On 20 August 2019, Nazakat Ali, the Council's Interim Head of Housing Needs sent an email to Mr Inwards and to Tim Parrett, the Council's Building Control Inspector, stating:

> "As you know we are in negotiations with Jahid to take on approx. 43 flats at [Shire] House. We can only proceed once we have your planning and building control approval.
>
> Could you please let me have an update on the Planning and Building Control situation for [Shire] House."

13. On 2 September 2019, Mr Inwards responded:

> "Please accept my apologies for the delay in coming back to you but I had to review the file in the first instance.
>
> I can confirm that the premises at [Shire] House has the necessary approval under reference 16/00766/COM that

> confirms that the prior approval of the Local Planning Authority was not required for the change from offices to residential use. Please let me know if you need anything further from me." (Emphasis added.)

The same day, Mr Inwards sent an email to Mr Akbar, apologising for the delay and attaching a copy of the above email to his "*colleagues in Housing*". Mr Akbar again sought a copy of the letter to which Mr Inwards had referred, but none was forthcoming.

14. On 2 September 2019, Mr Ali indicated in a response to Mr Inwards that, based on Mr Inward's confirmation, and subject to Building Control approval, the Council "*will be looking to use approx. 33 units for Temporary Accommodation*". In the event, the Council did not place anyone in the units at Shire House as the then Director of Housing considered "*the units looked awful*".

15. The claimant draws attention to an email dated 13 November 2020 from a Private Sector Housing Officer in the Council's Private Sector Housing Enforcement department to Mr Akbar. The circumstances in which it was written are unclear, save that the Private Sector Housing Officer had visited one of the flats the previous day, it appears at the prompting of a tenant. In the email the Housing Officer stated that there were "*no other issues noted*" beyond the "*minor issues discussed*" during the visit. The Officer referred to the need to "*make good any cracks/blown plaster within the flat*" and to ensure the fixed heaters were in safe working order. He also expressed appreciation for the offer to re-locate the tenant to another available flat "*with openable windows*" and suggested (but did not require) the provision of thermal blinds for the skylights.

16. According to the Council's building control records, the demolition and extension of the original building at the Site was complete by 12 September 2019. The date of completion of the works is contentious but that is an issue for the appeal not for this judicial review claim.

17. On 12 January 2021, the claimant made a planning application (ref: 21/00039/FUL) for: "*Erection of multi-use community centre and residential development of 47 apartments (19 one-bedroom, 23 two-bedroom and five three-bedroom) in relation to land adjacent to [Shire] House*" ('the Adjacent Application'). On 10 February 2021, an objection was submitted by Kirby-Diamond on behalf of their client Forte Developments, the owner of the employment site immediately adjoining the application site, questioning the lawfulness of the change of use of Shire House.

18. The Adjacent Application was brought to the attention of Mr Sunil Sahadevan, the Council's Head of Planning, by the Principal Planner, Mr Graham Dore, on 29 March 2021. Mr Sahadevan states in his witness statement dated 28 November 2022:

> "As a Planner I considered the two applications (16/00677/COM and 21/00039/FUL) were linked. The acceptability 'in principle' of residential use being acceptable on land within a Category A Employment site was dependent on whether the 'principle' had been affected by the already existing lawful use of the site for residential use. It was clear to me that application 21/00039/FUL could only be considered acceptable if the residential use under application 16/00677/COM was lawfully implemented."

19. Mr Sahadevan had a number of discussions with Mr Dore, who explained what he had learnt about the planning history of the Site and expressed the view that the current use of Shire House for residential purposes was not lawful. Mr Sahadevan reviewed the correspondence with Mr Inwards, to which Mr Abkar had drawn attention. In his witness statement, Mr Sahadevan states:

> "I did not think there was anything in his previous communication which suggested the existing use which was continuing at Chubb House was lawful. I also considered the issue of estoppel and concluded that there was nothing preventing any future enforcement action against the existing residential use. I responded to Mr Akbar on the 12th April 2021, and advised him based on my understanding of the issues, that the application (that was before us, namely 21/00039/FUL) should be withdrawn."

20. By a decision dated 22 April 2021, the Council refused the Adjacent Application for three reasons:

> "1. The development would lead to residential accommodation and community floorspace being situated within a Category 'A' Employment Area, thereby resulting in the taking of land allocated for a use for which there is an identified need and introducing sensitive receptors within a commercial area. The development would, therefore, reduce employment potential and adversely affect the operations and viability of existing and future businesses through the introduction of sensitive uses, which would limit their potential within an area envisaged to allow growth. The development would, therefore, adversely affect the local economy and would be contrary to the sustainable, spatial and economic strategies as outlined within Policies LLP1, LLP2, LLP13, LLP14, LLP15 and LLP24 of the Luton Local Plan 2011-2031, in addition to the objectives surrounding sustainable development and economic growth within the National Planning Policy Framework (NPPF, or the Framework). The principle of development is, therefore, unacceptable.
>
> 2. The lawful use of [Shire] House does not fall within Use Class C3. The information submitted in support of the planning application, is, therefore, inaccurate and in being so does not provide the Local Planning Authority with precise and sufficient information in order to appropriately assess the development in respect of transport implications, design, the living environment of future occupiers and the amenities of adjoining occupiers.
>
> 3. Had the above reasons for refusal not applied, it would have been necessary for the Local Planning Authority to secure on-site affordable housing and CIL compliant financial contributions towards Education, Museums, a Car Club and Waste Management in pursuance of S106 of the Town and

> County Planning Act 1990 (as amended). In the absence of CIL compliant financial contributions, the development would conflict with Policies LLP1 and LLP39 of the Luton Local Plan 2011-2031, the Council's Supplementary Planning Document on Planning Obligations, and the objectives of the National Planning Policy Framework (NPPF, or the Framework) to achieve sustainable development."

21. In his witness statement, Mr Sahadevan states:

> "My focus then moved onto the current use of the [Shire] House. Having refused permission for 21/00039/FUL on the basis that the current use was unlawful, it was my responsibility to ensure that the Planning Enforcement Team within the Council investigated the matter further with a view to deciding whether it was expedient to take enforcement action."

22. Council officers undertook visits to the Site on 22 May 2021, 14 July 2021 and 15 November 2021. On 14 July, Mr Sahadevan himself undertook a site visit during which he saw the property externally and within the context of the rest of the industrial site. He states that he "*could see that it was entirely unsuitable for residential use*". The Council was satisfied that a breach of planning control had occurred on the Site, in that it was being used for accommodation, with some 109 units present (instead of the 130 one bed units approved in the Prior Approval); aerial photographs gathered using Google Pro demonstrated that the original building had been partly demolished and rebuilt with extensions (the Prior Approval having given no consent for such works); and the Prior Approval had not been lawfully completed within the required three years.

23. The delegated officer's report, recommending formal enforcement action, was presented to Mr Sahadevan on 18 November 2021 by the Council's Planning Enforcement Officer, Mr Joe McMahon. Mr Sahadevan considered and agreed with the officer's report, and signed it the same day.

24. Subsequently, on the Council's solicitor carrying out searches via the Land Registry and discovering an application for a dispositionary first lease, it was considered necessary to serve notices pursuant to s.330 of the TCPA on the known interests at that stage. Consequently, the officer's report was updated and, having re-read the Human Rights and Equalities sections of it, Mr Sahadevan signed the updated report on 17 February 2022 ('the Officer's Report'). It was in materially the same terms as the version signed three months earlier.

25. Having addressed the question whether the Prior Approval was lawfully implemented, the Officer's Report states:

> "4.5 The prospect of retrospective planning permission is a necessary consideration to make when determining an adequate remedy to the aforementioned breach of planning control. In this instance, retrospective planning permission is highly unlikely to be granted as a result of the developments contradiction to local planning policy, in particular LLP14 of the Luton Local Plan 2011-2031. The contents of LLP14 ensures that Category A

> employment areas shall be protected for B1, B2, or B8 uses, and changes of use that result in loss of floor space for economic development will be resisted. Shire House is situated in the Firbank Industrial Estate, a designated Category A employment site. As the change of use results in the loss of an employment site of B class use, it is unlikely that it [the change of use] would receive retrospective planning permission.
>
> 4.6 Furthermore, the inadequate living standards offered by several units on the land do not offer a sustainable long term living environment for current and future occupiers. The development is also therefore contrary to LLP1 and LLP25. The development also undermines the Council's employment and economic growth strategy by introducing sensitive residential receptors in close proximity with existing employment uses in a designated Employment Area, contrary to LLP13 and LLP14." (Emphasis added.)

