GORING-ON-THAMES PARISH COUNCIL

Members are summoned to a Goring Weir Committee Meeting, to be held at The Old Jubilee Fire Station, Red Cross Road, Goring on Tuesday 31 July 2018 at 6.30 pm
Public and press are invited to attend

Members are respectfully reminded of the obligation to declare any interest relevant to business to be conducted at this meeting and of the convention as to withdrawal from the meeting for the relevant item unless the interest is not one that debars the member from speaking thereon.

AGENDA – Goring Weir Committee Meeting

1. To receive apologies for absence.
2. To receive declarations of interests.
3. Chairman's announcements.
4. To approve minutes of the meeting held on 24th November 2016.
5. To receive a report on the Judicial Review and Appeals process. (BU)

   (Report and Appendices A to G)

6. Public forum: *An opportunity for the public to address the committee. With the permission of the chairman, the public may also speak about specific items of business as they arise.*
7. To consider an article be submitted to the Goring Gap News.
8. To consider whether any other matters are outstanding for the Committee.
9. To consider recommending to Council that the Weir Committee be dissolved.

Colin Ratcliff
Clerk
26 July 2018

MINUTES OF THE MEETING OF THE GORING WEIR COMMITTEE
GORING ON THAMES PARISH COUNCIL
The Old Jubilee Fire Station, Red Cross Road, Goring 10:30am Thursday 24 November 2016

Members Present:

Chairman	John Wills
Vice-Chairman	Catherine Hall
Members	David Brooker
	Brandon Hancox
	Lawrie Reavill
	Bryan Urbick
	Emrhys Barrell
	Matthew Brown (from 1038 hrs)

Officers Present:

Clerk	Colin Ratcliff

11 members of the public

16/19 To receive apologies for absence
Apologies for absence were received from:
Cllr. Mary Bulmer

16/20 To receive any declarations of interests
None

16/21 Chairman's announcements
The Chairman stated the committee were indebted to Cllr. Bryan Urbick for the many hours and hard work he has put in.

16/22 To approve minutes of the meetings held on 13 June and 17 October 2016
Resolved: That the minutes be approved and signed by the Chairman

16/23 To receive an update on the High Court Judgment dated 17 November 2016
Cllr. Urbick gave an update noting that Goring Parish Council (GPC) won two of the three grounds but the Judge used his discretion not to quash. The Judge was highly critical of South Oxfordshire District Council (SODC) and flaws in their approach to planning decisions. SODC were not awarded costs. Cllr. Urbick ran through grounds as contained in an application for permission to appeal.
The costs so far, donations received, potential costs of an appeal and further public donations were discussed.
The Chairman noted that 43 emails had been received from the public since the judgment was made, some offering further monetary contribution and all in support of GPC continuing to appeal with none against.

16/24 To note application for permission to appeal
Noted

16/25 Public Forum
Mary Carr on behalf of Stop Goring Hydro stated they would fully support GPC in an appeal and hoped they would do so. Several had indicated they will contribute and the group would start further fundraising immediately and would hope to raise a reasonable amount.
Abel Westerhof commented there is a greater cost to the village than monetary and that an appeal should not be a decision based on cash value only.
Cllr. Brooker asked how many supporters there are for Stop Goring Hydro. Mary Carr

stated they have at least 130, With 103 email addresses on their list and a further 23 contributors with no email recorded.
John Farr asked how many in the village support the hydro project. Cllr. Urbick stated GPC had written to the Goring and Streatley Sustainability Group, they eventually replied but do not wish a dialogue and left several unanswered questions.

16/26 Confidential Business - To consider and, if thought fit, approve the following motion: In view of the confidential nature of the business about to transacted, it is advisable in the public interest that the public and press be temporarily excluded and they are instructed to withdraw.
Resolved: That the motion be approved

16/27 To consider any further steps that may be taken including the potential for an appeal.
Following further discussion a motion was proposed that GPC should take the High Court Judgment to appeal.
Resolved: That the judgment should be taken to appeal
A further motion was proposed that a release from GPC be submitted to the Goring Gap News and other news agencies in order to communicate the issues as seen by GPC to the public.
Resolved: Motion carried and agreed that Cllr. Urbick draft a release to be circulated by email to the committee for comment prior to publication.

The Chairman declared the meeting closed at 1135 hrs.