26. The Officer's Report addressed the expediency of "*doing nothing*" or taking enforcement action in paragraphs 6.1-9.1. The Report noted that doing nothing would allow the breach of planning control it had identified, and the subsequent harm it generates, to continue until ultimately the breach would gain lawful status through the passage of time. The Council considered this would be contrary to section 3 of the Luton Council enforcement policy and not appropriate in this instance. The Officer's Report continued:

> "6.3 … Pursuing formal enforcement action is considered expedient on several grounds. Foremost is that some flats on the land are of a poor finish, and offer very inadequate living standards to current and future occupiers. This is evident in some units not even featuring opening windows to allow for adequate ventilation. Furthermore, the change of use has resulted in the loss of an employment site in a designated Category A employment area. This compromises the aims of local policy and further perpetuates the loss of employment space available in the Borough. Moreover, the presence of the residential units within the Firbank industrial estate generates inadequate living standards to current and future occupiers of the residential units as a result of the common noise, and traffic movements associated with an industrial area. The presence of residential units in the Firbank industrial area compromises the operation of the business within Firbank, as a result of the increased traffic and parking congestion."

27. The Officer's Report noted that article 1 of protocol 1 and article 8 of the European Convention on Human Rights "*are relevant when considering enforcement action*". It noted that the owner of the property had provided a list of all the occupants of 109 self-contained flats. The owner's solicitor described the approximately 200 residents as "*working professionals, low income occupants, parents and children. All of whom have settled for employment, schooling and GP services etc and are part of the fabric of Dallow Ward*". The Report stated:

> "officers are aware that pursuing enforcement action will clearly disrupt and possibly distress the residents and will result in these occupants having to vacate the property, and thus there is a potential risk of some of them becoming homeless. In addition, officers are also aware of the impact enforcement action will have on the owner of the property as the residential use will be lost.
>
> In this case the rights of the owner and each occupant (including children (according to the owner's solicitor) to whom special regard has been given,) to the uninterrupted enjoyment of their land are considered to be outweighed by 1) the rights of the current and any future occupants to enjoy a satisfactory living environment, and 2) the public interest in enforcing planning control where the identified harm is substantial. It is considered that the current accommodation is particularly unsatisfactory and offers very poor substandard accommodation that is injurious to the well-being and health of the current occupiers. The proposed course of action seeks to remedy the substantial planning harm that is being caused in a reasonable and proportionate manner. There will be the displacement of tenants and disruption caused to the land owner but both of these are justified in the public interest in ensuring appropriate land use and upholding the integrity of the planning system. Care has been taken to ensure that a sufficient period for compliance (6 months) has been allowed in the Enforcement Notice to ensure that suitable alternative accommodation can be secured for the occupants. In addition the unauthorised use is injurious to the continued employment function and operation of this designated Employment Area, which will impact negatively on job and income prospects and potentially harming wider social and economic well-being and tackling poverty and homelessness."

28. Under the heading "*Equality Impact Assessment*", the Officer's Report set out s.149(1) of the Equality Act 2010 and identified the relevant protected characteristics as: age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation. The Officer's Report stated:

> "7.4 The flats in this case have only been occupied for approximately a year and a half. Save for the details provided by the owner's solicitor in August and so whilst the exact personal circumstances of every individual that occupies the unauthorised flats are not known, it is understood from liaison with other Council services that a number of individuals fall within the protected characteristics and are vulnerable people who have been placed in their current accommodation by other Councils. As the unauthorised accommodation is highly deficient in amenities, standards and quality; the units are small in size, and do not meet the Nationally Described Space Standards and some of them have no windows on the external building envelope it is

> considered that the continued provision of this type of accommodation is contrary to the aims of the Equalities Act. Providing this type of accommodation is considered to be injurious to the health and well-being of vulnerable groups. The Councils that are utilising these placements may be unaware of the unauthorised/unsatisfactory nature of the accommodation and therefore the unnecessary harm such placements cause. By pursuing enforcement action, these Council's will be alerted to the issue and will then be able to move vulnerable individuals with protected characteristics into better accommodation.
>
> 7.5 It is acknowledged that some of those with protected characteristics may find it difficult to understand the requirements of the notice and that a fair level of disruption, inconvenience and potentially distress is likely to occur. However the above overall assessment is considered to outweigh these potential negative impacts.
>
> 7.6 The reasons for taking enforcement action in the public interest in this case are, in part, to protect the interests of all the occupiers so as to ensure that they do not continue to occupy substandard accommodation to which substantial weight is given. In addition, specific reference and attention is given to ending exploitation of vulnerable groups in substandard accommodation. It is also considered expedient in the interests of amenity and in order to uphold the planning system as set out in this report.
>
> 7.7 The proposed response to the breach of planning control has been assessed in the context of the Equality Act and [it] is considered that remedying the harm to vulnerable people living in substandard accommodation is consistent with the council's Public Sector Equality Duty."

29. The Enforcement Notice was issued on 25 February 2022. It stated that it would take effect on 8 April 2022 unless an appeal was made against it beforehand, and specified the time for compliance as six calendar months after the Enforcement Notice takes effect. The Enforcement Notice states:

> "WHAT YOU ARE REQUIRED TO DO
>
> (i) Cease the residential use of the Land
>
> (ii) Demolish the three two storey structures shown …
>
> (iii) Remove all kitchens and all associated fixtures and fittings from the Land.
>
> (iv) Remove all bathrooms and all associated fixtures and fittings from the Land.

> (v) Remove all items ancillary and/or incidental to the residential use from the Land; including but not limited to: beds, wardrobes, sofas, and other home furnishings.
>
> (vi) Remove all associated building materials and rubble and waste materials arising from compliance with steps (ii) to (v) above from the Land."

30. The claimant has appealed against the Enforcement Notice pursuant to s.174 of the TCPA and so it is not currently required to take the action specified in the Notice.

31. Although the claimant disputes, in the context of its statutory appeal, that there has been a breach of planning control, the Council's conclusion that the residential development at Shire House was in breach of planning control is not challenged in this claim. Accordingly, the grounds fall to be considered in the context of the Council's conclusion that the change of use and the building work on the Site was in breach of planning control, and that the development was in conflict with policies LLP1, 2, 13, 14, 15 and 25 of the adopted development plan, as well as paragraphs 127 and 130 of the National Planning Policy Framework.

C. Legal framework

32. Section 172 of the TCPA empowers a planning authority to issue enforcement notices:

> "(1) The local planning authority may issue a notice (in this Act referred to as an "enforcement notice") where it appears to them—
>
> (a) that there has been a breach of planning control; and
>
> (b) that it is expedient to issue the notice, having regard to the provisions of the development plan and to any other material considerations."

33. It is common ground that there is no statutory obligation to consult any party before taking enforcement action.

34. Any person with an interest in the land to which an enforcement notice relates, or a relevant occupier (including, here, the occupants of the 109 flats), has a right of appeal: s.174(1) TCPA. An enforcement notice may be appealed by any such person on various statutory grounds (set out at s.174(2)(a) to (g) TCPA). The grounds include that planning permission should be granted for the development which is the subject of the notice, that the matters alleged have not occurred or (if they occurred) do not constitute a breach of planning control, and that the time for compliance falls short of what should reasonably be allowed.

35. Section 285 of the TCPA precludes challenge to the validity of an enforcement notice in any proceedings on any ground on which an appeal may be brought under s.174(2) of that Act. However, it is well established that grounds falling outside of the appeal grounds at s.174(2) remain as "*residual grounds*" on which a decision to issue an enforcement notice may be challenged by way of judicial review: *R v Wicks* [1998] AC 92, Lord

Hoffmann at 120. These "*residual grounds*" include conventional public law challenges to the decision to issue an enforcement notice.

36. The approach to be taken by planning authorities when determining whether enforcement action is expedient was described by Ouseley J in *Usk Valley Conservation Group) v Brecon Beacons National Park Authority* [2010] EWHC 71 (Admin) (cited with approval by Sullivan LJ in *The Health & Safety Executive v Wolverhampton City Council* [2010] EWCA Civ 892, [42]):

> "198. An *expedient* decision would, to my mind, necessarily require attention to be paid to the advantages and disadvantages of taking one or other or none of the available steps under s102. These advantages and disadvantages should not be confined to those which the subject of the notice would face; they should be measured against the advantages and disadvantages to the public interest at large, including the costs and effectiveness of the various possibilities. The question of whether the cost to the public is worth the gain to the public is, I would have thought, the obvious way of testing expediency. At least it is difficult to see that expediency could be tested without consideration of that factor.
>
> …
>
> 201. … S102, like s97 and s172, deals with expediency decisions: what if anything should be done about a state of affairs that has arisen. They are processes which an authority can initiate to deal with that state of affairs, if it is *expedient* to do so. There is no obligation to take enforcement action in respect of every breach of planning control, nor to take revocation or discontinuance proceedings in respect of unlawful uses or permissions which the authority wishes had not been granted. The notion of "*expediency*" in the context of a decision as to what to do, if anything, about a state of affairs which has arisen, brings with it the issue of whether the gain is worth the cost, which I regard as an obvious part of any decision on expediency. The cost and time of taking enforcement proceedings balanced against the prospects of success and the gain from success would be obviously relevant to the decision on enforcement proceedings.
>
> 202. Although Richards J. in Alnwick may be right to say that what is expedient must be judged in a planning context, that context is provided by the statutory provision itself. The inclusion of the notion of "*expediency*" contrasts s102, s97 and s172 enforcement, with s70, the grant of permission whether prospective or retrospective. This shows quite clearly that these provisions, two of which are expropriatory, must be approached quite differently from the grant of a s70 permission. … "*Expediency*" is not part of the s70 decision-making process which, by contrast, is initiated by the applicant and not the

> authority, and requires the authority to reach a decision one way or the other having regard to the development plan and other material considerations. A proper and substantial meaning has to be given to that contrast and to the notion of "*expediency*". No interpretation of s102 which fails to draw a very clear distinction between decisions under s70 and decisions under s102, or s97 and s172 for that matter, can be correct."

37. Local planning authorities have a wide discretion in deciding whether to take enforcement action and, if so, how to do so: *R (Liquid Leisure Ltd) v Windsor and Maidenhead RBC* [2022] EWHC 1493 (Admin), Lang J at [29], *Ardagh Glass Ltd v Chester City Council* [2009] EWHC 745 (Admin), [2009] Env LR 34, HHJ Mole QC, at [81]. It is for the local planning authority to weigh the advantages and disadvantages of taking enforcement action and determine whether the gain is worth the cost.

38. Under s.171C, local planning authorities may require a person on whom a *planning contravention* notice is served to provide information falling within subsection (2), including the name and postal address of any person known to them to use the land. Section 330 of the TCPA provides local planning authorities with a power to require certain persons to provide information of the kinds set out in subsection (2), relating to matters such as identifying ownership of or interests in land and details of activities being carried on. The power is conferred for the purpose of enabling an authority to serve a notice on appropriate persons. By subsection (3) a recipient of a notice has 21 days to respond to a notice served on them.

39. The principles to be applied by the court when considering criticism of an officer's report *to a planning committee* were summarised by Lindblom LJ in *Mansell v Tonbridge & Malling Borough Council* [2017] EWCA Civ 1314, [2019] PTSR 1452 at [42]:

> "… (2) The principles are not complicated. Planning officers' reports to committee are not to be read with undue rigour, but with reasonable benevolence, and bearing in mind that they are written for councillors with local knowledge (see the judgment of Baroness Hale of Richmond JSC in *R (Morge) v Hampshire County Council* [2011] UKSC 2, at paragraph 36, and the judgment of Sullivan J, as he then was, in *R v Mendip District Council, Ex p Fabre* (2000) 80 P&CR 500 at p.509). Unless there is evidence to suggest otherwise, it may reasonably be assumed that, if the members followed the officer's recommendation, they did so on the basis of the advice that he or she gave (see the judgment of Lewison LJ in *R (Palmer) v Herefordshire Council* [2017] 1 WLR 411, at paragraph 7. The question for the court will always be whether, on a fair reading of the report as a whole, the officer has materially misled the members on a matter bearing upon their decision, and the error has gone uncorrected before the decision was made. Minor or inconsequential errors may be excused. It is only if the advice in the officer's report is such as to misdirect the members in a material way—so that, but for the flawed advice it was given, the committee's decision would or might have been different—that the court will be able

> to conclude that the decision itself was rendered unlawful by that advice.
>
> (3) Where the line is drawn between an officer's advice that is significantly or seriously misleading—misleading in a material way—and advice that is misleading but not significantly so will always depend on the context and circumstances in which the advice was given, and on the possible consequences of it. There will be cases in which a planning officer has inadvertently led a committee astray by making some significant error of fact (see, for example *R (Loader) v Rother District Council* [2016] EWCA Civ 796), or has plainly misdirected the members as to the meaning of a relevant policy (see, for example, *R (Watermead Parish Council) v Aylesbury Vale District Council* [2017] EWCA Civ 427). There will be others where the officer has simply failed to deal with a matter on which the committee ought to receive explicit advice if the local planning authority is to be seen to have performed its decision-making duties in accordance with the law (see, for example, *R (Williams) v Powys County Council* [2018] 1 WLR 439). But unless there is some distinct and material defect in the officer's advice, the court will not interfere." (emphasis added)

40. In this case, the Officer's Report was not a report to the planning committee. The decision was a delegated one made by the Head of Planning, Mr Sahadevan. In *R (Noble) v Cornwall Council* [2022] EWHC 2402 (Admin), I observed that the same injunction against hypercritical scrutiny of an officer's report applied where the decision was delegated ([15]). Counsel for the claimant, Mr Stemp, accepts that the court should not adopt a hypercritical approach, and that the court will only interfere if any defects are material rather than minor or inconsequential. Nonetheless, he submits that the court should be more rigorous in scrutinising the report than it would be where the officer was writing for committee members. The reason he gave for drawing such a distinction was that committee members bring their own local knowledge to bear in making their decisions whereas in the context of a delegated decision the officer's report is, in effect, the decision.

41. I am not persuaded that a greater level of scrutiny of an officer's report is required where the decision is a delegated one than would be the case where the report is addressed to the planning committee. As Lindblom LJ observed in *Mansell* at [41], the "*Planning Court ... must always be vigilant against excessive legalism infecting the planning system*". In principle, that directive applies with no less force in circumstances where the planning committee has delegated certain decisions to the professional officers of the local planning authority who, in common with members who sit regularly on a planning committee, may be expected to have substantial local knowledge, including of the local development plans.

42. No authority for the proposition that more intense scrutiny is required in the case of delegated decisions was cited, and it seems to me to be inconsistent with the approach taken by Lang J in *R (Hayes) v Wychavon District Council* [2014] EWHC 1987 (Admin) [2019] PTSR 1163 at [26]-[28] where she applied broadly the same principles in considering criticism of an officer's report for the purposes of a delegated decision by a

planning officer and for the purposes of a local ward councillor's decision. Lang J observed that certain matters did *not* require to be set out for the planning officer, or not in detail, because he had the benefit of knowledge of the relevant planning law and policy, local knowledge and some prior knowledge of the particular application. ([27])

D. Ground 2(a): Public Sector Equality Duty

The law

43. Section 149 of the Equality Act 2010 provides:

> "(1) A public authority must, in the exercise of its functions, have due regard to the need to -
>
> (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
>
> (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
>
> (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.
>
> …
>
> (3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to-
>
> (a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
>
> (b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;
>
> (c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.
>
> (4) The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.
>
> …

> (6) Compliance with the duties in this section may involve treating some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act.
>
> (7) The relevant protected characteristics are
>
> age;
> disability;
> gender reassignment;
> pregnancy and maternity;
> race;
> religion or belief;
> sex;
> sexual orientation. ”

44. In *Bracking v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345, [2014] EqLR 60, McCombe LJ drew together the authorities and summarised the applicable principles in respect of the PSED at [25]:

> “(1) As stated by Arden LJ in *R (Elias) v Secretary of State for Defence* [2006] 1 WLR 3213; [2006] EWCA Civ 1293 at [274], equality duties are an integral and important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation.
>
> (2) An important evidential element in the demonstration of the discharge of the duty is the recording of the steps taken by the decision maker in seeking to meet the statutory requirements: *R (BAPIO Action Ltd) v Secretary of State for the Home Department* [2007] EWHC 199 (QB) (Stanley Burnton J (as he then was)).
>
> (3) The relevant duty is upon the Minister or other decision maker personally. What matters is what he or she took into account and what he or she knew. Thus, the Minister or decision maker cannot be taken to know what his or her officials know or what may have been in the minds of officials in proffering their advice: *R (National Association of Health Stores) v Department of Health* [2005] EWCA Civ 154 at [26 – 27] per Sedley LJ.
>
> (4) A Minister must assess the risk and extent of any adverse impact and the ways in which such risk may be eliminated before the adoption of a proposed policy and not merely as a ‘rearguard action’, following a concluded decision: per Moses LJ, sitting as a Judge of the Administrative Court, in *Kaur & Shah v LB Ealing* [2008] EWHC 2062 (Admin) at [23 – 24].
>
> (5) These and other points were reviewed by Aikens LJ, giving the judgment of the Divisional Court, in *R (Brown) v Secretary*

of State for Work and Pensions [2008] EWHC 3158 (Admin), as follows:

> i) The public authority decision maker must be aware of the duty to have 'due regard' to the relevant matters;
>
> ii) The duty must be fulfilled before and at the time when a particular policy is being considered;
>
> iii) The duty must be 'exercised in substance, with rigour, and with an open mind'. It is not a question of 'ticking boxes'; while there is no duty to make express reference to the regard paid to the relevant duty, reference to it and to the relevant criteria reduces the scope for argument;
>
> iv) The duty is non-delegable; and
>
> v) Is a continuing one.
>
> vi) It is good practice for a decision maker to keep records demonstrating consideration of the duty.

(6) '[G]eneral regard to issues of equality is not the same as having specific regard, by way of conscious approach to the statutory criteria.' (per Davis J (as he then was) in *R (Meany) v Harlow DC* [2009] EWHC 559 (Admin) at [84], approved in this court in *R (Bailey) v Brent LBC* [2011] EWCA Civ 1586 at [74-75].)

(7) Officials reporting to or advising Ministers/other public authority decision makers, on matters material to the discharge of the duty, must not merely tell the Minister/decision maker what he/she wants to hear but they have to be 'rigorous in both enquiring and reporting to them': *R (Domb) v Hammersmith & Fulham LBC* [2009] EWCA Civ 941 at [79] per Sedley LJ.

(8) Finally, and with respect, it is I think, helpful to recall passages from the judgment of my Lord, Elias LJ, in *R (Hurley & Moore) v Secretary of State for Business, Innovation and Skills* [2012] EWHC 201 (Admin) (Divisional Court) as follows:

> (i) At paragraphs [77-78]
>
> '[77] Contrary to a submission advanced by Ms Mountfield, I do not accept that this means that it is for the court to determine whether appropriate weight has been given to the duty. Provided the court is satisfied that there has been a rigorous consideration of the duty, so that there is a proper appreciation of the potential impact of the decision on equality objectives and the desirability of promoting them, then as Dyson LJ in Baker (para [34]) made clear, it is for the decision

> maker to decide how much weight should be given to the various factors informing the decision.
>
> [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. If Ms Mountfield's submissions on this point were correct, it would allow unelected judges to review on substantive merits grounds almost all aspects of public decision making.'

(ii) At paragraphs [89-90]

> '[89] It is also alleged that the PSED in this case involves a duty of inquiry. The submission is that the combination of the principles in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 and the duty of due regard under the statute requires public authorities to be properly informed before taking a decision. If the relevant material is not available, there will be a duty to acquire it and this will frequently mean that some further consultation with appropriate groups is required. Ms Mountfield referred to the following passage from the judgment of Aikens LJ in Brown (para [85]):
>
> > '….the public authority concerned will, in our view, have to have due regard to the need to take steps to gather relevant information in order that it can properly take steps to take into account disabled persons' disabilities in the context of the particular function under consideration.'
>
> [90] I respectfully agree…'" (Emphasis added.)

45. That passage was approved by the Supreme Court in *Hotak v Southwark London Borough Council* [2015] UKSC 30, [2016] AC 811, [73], and the parties agree it reflects the principles to be applied. The PSED has been applied in a number of planning cases as Lang J observed in *Liquid Leisure* at [52].

46. In *R (Bridges) v Chief Constable of South Wales Police* [2020] EWCA Civ 1058 [2020] 1 WLR 5037 the Court of Appeal (Sir Terence Etherington MR, Dame Victoria Sharp P and Singh LJ), at [175], emphasised the following principles:

> "(1) The PSED must be fulfilled before and at the time when a particular policy is being considered.

> (2) The duty must be exercised in substance, with rigour, and with an open mind. It is not a question of ticking boxes.
>
> (3) The duty is non-delegable.
>
> (4) The duty is a continuing one.
>
> (5) If the relevant material is not available, there will be a duty to acquire it and this will frequently mean that some further consultation with appropriate groups is required.
>
> (6) Provided the court is satisfied that there has been a rigorous consideration of the duty, so that there is a proper appreciation of the potential impact of the decision on equality objectives and the desirability of promoting them, then it is for the decision-maker to decide how much weight should be given to the various factors informing the decision."

47. The court noted that "*the PSED is a duty of process and not outcome*", observing that this does not diminish its importance ([176]), and continued at [181]:

> "We acknowledge that what is required by the PSED is dependent on the context and does not require the impossible. It requires the taking of reasonable steps to make enquiries about what may not yet be known to a public authority about the potential impact of a proposed decision or policy on people with the relevant characteristics…" (Emphasis added.)

48. In *R (Sheakh) v London Borough of Lambeth* [2022] EWCA Civ 457 [2022] PTSR 1315 the Court of Appeal (Sir Keith Lindblom SPT, Males and Elisabeth Laing LJJ) held at [10]:

> "First, section 149 does not require a substantive result … Second, it does not prescribe a particular procedure. It does not, for example, mandate the production of an equality impact assessment at any particular moment in a process of decision-making, or indeed at all … Third, like other public law duties, it implies a duty of reasonable enquiry (see *Secretary of State for Education and Science v Tameside Metropolitan Brough Council* [1977] AC 1014). Fourth, it requires a decision-maker to understand the obvious equality impacts of a decision before adopting a policy … And fifth, courts should not engage in an unduly legalistic investigation of the way in which a local authority has assessed the impact of a decision on the equality needs …"

49. Whether the PSED has been complied with involves a highly fact sensitive enquiry: see *R (Hough) v Secretary of State for the Home Department* [2022] EWHC 1635 (Admin), Lieven J, [106].

The duty of enquiry in the context of the PSED

50. The legal principles that I have outlined above were not in dispute. However, there was a dispute between the parties on one point of law under this head. In short, the Council contends that in the absence of a *statutory* duty of enquiry, it is for a local authority to decide the parameters of any information gathering exercise, subject to the test of rationality. The claimant, on the other hand, submits that in the context of the PSED, it is for the court to determine whether the duty of enquiry has been complied with and the irrationality threshold is inapplicable.

51. It is well established, and not in dispute, that where the *Tameside* duty applies, it is for the decision maker to decide on the manner and intensity of enquiry, subject to a *Wednesbury* challenge: see *R (Balajigari) v Secretary of State for the Home Department* [2019] EWCA Civ 673, [2019] 1 WLR 4647, Underhill LJ (giving the judgment of the court), [70]. The Council's position is that the approach to be taken by the court in assessing whether a decision maker has failed to comply with its duty of enquiry is the same where it arises in the context of the PSED as any other case where it arises pursuant to the principle identified in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014.

52. In support of this submission, the Council relies on four cases: *Balajigari, R (National Association of Health Stores) v Secretary of State for Health* [2005] EWCA Civ 154, *R (Pharmaceutical Services Negotiating Committee) v Secretary of State for Health* [2018] EWCA Civ 1925, [2019] PTSR 885, and *R (Sheakh) v Lambeth London Borough Council* [2022] EWCA Civ 457 [2022] PTSR 1315.

53. The claimant submits that the first three cases do not assist on the legal test applicable in the context of the PSED because the courts were not considering the duty of enquiry in that context. Although in *Sheakh* the court was directly addressing the PSED, the claimant draws attention to the fact that the decision in issue in that case concerned experimental traffic orders made urgently during the Covid-19 pandemic. The claimant submits that in relation to a final and permanent determination such as a decision to issue an enforcement notice, the requirement that the decision-maker should be properly informed is a more demanding one, requiring the acquisition of more granular information. The duty is encapsulated in McCombe LJ's observation in *Bracking* at [60] that

> "the 2010 Act imposes a heavy burden upon public authorities in discharging the PSED and in ensuring that there is evidence available, if necessary, to demonstrate that discharge."