Signed: Dated:

As the Weir claim has reached its conclusion, I wanted to report on the matter – reviewing the decision-points along the way and to remind us and our constituents what we did and why we did it. This is right, and hopefully addresses the questions raised at Parish Council meetings and in previous issues of the GGN.

The Planning Decision

You will all recall the outcome of the Planning Committee meeting in March 2016 in which the Planning Committee agreed, based on the officer's report, to grant planning consent for the demolition of part of the existing weir at Goring Lock and to replace it with three large Archimedes screws and build associated housing for generators and control equipment, as well as fish and eel passes, and a new flood control gate. Even after Parish Councillors meeting with the Planning Officers, and encouraging them to do further due diligence, the decision to grant planning permission was taken. At that same meeting, in the discussion about the weir scheme, one of the individuals on the planning committee made a comment that 'Goring had to learn that it isn't set in aspic', generating serious concern that the Planning Committee was not aware of the responsibility to protect and enhance the AONB.

That decision didn't settle well for a number of reasons, so legal advice was sought. You will also recall that at the time, there had been two major instances where the Parish Council felt SODC Planning had really dropped the ball: the weir decision, but also the rail electrification programme through the Goring Gap, neither of which seem to have been considered in the context of the AONB and with the Weir, adding the required regard to the Conservation Area status. Unfortunately, the only recourse against a granted Planning Decision is a legal one; the granting of planning permission can only be quashed by the Courts. There was a suggestion that a complaint to the Ombudsman would be able to address the matter, but an Ombudsman has no power to reverse a granting of planning decision. Not even SODC could reverse a decision without seeking a Consent Order from the Courts.

Pre-Action Protocol

Our legal advisers indicated that we had an arguable case before the High Court against SODC and potentially against the Environment Agency. We needed first to try to warn any potential defendants via a Pre-Action Protocol letter, giving them 14 days' notice to reply, and this needed to be completed prior to a final deadline to make the claim to the High Court (within 6 weeks of the planning decision). Timing was tight, so an Extraordinary General meeting of the Parish Council was called.

The Council agreed, at that Extraordinary meeting on 2nd April 2016, to send the Pre-Action Protocol Letter as advised by legal counsel. The letter, sent on 4th April, raised four grounds:

1. SODC did not complete a screening opinion, as required by Regulation 7 of the EIA regulations.
2. The irrational argument (in the Officer's Report) that the scheme would cause visual harm to the Goring and Streatley Conservation Areas but not the AONB (irrational because the AONB has a higher status than a Conservation Area). In this we also raised issues of other harm to the AONB, including noise impact that was disregarded in the Officer's report.
3. That SODC did not comply with its statutory duty under s66(1) of section 72(1) of the Town and Country Planning (Listed Buildings and Conservation Areas) Act 1990 because they did not give 'considerable weight' to preserving Listed Buildings and their settings.
4. That SODC did not seek its own expert hydrological advice, relying on advice from the EA, which in turn relied on a 2010 report that failed to take account of recent flooding (in 2012 and in 2014).

A copy of the Pre-Action Protocol Letter is provided in Appendix A.

It should be noted that at this stage, SODC could have agreed to request of the Court (by Consent Order) to quash the planning permission. This one decision would have saved taxpayers the legal expenses to defend a decision that the court eventually deemed were in error.

A recent example in this regard is of Fish Legal (an organisation that acts for the Angling Trust and others). Last month they sent a pre-action protocol letter on behalf of Collingham Angling Association to Newark & Sherwood District Council. The N&SDC had granted planning permission for a hydropower scheme on the Trent without following European Rules on assessing impact on the environment. This is **exactly** the same point GPC raised with SODC in our 1st Ground. As a result of the PAP letter, S&NDC has agreed to go to the courts to revoke its decision. Had SODC taken the same view with our claim, GPC would not have needed to take further action.

High Court Claim

After a negative response by SODC to our letter, and a delayed response by the EA, we were advised that the only recourse was to take the matter to the High Court. We were also advised to include the EA as a defendant in the matter.

We had established a Weir Committee (as a sub-committee of the Parish Council) as our Chairman needed to recuse himself from future decisions due to a conflict of interest being both an SODC Ward Councillor and a Parish Councillor. We agreed in an 18th April 2016 Weir Committee meeting to submit a High Court Claim against SODC and the EA on the same grounds as the Pre-Action Protocol Letter.