54. I accept the claimant's submission that *Balajigari,* the *National Association of Health Stores* and the *Pharmaceutical Services* cases do not give an answer to the issue raised by the claimant, as none of those cases concerned the PSED. The *Pharmaceutical Services* case considered the duty of enquiry in the context of a statutory duty to have "*regard*" (rather than "*due regard*") "*to the need to reduce inequalities between people in England with respect to the benefits they can obtain from the health service*" ([80]). In that case, the parties were agreed that the duty of enquiry was subject to a *Wednesbury* challenge only ([55]); and that formulation was "*echoed*" in the statutory language which provided for a determination to be made "*only after taking into account all the matters which are considered to be relevant by the determining authority*" ([20]).

55. However, in *Sheakh* the court did address the duty of enquiry in the context of the PSED. The duty of reasonable enquiry is not an express statutory duty in s.149. The Court of Appeal stated that s.149 of the Equality Act 2010 "*like other public law duties*", citing *Tameside*, "*implies a duty of reasonable enquiry*" (see paragraph 48 above). In my judgment, it follows that the duty to take reasonable steps to make enquiries with a view to understanding the potential impact of a proposed decision on people with the protected characteristics identified in s.149 is an example of the *Tameside* duty being applied in a particular statutory context. While I accept that the nature of the function being exercised, and the context, may have an important impact on what is required to fulfil the duty of enquiry (see *R (K) v Secretary of State for Work and Pensions* [2023] EWHC 233 (Admin), [191]), it remains the case that it is not for the court to step into the shoes of the primary decision-maker. The duty of enquiry, in the context of the PSED, as in other contexts where it is implied in accordance with *Tameside*, is subject to challenge only on *Wednesbury* grounds.

The parties' submissions

56. The claimant submits that the Council did not know what the equality implications would be of the decision to issue the Notice, which would have the effect on coming into force of requiring the occupants of the flats in Shire House to leave their homes. The Council knew that the Site was used to house about 200 people, including children, in 109 flats. Liaison with other local authorities had revealed that a number of individuals possessed protected characteristics and were vulnerable people placed there by those authorities. But the Council had not gained access to the majority of flats at the Site, or assessed the majority of the flats as built. And the personal circumstances of the occupants were unknown to the Council.

57. The Council made its decision not knowing: (a) how many of the occupants were persons with protected characteristics, (b) whether those persons were adults or children, (c) what protected characteristics those persons held, (d) the nature and extent of the vulnerability of those possessing protected characteristics, (e) what needs arose from those protected, (f) how those needs were or were not being met by their accommodation in Shire House or (g) what the impact would be on those persons of being made homeless.

58. The claimant submits that the Council took no reasonable steps, indeed it took no steps at all, to make enquiries about what was not known to it. The claimant accepts that the Council was not necessarily required to undertake a door-to-door survey of all the occupants. It did not have to consider the impact of taking enforcement action on each individual occupant with a protected characteristic. But it had to grasp the likely consequences of the decision it was taking for the range of persons affected with protected characteristics. The claimant contends that given the final and permanent nature of the proposed decision (albeit subject to appeal), there was a heavy onus on the Council to determine the nature and extent of any protected characteristics that were engaged and to undertake a conscious assessment of the likely consequences of the enforcement action for people with those specific protected characteristics, having regard to the statutory needs.

59. The claimant submits that the Officer's Report does not distinguish between persons with protected characteristics, wrongly treating them as a homogeneous group. What is missing from the Officer's Report is the required structured and rigorous focus on the matters specified in s.149.

60. The claimant submits that in giving six months for compliance with the Notice the Council was not, as it suggested in the Officer's Report, giving occupants six months to find alternative accommodation. That is because within that six month period the claimant was required to demolish the buildings and remove all materials from the Site (see paragraph 29 above). The period for finding alternative accommodation was, therefore, much shorter. The claimant does not challenge the compliance period in this judicial review claim (that being a matter for appeal), but the claimant submits the fact the Council was not giving occupants the time it thought it was giving illustrates the defective approach the Council took in performing the PSED. It is no answer, the claimant contends, that the Council apprehended that the claimant was likely to appeal.

61. The claimant submits that in the absence of enquiry, the Council proceeded on the basis of assumptions regarding the impacts on persons with protected characteristics. This conflicts with the requirement to be clear precisely what the equality implications of its proposed action would be and so precludes a finding that the Council has had the due regard required by s.149.

62. The focus of the Officer's Report on housing needs was also, the claimant submits, too narrow as the needs of those with protected characteristics which might be affected by being made homeless extend to social welfare, education, employment, health and social needs in the form of familial and community ties.

63. The Council emphasises that the PSED, and the implied duty of enquiry, is highly fact and context specific. The Council was exercising its function of determining whether to take enforcement action in circumstances where it considered that the development at the Site was in breach of planning control, and that it was highly unlikely to be granted planning permission as it was in conflict with policies LLP1, 2 13, 14, 15 and 25 of the adopted development plan, as well as paragraphs 127 and 130 of NPPF. The Council's view was that the accommodation was substandard and oppressive, offering "*very inadequate living standards*", with some units not even featuring opening windows. The Council was not making a decision affecting a single person or a small group; given the view it took of the development, the level of the decision was more akin to a policy-type decision.

64. The Council considered whether it had sufficient information and concluded that it did. In his statement, Mr Sahadevan states:

> "I could have asked for information to be collected on each of the individuals affected. I did give this consideration, however I did not think this would add any significant value to the process. Given that I knew the accommodation was likely to be transient and that the circumstances and the individuals themselves would change over time (for example by the time the Enforcement Notice was issued, came into effect or had to be complied with). I also factored into my thinking in that respect the likelihood that an appeal would be launched, making it more likely there would be increased turnover of occupants before compliance with the Enforcement Notice was required. I was aware of the likely financial benefits of the current use continuing for as long as possible for the owners, and the likelihood that every legal and

> appeal avenue would be explored and engaged simply to delay the termination of the use.
>
> In my view, if particulars of the individuals residing within the property were known and if it became apparent that some of them [were] very vulnerable or had protected characteristics, in my mind this would strengthen, not weaken the case for issuing the Enforcement Notice. The accommodation was so poor that in my view, proceeding with action to seek a termination of the use was more likely to act in the interests of vulnerable groups or individuals with protected characteristics, and therefore adding more justification for the action we were about to take. Therefore, providing this type of accommodation was considered by me to be injurious to the health and well-being of vulnerable groups."

65. The claimant accepts the Council was not required to complete a survey of each of the occupying individuals or families of the development before it could legally decide it was expedient to take enforcement action. The Council submits that its judgement that the level of transience among occupiers of Shire House made the utility of a survey doubtful was a reasonable one. That being the case, and in this context, a "*relatively broad brush approach*" should be considered adequate: *R (West Berkshire District Council) v Secretary of State for Communities and Local Government* [2016] EWCA Civ 441, [2016] 1 WLR 3923 at [85].

66. The Council points out that the claimant has not indicated what steps it contends the Council was reasonably required to take. During the course of oral submissions, it was suggested that as the Council had garnered some general information from other authorities through informal channels that showed it could have sought more specific information through such channels. Mr Beglan refuted that suggestion as being inconsistent with the data protection laws with which local authorities must comply. He also rejected an alternative suggestion that the Council could have served planning contravention notices, requiring the provision of information on pain of penalty, as an approach the Council was entitled not to consider reasonable in the circumstances.

67. The Council submits that it was entitled to assume that other local authorities will comply with any duties owed by them under the Housing Acts. There is no suggestion that there are any particularly acute issues for occupiers with protected characteristics that the Council did not have in contemplation. For example, there is no suggestion that adaptations have been made to any flat to accommodate a wheelchair user and, given the very small size of the flats it was reasonable to believe that would not have been feasible. The claimant would have been aware of any such adaptation, as the consent of the landlord would have been required, and it has never suggested that issues of that nature arose.

68. As regards the time for compliance, the Council submits that a six month period is not indicative of a failure to comply with the PSED. Under Part VII of the Housing Act 1996, the point at which a person may be found to be threatened with homelessness is if it is likely they will become homeless within 56 days (s.175). It is at that point that meaningful assistance in terms of the provision of suitable accommodation could be given by other authorities. The Council also contends that it was reasonable to take into account that it

was highly likely, as has occurred, that the Notice would be the subject of an appeal and so it would not come into force for a much longer period.

Analysis and decision

69. It is evident from the Officer's Report that the Council consciously considered the impact of the proposed enforcement action on the needs of those with protected characteristics before issuing the Notice.

70. Before making its decision, the Council was aware that there were about 200 people occupying the flats. In April 2021, the Council had obtained a schedule of the (then) occupiers which provided the names of the tenant(s) of each flat, as well as the start and end date, and length, of each tenancy. Almost all the tenancies were 24 months or 6 months, and had begun in 2020 or 2021. Mr Sahadevan's evidence is that he "*studied the accommodation schedule*". He states:

> "I could see that most of the flats had one occupant, but in all cases, no more than two tenants. I could also see that the tenancy agreements ranged from 6 months to 24 months. I knew given the nature of the accommodation, the likelihood was that tenants from local authorities would be placed in the property. I knew that our Council Housing Team had declined to make any placements themselves. This was mainly from internal conversations with Housing colleagues where I asked this question."

71. The Council's assessment that the nature of the flats was such that they would most likely be used as temporary accommodation, albeit recognising that the periods for which people are placed in so-called temporary accommodation not infrequently extends into years, was reasonable.

72. The Council knew that the occupiers included children, as well as parents, working professionals and low income occupants. The Council was told they had variously settled in the area for employment, schooling and GP services. The Council ascertained from liaising with other local authorities that some of those occupying the flats had been placed there by other authorities, and that some of them were people with the protected characteristics identified in s.149 and some were vulnerable. I accept that the Council reasonably understood, given the housing context, that the term "*vulnerable*" referred to those who were "*vulnerable as a result of old age, mental illness or handicap or physical disability or other special reason*" (s.189(1)(c) of the Housing Act 1996).

73. It is clear from the Officer's Report, reinforced by Mr Sahadevan's statement, that the Council had a proper appreciation of the desirability of promoting the equality objectives. The Council was conscious that it did not know the personal circumstances of the individual occupiers. In my judgment, the nature and context of the proposed decision was such that the Council was not required to identify, on an individual basis, the protected characteristics of the occupiers or to ascertain their individual circumstances. Indeed, the claimant accepts as much. That being so, I consider that the Council's assessment of what was required by way of enquiry to enable it to assess the impact on people with the relevant characteristics of taking enforcement action was rational and

lawful. Given that the Council had obtained the information to which I have referred, the submission that it took no steps to make enquiries is unsustainable.

74. The Officer's Report recognised that issuing a Notice would result in the occupiers having to vacate their homes (OR §§6.9, 6.10, 8.1). The Council recognised the potential risk that some of the occupiers would become homeless (OR §6.9), albeit in relation to those owed a housing duty, it took the reasonable view the local authorities could be expected to comply with their statutory duties to secure suitable alternative accommodation (OR §6.10, 8.1). The Council acknowledged that requiring the occupiers to vacate Shire House would cause a fair level of disruption and possibly distress (OR §§6.9, 6.10, 7.5), and that some of those with protected characteristics may find it difficult to understand the requirements of the Notice (OR §7.5).

75. The Council appreciated that the potential impact extended beyond the occupiers' housing needs to:

    i) "*financial wellbeing*", in circumstances where it had been informed some occupiers had settled in Shire House for employment (OR §§6.5 and 6.7);

    ii) "*health*", in circumstances where some had settled for "*GP services etc*"; and the Council considered that the "*very poor substandard accommodation"* was harmful, oppressive and *"injurious to the well-being and health of the occupiers*" (OR §§6.5, 6.7, 6.10, 7.4, 7.7, 9.5 and 9.6);

    iii) "*schooling*", in circumstances where some of the occupiers were children who had settled in the area for schooling (OR §6.7).

76. In his statement, Mr Sahadevan states:

> "… I gave due regard to the impact on children given they would be settled in local schools and would most likely have to find alternative schools as a result of the enforcement action. I recognise the impact this would have on their education needs and also the social bonds they [may] have formed."

    The claimant submits this is a gloss on the Officer's Report. While I accept that Mr Sahadevan's statement adds detail that does not appear in the report, in my judgment it is apparent that the disruption the Council appreciated would be caused by taking enforcement action included the potential effect on the education of the children who would be required to move.

77. While recognising that enforcement action would have these impacts, the Council's assessment was that the continued provision to those with each of the protected characteristics it had identified of accommodation which it considered to be "*oppressive*", "*very poor*", "*small in size*", and "*highly deficient in amenities, standards and quality*", and which it regarded as exploitative of vulnerable groups (OR §7.6), was "*contrary to the aims*" of the Equality Act 2010. That conclusion was reasonably open to the Council.

78. I do not accept that in stating in the Officer's Report that care had been taken to ensure that sufficient time for compliance with the Notice had been given to ensure that suitable

alternative accommodation could be secured for the occupants, the Council misapprehended that the entire six month period would be available for finding such alternative accommodation. The Council's officers were well aware of the actions required during the six month period (see the OR §9.1). I agree with the Council's submissions that the time provided for compliance, and the Council's understanding in that regard, is not indicative of any lack of due regard.

79. Although I accept that the Council has not teased out the potential impacts by reference to each of the relevant protected characteristics, and ordinarily it would be better to do so, ultimately, in the circumstances of this case, and for the reasons I have given, I consider that the Council has clearly shown a proper appreciation of the potential impact of the decision on equality objectives and of the desirability of promoting those objectives. Accordingly, I reject this ground.

E. Ground 2(c): Article 8 of the ECHR

80. I shall address article 8 before considering the claimant's reliance on the best interest of the child because of the effect my analysis of the former sub-ground has on the latter.

81. The claimant contends that the Council failed to have regard to the article 8 rights of the occupants of Shire House. It does not allege that there has been any breach of any rights it may have under article 8 of the ECHR. The claimant's submission is that the Council failed to make proper inquiry into the impacts on the approximately 200 residents of the residential use of Shire House ceasing, and so failed to assess properly the proportionality of pursuing enforcement action. In these circumstances, the claimant alleges the Council has breached the article 8 rights of the residents of Shire House.

Standing: the victim test

82. Section 7 of the Human Rights Act 1998 provides so far as relevant:

> "(1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may—
>
> (a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or
>
> (b) rely on the Convention right or rights concerned in any legal proceedings,
>
> but only if he is (or would be) a victim of the unlawful act.
>
> (2) In subsection (1)(a) "appropriate court or tribunal" means such court or tribunal as may be determined in accordance with rules; and proceedings against an authority include a counterclaim or similar proceeding.
>
> (3) If the proceedings are brought on an application for judicial review, the applicant is to be taken to have a sufficient interest in relation to the unlawful act only if he is, or would be, a victim of that act.

> …
>
> (7) For the purposes of this section, a person is a victim of an unlawful act only if he would be a victim for the purposes of Article 34 of the Convention if proceedings were brought in the European Court of Human Rights in respect of that act." (Emphasis added.)

83. Article 34 of the ECHR provides:

> "**Individual applications**
>
> The court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right."

84. The clear effect of s.7 is that the claimant can only rely on article 8 in these proceedings, and only has standing to pursue an allegation of breach of that Convention right, if he would be victim for the purposes of article 34 if proceedings were brought in the Strasbourg court in respect of that act.

85. In circumstances where the Council had not raised the issue of standing, during the hearing I asked the parties to address the question whether, having regard to the terms of section 7, the claimant has standing to allege a breach of article 8. Counsel for the claimant, Mr Stemp, contends that the question is whether the claimant is directly affected by the Council's failure to grapple with article 8. He submits that is a defect in the decision-making in respect of the Notice which directly affects the claimant who is required to take action pursuant to it. Counsel for the defendant, Mr Beglan, contends that treating a commercial landlord as having victim status in respect of an alleged breach of occupiers' rights would be a significant extension and the court should reject the claimant's contention that it has standing.