There was a great deal of public support in the meeting, and no one spoke up to suggest that the High Court claim should not go ahead. We were aware of the potential costs, and the potential, if we lost the case, to pay a further £10,000. The discussion about the costs is clearly laid out in the minutes of that meeting (and shows how we grappled with that decision) – and though none of us loved the idea of spending public money, we felt that it was important to stand up and fight to protect the Conservation Area and AONB from a flawed decision. We worried more about what would happen if we didn't fight it.

The High Court Claim was accepted 'on the papers' meaning that we had satisfied the Court that we had an arguable case with our written application. SODC legal counsel attempted to refute the claim by arguing that 'it didn't matter, they'd have made the same decision', but the judge refused that argument. It was determined that ours was an Aarhus Convention claim, so we were limited to £10,000 costs to the defendants and they were limited to £35,000 in costs in the event we won. It should be noted, at all times, we stayed within the recoverable costs and SODC outspent the limitations on costs.

Prior to the hearing, we entered into negotiation with the Environment Agency (as they were also defendants in the case. It was our objective to resolve the issues with them, and subject to an appropriate agreement, we would seek Consent Notice to remove them as defendants. In the main, the agreement with the EA:

1. With regard to hydrological flood modelling, we were invited to make suggestions as to how the hydrology modelling can be improved to inform future flood assessments for the stretch of the River Thames.
2. In pursuit of better communications between the EA and the Parish Council, the EA agreed to assist in setting up, when desired, a "Goring Flood Forum" in which the EA will provide an EA technical officer to attend the Forum on an annual basis, or if there is a flood event, on a more frequent meeting rota to deal with any aftermath of a flood event, to ensure ongoing direct liaison between the parties.
3. Regarding permit applications and consultations on development consent applications, any new permit application received by the EA for activities within the Goring Gap/Goring Weir stretch of the River Thames, the EA will endeavour to notify the Parish Council about any

application made for a permit, including inter alia any flood defence consent, water extraction licence or water impoundment licence. The EA Partnership and Strategic Overview Team will endeavour to notify the Parish Council when they receive a flood risk activity permit.

4. In relation to any consultation on a development consent application for activities within the Goring Gap/Goring Weir stretch of the River Thames, the EA will communicate directly with the Parish Council or if more appropriate through the Forum in relation to any application for development consent which the Local Planning Authority sends to the EA for consultation.
5. Regarding negotiations in relation to a permit for a hydro-electricity plant at Goring Weir the EA will provide to their Estate's Department, any concerns of the Parish Council in relation to noise issues which may arise in relation to a hydro-electricity plant at Goring Weir, so that the surveyor acting on the negotiations is aware of the Parish Council's concerns prior to any contract for lease or licence being drawn up between the EA and the plant operator.

As a result, it was resolved in a Weir Committee meeting of 17th October 2016, to release the EA as a defendant in our claim, and therefore we would not argue Ground 4 of our Claim. And there were no costs to be awarded to the EA in the matter (as would typically be expected with a Consent Order releasing them as defendants) – each party agreed to accept their own costs in the matter.

At the same meeting we received a letter from the Goring & Streatley Sustainable Energy Ltd, who finally responded after several 'chases', and yet did not address several key points in our letter, and did not respond to our request for a meeting. Though the claim was against SODC and not the Sustainability Group, they were an Interested Party to the claim. It would have been helpful if they had engaged and addressed the very serious concerns we had about the specific benefits promised to the community and the contingency plan if the development began and would have to be discontinued. The scheme was misunderstood by many to provide 'local energy', and because this wasn't true – the structure of the company meant that a portion of the profits would be fed back to the community - we were also concerned as to the administrative costs and salaries expected to be paid to the Principals of the company and exactly how much of the profits would be used in Goring & Streatley. We didn't receive answers to those questions. Importantly, at no time, was there any indication from the Sustainability Group that they would not pursue the scheme, or that it was no longer viable.

It should also be noted that we had also tried to enter into discussions with SODC, but their solicitors informed our solicitors that there was no interest as they believed that they would win the case and that our grounds for the claim were unfounded.

The Claim was heard on 9th November 2016, by Mr Justice Cranston. In my view, SODC presented one very concerning argument, paraphrased along the lines of 'even if this weir scheme damaged the AONB, it doesn't matter, it's only a very small part of a large AONB'. Our response was strong in that 'a death by a thousand cuts' would gradually erode all the protections of the AONB. They also indicated (wrongly) that no one, in the consultation, had raised any concerns about the Listed Buildings. This was proven to be incorrect, and they needed to apologise to the court for misleading the judge. There were a number of other issues raised, and it was very clear that SODC merely wanted to win this case and chose arguments that were contrary to other situations in which they had argued exactly the opposite. As a resident and taxpayer in South Oxfordshire, I was hugely disappointed. It was very clear that they hadn't done their job properly on that application, and now were trying to defend the indefensible. Cllrs Wills and Hall were also in attendance to witness the arguments, and the three of us walked away feeling that our legal team had done an excellent job to put forward our case, and to argue the case put forward by SODC's legal team.

The judgment was handed down on 17th November, and though we won two grounds, the judge used his discretionary power to not quash the application. This was unusual since one of the grounds was a breach of legislation (not merely an administrative error, as was the first ground). Also unusual, there were no costs awarded to SODC from GPC. It was very clear that the judge was aware of the failings of SODC, as indicated in the final paragraph of his judgment.

> "For the reasons I have given, I refuse judicial review. However, in advancing the case for Goring Parish Council Mr Streeten has expertly exposed flaws in the Council's approach to the grant of planning permission. I will consider the Council's written submissions on the matter but against that background my view at this stage is that it is not entitled to its costs."

Please see the full judgment at Appendix B.

Some days later, a full Order of the court was sealed, giving specific indication of the legal failures of SODC in the matter:

> "The court declares that the First Defendant's (SODC) decisions did not comply with the duty in section 72 of the Planning (Listed Buildings &tc) Act 1990 and did not comply with the duty in regulation 7 of the Town and Country Planning (Environmental Impact Assessment) Regulations 2011."

For a copy of the order, see Appendix C.

Seeking an Appeal against the High Court decision

As it has been explained to me, there are three 'steps' that can be taken to seek an Appeal against a High Court decision: 1) request permission from the High Court judge who made the judgment; 2) request directly to the Appeal Court; and 3) if both are unsuccessful, file an application to 'reopen the decision'. To set the context, the first is common – barristers routinely ask the judge for permission to appeal, and they typically refuse. To do the second, it is more robust, and much of the cost in the process is putting together the Appeal application (the detail of the claim needs to be argued). The third, called a 52.30 application, is not uncommon to request, but rarely is a hearing granted as they are mostly refused on application. The costs to request to re-open are minimal.

Application to the Court of Appeals

After we received the judgement, and the barristers request to the judge was unsurprisingly refused, the Weir Committee took legal advice and were advised that we had a substantial and arguable case for the Appeal on four specific grounds:

> Ground 1: The judge erred in finding that it was highly likely that the outcome would not have been substantially different if the Council had applied the correct test under section 72 of the 1990 Act.
>
> Ground 2: The judge was wrong to say that there would be no harm to the Areas of Outstanding Natural Beauty when he confirmed harm to the conservation areas. The Conservation Area, which falls within the AONB, is acknowledged in policy to contribute to the special character of the AONB.
>
> Ground 3: The judge erred in finding that the Council's approach to acoustic harm to the AONB was lawful.
>
> Ground 4: The judge was wrong to conclude that the duty to investigate harm to listed buildings "must be triggered by at least someone either in the Parish Council or outside raising it as a potential issue". The judge was in error to conclude that it was not necessary for the officer's report to identify the listed buildings which may be harmed by the development.

On the 24th of November 2016, the Weir Committee agreed to seek an Appeal. There were, at the time, 43 e-mails sent to support the Parish Council in taking the matter further. Additionally there were supportive comments made at the meeting – with no one suggesting that we shouldn't seek

appeal. I would remind again that we had only 21 days from the judgment in which to make this decision, and we made the decision based on the information we had at the time.

Our application for appeal was lodged with the Court on 8th December 2016. A copy of the application is attached at Appendix D
There have been some comments that the Council shouldn't have pursued the Appeal, not least because the 'hydro scheme isn't viable'. Firstly, I would remind everyone that we made the decision to seek an appeal at the end of November 2016, to meet the very tight deadline. At that time, there was news about the Sandford scheme going ahead (and later, it was installed – though not yet working up to the levels originally predicted). Another compelling challenge, of course, is that the Planning Permission goes with the land and not the applicant – so even if the Sustainability Group agreed they would not go forward, the planning permission could be used by another entity.

The Court of Appeals refused the permission to appeal in February 2017, but because of a recent change in procedures, we were not given permission to present our arguments in an oral hearing. See decision at Appendix E.