86. As Lord Burnett of Maldon CJ observed in *R (Reprieve) v Prime Minister* [2022] QB 447 (giving the judgment of the court):

> "39. Convention rights are not free-floating entities which are available to and enforceable by anyone who disagrees with a decision of a public authority on the grounds that it breaches, or may breach, somebody's Convention rights. Convention rights have effect in the law of England and Wales to the extent provided for by the 1998 Act. … The clear purpose of section 7 of the 1998 Act is to permit, and only to permit, a victim to litigate an alleged breach of Convention rights. …"

87. As the Court of Appeal observed at [40], there are "*two broad groups of cases in which the Strasbourg court has decided that a person who does not allege, or cannot show, that he himself has directly suffered a breach of a Convention right can nevertheless bring a claim in Strasbourg*". "*The first group of cases concerns secret surveillance*": [41]. "*The*

second group of cases includes three broad types: (a) direct victims who have died in circumstances which engage article 2 (the right to life) in which others, such as their close relatives, can bring a claim; (b) applicants who have raised complaints of breaches of other articles of the Convention but who have died during proceedings; and (c) claims brought by a representative organisation on behalf of actual or likely victims (such as Lizarraga 45 EHRR 45)": [43].

88. This case does not fall within, and is not analogous to, either group of cases. The claimant makes no allegation that its article 8 rights have been breached. The occupiers whose article 8 rights are said to have been breached can speak for themselves, and in any event the claimant landlord does not represent them. The claimant is, of course, directly affected by the Notice. But it is not a victim within the meaning of s.7 of the Human Rights Act and so it cannot rely in these proceedings on any alleged breach of article 8.

The merits of the article 8 claim

89. If, contrary to my conclusion, the claimant could rely on article 8, I would in any event dismiss that ground of claim. The way the claim is put, as a failure to have any, or any proper regard to article 8 rights, shows that it is misconceived. As Lord Bingham observed in *R (Begum) v Denbigh High School Governors* [2007] 1 AC 100]:

> "29 … the focus at Strasbourg is not and has never been on whether a challenged decision or action is the product of a defective decision-making process, but on whether, in the case under consideration, the applicant's Convention rights have been violated. … The unlawfulness proscribed by section 6(1) is acting in a way which is incompatible with a Convention right, not relying on a defective process of reasoning, and action may be brought under section 7(1) only by a person who is a victim of an unlawful act.
>
> 30 ... Proportionality must be judged objectively, by the court: *R (Williamson) v Secretary of State for Education and Employment* [2005] 2 AC 246 , para 51. As Davies observed in his article cited above ["Banning the Jilbab: Reflections on Restricting Religious Clothing in the Light of the Court of Appeal in *SB v Denbigh High School*" (2005) 1:3 European Constitutional Law Review 511], "The retreat to procedure is of course a way of avoiding difficult questions". But it is in my view clear that the court must confront these questions, however difficult. The school's action cannot properly be condemned as disproportionate, with an acknowledgement that on reconsideration the same action could very well be maintained and properly so.
>
> 31 … If, in such a case, it appears that such a body has conscientiously paid attention to all human rights considerations, no doubt a challenger's task will be the harder. But what matters in any case is the practical outcome, not the quality of the decision-making process that led to it.

90. Lord Hoffmann's judgment in *Begum* was to the same effect: see [68]; and all members of the Judicial Committee agreed on the approach, as well as the overall outcome. The House of Lords reiterated in *Belfast City Council v Miss Behavin' Ltd* [2007] 1 WLR 1420 that when Convention rights are relied on in a judicial review claim the relevant question is not whether the public body properly considered the claimant's Convention rights but whether there has in fact been a violation of those rights: Lord Hoffman [13]-[16], Lord Rodger [23]-[24], Baroness Hale [31], Lord Mance [44]-[45], Lord Neuberger [88]-[90].

91. The claimant points to the fact that the Council did not obtain sufficient information about the approximately 200 residents of Shire House to assess the likelihood of each of them securing suitable alternative accommodation or being made homeless, or any other impacts on them having regard to their particular circumstances. However, in circumstances where there is no evidence before me as to the impact of the Council's decision on any individual resident of Shire House, and the claimant has not sought to adduce any such evidence, it is manifest that no violation of article 8 has been established.

92. Moreover, in the context of the PSED ground, I have rejected the contention that the Council failed to comply with its duty of reasonable enquiry. Having regard to the assessed positive and negative impacts that the Council assessed would be the consequence of issuing the Notice, on the evidence before me, I am in any event satisfied that that the decision was necessary and proportionate.

F. Ground 2(b): Best interests of children

93. Section 11(2) of the Children Act 2004 provides:

> "Each person and body to whom this section applies must make arrangements for ensuring that –
>
> (a) their functions are discharged having regard to the need to safeguard and promote the welfare of children;…"

Section 11(1) provides that s.11 of that Act applies to local authorities.

94. The claimant contends that Article 3.1 of the United Nations Convention on the Rights of the Child ('UNCRC') was given effect in domestic law by s.11 of the Children Act 2004, and that it requires that all relevant authorities treat the best interests of the child as a primary consideration. In support of this contention, the claimant relies on *ZH (Tanzania) v Secretary of State for the Home Department* [2011] 2 AC 166.

95. In *ZH (Tanzania)* the Secretary of State conceded that the best interests of the claimant's children had to be taken into account in assessing whether her removal was compatible with article 8, and that on the facts the decision to remove the claimant violated their article 8 rights. Baroness Hale (with whom all members of the Court agreed) stated:

> "23. For our purposes the most relevant national and international obligation of the United Kingdom is contained in article 3.1 of the UNCRC: 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or

> legislative bodies, the best interests of the child shall be a primary consideration'. This is a binding obligation in international law, and the spirit, if not the precise language, has also been translated into our national law. Section 11 of the Children Act 2004 places a duty upon a wide range of public bodies to carry out their functions having regard to the need to safeguard and promote the welfare of children. The immigration authorities were at first excused from this duty, because the United Kingdom had entered a general reservation to the UNCRC concerning immigration matters. But that reservation was lifted in 2008 and, as a result, section 55 of the Borders, Citizenship and Immigration Act 2009 now provides that, in relation among other things to immigration, asylum or nationality, the Secretary of State must make arrangements for ensuring that those functions 'are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom'.
>
> …
>
> 25. Further, it is clear from the recent jurisprudence that the Strasbourg court will expect national authorities to apply article 3.1 of UNCRC and treat the best interests of a child as 'a primary consideration'. Of course, despite the looseness with which these terms are sometimes used, 'a primary consideration' is not the same as 'the primary consideration', still less as 'the paramount consideration'. …" (Emphasis added.)

96. In my judgment, the claimant's submissions do not reflect the law. In *ZH (Tanzania)*, the Supreme Court did not hold that article 3.1 of the UNCRC has been *incorporated* into the law of England and Wales by s.11(1) of the Children Act 2004. What was said was that the *spirit* of it has been translated into our national law. The UNCRC is an unincorporated treaty: *R (SC) v Secretary of State for Work and Pensions* [2022] AC 223, Lord Reed PSC (with whom the six other Justices agreed), [75]. As Lord Reed observed in *SC* at [77], "*it is a fundamental principle of our constitutional law that an unincorporated treaty does not form part of the law of the United Kingdom*".

97. This constitutional principle continues to hold good in the context of the Human Rights Act: *SC*, [84]. In a matter concerning a child, when assessing the proportionality of an interference with article 8 rights, the proper approach is to treat the best interests of the child as a relevant consideration, rather than treating the UNCRC as directly applicable: *SC*, [85]-[86]. Mr Stemp drew attention to the fact that in *SC* the court was not referred to *ZH (Tanzania)*. However, it seems to me that this is of no consequence: Lord Reed gave detailed consideration in *SC* to *R (SG) v Secretary of State for Work and Pensions* [2015] 1 WLR 1449 in which the judgments, including his own at [82], had referred to the passages from *ZH (Tanzania)* on which Mr Stemp relies.

98. The claimant relies on *Collins v Secretary of State for Communities and Local Government* [2013] EWCA Civ 1193 [2013] PTSR 1594, a case decided prior to *SC*, for the proposition that where a planning decision engages a child's private and family life under article 8, the child's best interests should be a primary consideration for the

decision-maker. However, even if, where article 8 rights are engaged, the child's best interests should be treated as a primary consideration (per *Collins*) rather than a relevant consideration (*per* SC), that would not assist the claimant who, as I have said, is not a victim within the meaning of s.7 of the Human Rights Act and has no standing to rely on article 8 (whether as a distinct ground or as a means of relying on article 3.1 of the UNCRC).

99. Nevertheless, the Council does not dispute that the duty in s.11(2) applies in the context of decision-taking concerning planning matters, where the welfare of children is engaged. The Council was informed that some of the residents of Shire House were children. In circumstances where the effect of taking enforcement action was that the child residents (among others) would lose their homes, the decision had to be taken having regard to the need to safeguard and promote their welfare.

100. The claimant contends that the Council breached its duty because (a) the Officer's Report stated that "special regard" was had to the interest of children, not that their best interests had been treated as a primary consideration; (b) the Council did not know how many children were resident in Shire House, or how many of them may have had other protected characteristics; and (c) the Council failed to investigate thoroughly each and every child's needs.

101. In my judgment, in circumstances where the relevant duty was to make arrangements for ensuring that the Council made its decision "*having regard to the need to safeguard and promote the welfare of children*", the objection to the terms in which the Council described the regard it had had to the welfare of children is a semantic one which lacks substance. The extent of the duty under s.11 depends on the context and the function that the authority is exercising. In my judgment, in the context of this determination regarding the exercise of its enforcement powers, s.11 of the Children Act 2004 did not impose a duty on the Council to investigate the individual needs of the children occupying Shire House. It was sufficient that the Council had due regard, as I have explained above, to the positive and negative impacts of its proposed decision on children, and reached the view that the positive impact of stopping the use of such poor accommodation substantially outweighed the disruption and potential distress that was likely to be caused. Accordingly, Ground 2 fails in its entirety.

G. GROUND 3: Expediency

The parties' submissions

102. The claimant contends that the Council did not properly address the expediency test in s.172(1)(b) of the TCPA. The claimant acknowledges that the Officer's Report addressed the question of expediency in express terms. However, the claimant submits that the following matters were material considerations which the Council failed to take into account in assessing whether it was expedient to take enforcement action:

    i) the view of Mr Inwards expressed in 2019 that the residential development at the Site was authorised; and

    ii) The views of the Council's housing officers that they had no issue with the quality of the accommodation provided at the Site.

103. The claimant submits that the correspondence that I have addressed above shows that in May 2019 Mr Inwards was tasked with investigating the residential conversion of the Site by Ms Church. His conclusions were that the residential development at the Site was lawful and authorised within the Prior Approval and his view was communicated to the claimant and the Council's housing officers in September 2019.

104. The Council contends that Mr Inwards' email of 2 September 2019 (paragraph 13 above) was informal officer comment that only answered the question whether *prior approval* was required. Mr Sahadevan states in his witness statement:

> "I reviewed Clive [Inward]'s previous correspondence on the matter, and concluded that he consistently maintained a position based on factual circumstances; that Prior Approval had been granted, see [Mr Inwards' email of 2 September 2019]. I did not think there was anything in his previous communication which suggested the existing use which was continuing at [Shire] House was lawful. I also considered the issue of estoppel and concluded that there was nothing preventing any future enforcement action against the existing residential use."

105. The claimant submits that the Council's position is untenable when the communications between Mr Inwards and the Council's housing officers are properly considered. The Council's housing department was considering leasing units at the Site to house people to whom it owed duties under the Housing Act. In that context, the question being asking by the housing officer was whether the residential development on the Site was lawful and authorised.

106. The claimant contends that in assessing whether it was expedient to issue an enforcement notice the Council was required to take into account, and weigh, this expression of view, conveyed both internally and externally by a senior officer in 2019, that the development was lawful. It was not binding on the Council but the fact that it had "*previously decided that the development was lawful and authorised, and had communicated that decision to both its own housing officers and to the Claimant*", was a material consideration, Mr Stemp submits, to which the Council failed to have regard.

107. The claimant also submits that the email from the Council's Private Sector Housing Officer dated 13 November 2020 (see paragraph 15 above) was relevant, albeit the view expressed that there were only "*minor issues*" with the particular flat visited did not bind the Council.

108. The Council contends that in circumstances where the Head of Planning decided that the development had not been properly implemented, and it is accepted (at least for the purposes of this claim) that that decision was open to him, any previous informal statements by officers are not in point. That is so whether or not Mr Inwards' statements in fact addressed the issue of implementation, which the Council contends is highly doubtful. In any event, the Council submits that Mr Sahadevan's understanding of Mr Inwards' views as being informal ones going to the grant of the Prior Approval, and not conveying a view about the lawfulness of the development as finally built, was rational. Moreover, Mr Inwards' email of 2 September 2019 has to be seen in the context of the series of letters from the Council in 2017 and 2018 encouraging the claimant to apply for a certificate under s.192 of the TCPA. The claimant must have known (having received

those letters) what was required to obtain a formal determination as to the lawfulness of the actual built development.

109. As regards the email of 13 November 2020 from an officer in the housing department, dealing with different statutory and/or policy questions, and exercising a different statutory function, the Council refutes the contention that it was a material consideration for the Head of Planning in making his decision.

110. During the course of his oral submissions Mr Stemp submitted that the Council had failed to provide any, or any adequate, explanation for changing its view as to the lawfulness of the development. In response to the objection that the claimant has no permission to bring a reasons challenge, he submitted that it would not have been possible to pursue such a ground of challenge because of the complete absence of reasons. Mr Beglan refuted that assertion, as a reasons challenge can be based on a claimed omission.

Analysis and decision

111. In public law, a distinction is drawn between (a) considerations that a decision-maker is *required* to take into account ('mandatory relevant considerations'); (b) matters that must not be taken into account ('mandatory irrelevant considerations'); and (c) those considerations which the decision-maker may choose whether or not to take into account. Where, as here, it is alleged that a decision-maker has failed to take into account a material consideration, it is axiomatic that such an omission will only vitiate a public law decision if the consideration fell into category (a).

112. In determining whether a matter was a mandatory relevant consideration the question is whether it has been expressly or impliedly identified by statute or policy as being required, as a matter of legal obligation, to be taken into account by the decision-maker, or whether, on the facts of the case, it was so obviously material as to require consideration. See *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 at 182-183, approved by the House of Lords in *In re Findlay* [1985] AC 318, and *R (Samuel Smith Old Brewery (Tadcaster)) v North Yorkshire County Council* [2020] UKSC 3 [2020] PTSR 221, Lord Carnwath JSC (with whom all other members of the Court agreed) at [29]-[32].

113. In this case, the claimant's contention is that the matters it has identified were obviously material. In my judgment, this ground must fail. It is not, and could not be, suggested that Mr Inwards' statements on the telephone or in his email of 2 September 2019 gave rise to any legitimate expectation. His statements were made informally, albeit he conveyed them to the claimant and to housing officers, in a context where, as the claimant must have known, it was open to it to seek a formal statement as to the Council's view of the lawfulness of the development. Even if his statements meant that, in his view at the time, the residential development as built was lawful and authorised, there is no justification for treating such bare and informal statements as so obviously material to the Council's determination as to whether to take enforcement action that Mr Sahadevan was required to take them into account.

114. Moreover, although I accept that the housing officer would have been concerned to know whether the residential development as built was lawful, it is not clear that Mr Inwards' answer addressed that question. Certainly, his statements cannot be said to be "*clear, unambiguous and devoid of relevant qualification*".

115. The view expressed by a Private Sector Housing Officer about the extent of the issues that required remediation in one flat that the officer visited is plainly not obviously material to the decision whether to take enforcement action. It was not the housing officer's function to consider the lawfulness of the development as a matter of planning law, and he did not do so. Nor is there anything to suggest that the officer was tasked with undertaking a broad evaluation of the quality of the residential units, still less was he doing so by reference to the local development plan. Indeed, he was not even considering whether the units were ones in which the Council would be prepared to place those to whom it owed a housing duty; unsurprisingly, the claimant does not suggest that the negative determination in that regard made by the Director of Housing (see paragraph 14 above) should have been taken into account.

116. I agree with the Council that it is unnecessary, and indeed would be inappropriate, to address the contention raised by the claimant for the first time during the course of oral submissions that the Council's reasons were inadequate. No such challenged is pleaded and the claimant has no permission to pursue it.

117. In my judgment, the approach taken in the Officer's Report to the question whether it would be expedient to issue an enforcement notice was lawful. Accordingly, Ground 3 also fails.

H. **Conclusion**

118. In the light of the conclusions that I have reached, it is unnecessary to consider the Council's reliance, in the alternative, on s.31(2A) of the Senior Courts Act 1981. The claim is dismissed.