52.30 application
At that point, because of some perceived flaws in the response from the criminal judge, the 52.30 application was put in, with the desire to have the Appeal heard. That application was dated 2nd March, but accepted by the court on the 27th March 2017 (see Appendix F, to see the reasons that the decision should be reconsidered).

As Councillors will recall, but the public is unlikely to know, when we put forward the 52.30 application to provide the final request to re-open the decision and to grant an appeal (on advice from our solicitors) we were forbidden from speaking about it if and until allowed by the Court. We had even asked for permission to notify SODC and the Interested Party (the Sustainability Group) – and the Court was clear in the response that no one could be informed of the application.

I asked the barrister about the 52.30 application, and he set the context for me. In the past 14 or so years, since the current court rule about 52.30 applications were established, there have been on average 200 applications each year. In that time, only 11 applications were accepted for a hearing. Our weir claim was the 12th. Because it is rarely granted, we knew that there was something to our claim that merited it being heard. The court originally indicated that there was one day needed for the hearing – the first to 'dispense of' the 52.30 application, and then we would go immediately into the Appeal hearing. In other words, we had to have the Appeal hearing ready, with skeleton arguments presented to the Courts in the usual timeframes.

Two or three weeks prior to the hearing, we were informed that the judges hearing the 52.30 request to re-open and appeal, and if successful, the full appeal hearing would then be heard. This change by the court was after we had prepared the skeleton arguments for the appeal and all the pre-work had been completed.

The hearing was heard on 20th March, with the judgment handed down on the 25th April 2018. Please see the judgment for that hearing at Appendix G.

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After considerable personal introspection and reflection, I would like to encourage us as a group to continue to not be afraid if we are again faced with a decision to stand-up for what we feel is right for our community, and if necessary to invest in that decision. There have been requests that we should indicate that we would never do something like this again. I personally have difficulty in that – because it is impossible to know what will happen in the future, and that it is inappropriate to attempt to pre-determine future Councils' decisions.

What I would recommend, though, is that we remind all future Councils to weigh heavily the cost of taking an action vs the cost of not taking an action.

Approximate allocation	**Dates of Payment**	**Amount (Ex VAT)**	
Pre-Action Protocol	17/05/2016	£	2,492.00
High Court Claim	24/05/2016	£	7,832.24
	30/12/2016	£	15,663.68
Appeal	12/05/2017	£	3,694.18
	02/11/2017	£	4,727.50
	20/03/2018	£	2,235.70
Costs	20/07/2018	£	6,700.00
Less donations	15/09/2016	-£	6,000.00
	22/02/2018	-£	5,500.00
Total		**£**	**31,845.30**

There may be another small, final invoice from our own solicitors who have been involved in negotiating a reduced cost to SODC and may have some outstanding costs from the court hearing.

In this case, over the three fiscal years in which this case was pursued, the financial cost to households in Goring is (by rough calculation) less than £0.50/month. One could always say that we could have used that money elsewhere – that's true of course. We made the decision to prioritise protection of the AONB and the Conservation Area, and to force SODC to improve their handling of planning matters.

In this case, I believe we approached all the decisions regarding the weir with as much objectivity as we could, and we made those decisions taking expert legal advice. At all times we knew that we might not win the case, and that we might have to pay costs as a result. We managed the costs as best we could, knowing that it isn't cheap to take legal action – and we kept within the limits of the amounts we could recover if we won. Though we received considerable donations (over £11,000) to support us taking the claim further, we made the decisions without any firm commitment for the amount that would be raised. The donations were an indication of the support of the idea, but at no time was that the deciding factor in our decisions.

The outcome desired in this matter was to 1) attempt to stop what the Parish Council and many, many parishioners and other local people and groups felt was a seriously flawed plan that would damage the AONB and the Conservation Area and 2) to ensure that SODC improve their approach to planning and be more mindful of their consultations. Though we weren't successful in 1), we have made progress on 2). The judgement in the High Court case vindicated our concerns and I believe, was part of bringing about some improvements by SODC (though more are needed). It is easy to be critical in hindsight, but I feel, based on the information and advice we received at the time, I would probably make the same decisions at each step. We made logical, well-considered decisions – and the logic wouldn't change. It is difficult to put one's head above the parapet and take a stand, but we did, I believe for the right reasons, and for that there is nothing to be ashamed.

We can, though, learn a lot from the process. Most importantly, that we need to be clear to SODC in Planning Committee responses to planning applications. If we recommend refusal, we should be specific and detailed in our written response and reference the various planning issues (and now, Neighbourhood Plan policies as well). We need to be mindful of the specifics in protecting the AONB and the Conservation Area, and act as if we would need to defend our position in court (so hopefully we won't ever have to again). Also, we need to keep reaching out to and engaging with SODC, the EA, OCC, and all other public bodies that are required to comply

with the various legal requirements – and we should support them in their responsibilities, at the same time as holding them accountable.

Cllr Bryan Urbick
26th July 2018

South Oxfordshire District Council
135 Eastern Avenue
Milton Park
Milton
OX14 4S

Attn.: Head of Legal Services (copy by email legal@southandvale.gov.uk)
(Copy to Head of Planning A Duffield)

Your ref: P15/S2946/FUL

4 April 2016

PRE-ACTION PROTOCOL LETTER
THIS LETTER REQUIRES YOUR URGENT ATTENTION

Dear Sirs

1. This is a letter before action sent in accordance with the pre-action protocol for judicial review.

Claimant

2. We are instructed by Goring-on-Thames Parish Council.

Proposed Defendant

3. South Oxfordshire District Council.

Decision to be Challenged

4. The decision of South Oxfordshire Council ("the Council") to grant planning permission for a hydroelectricity plant comprising partial demolition of the existing weir at Goring Lock for a distance of approximately 18m, and the replacement of the weir with three Archimedes screws and associated housing for generators, controls equipment and 2.1m wide fish pass, eel pass and 3m wide flood control gate ("the Decision") (application ref: P15/S2946/FUL).

Details of the Matter Being Challenged

5. The application was granted on 9 March 2016.

Factual Background

6. Goring Weir is located on the River Thames situated between the historic villages of Goring-on-Thames and Streatley. The development site is located in the Thames river corridor along the route of the Thames footpath, which runs along the eastern bank of the river from the south up to the bridge (adjacent to the weir and the lock) and then along the western bank of the river to the north of the Lock House. Both the Goring Bank and the Streatley Bank are within Conservation Areas. The weir falls within the boundary of the Chiltern Hills AONB and is adjacent and has visual intervisibility with and North Wessex Downs AONB.

7. An initial planning application was made in 2012 but was withdrawn on 25 February 2012 following objection from the Environment Agency on the basis, *inter alia*, that the Flood Risk Assessment was inadequate.

8. A fresh application was made on 22nd September 2015 and was subsequently amended to address concerns raised by the Environment Agency in relation, for example, to the specifics of the proposed fish and eel passes.

9. The proposal as approved consists of the demolition of 18m of the weir at Goring Lock and its replacement with three Archimedes screws, each of which is 3.5m in diameter along with a 2.1m wide fish pass a new eel pass and a new 3m wide flood gate. A control hut housing generating and other associated equipment will also be constructed next to the existing Lock House. Concrete works are to be left exposed and all metalwork will be painted 'Environment Agency' Grey.

10. The applicant submitted a noise impact assessment dated 2012 with the proposal which accepted that mechanical noise is substantially different from the noise of running water and therefore suggested the positioning of acoustic covers over all of the drive chains so as to reduce the audibility of the development to acceptable levels at surrounding residential developments.

11. A number of objections were made to the proposal including by the Claimant and by the Streatley Flood Forum which was set up following serious flooding in the area in 2012, 2013 and 2014. The Environment Agency responded to the consultation but confirmed they were content with the supposed update (consisting of a letter explaining that the repositioning of the control hut did not affect its validity to the 2010 Flood Impact Assessment). No reference was made by either the EA or the Defendant to the serious flooding in 2012, 2013 and 2014.

12. On 9 March 2016 The Defendant's Planning Committee considered the application and granted planning permission.

Ground 1

13. The Defendant has confirmed that it did not adopt a screening opinion in relation to the Development.

14. Regulation 7 of the EIA regulations states that where an application for planning permission for development falling within Schedule 1 or Schedule 2 to the

regulations is before a local planning authority, but has not been the subject of a screening opinion, the authority shall, in accordance with Regulation 5(5), adopt a screening opinion.

15. Regulation 2(1) defines Schedule 2 development, under (a), as development of a description mentioned in Column 1 of Schedule 2 where any part of that development is to be carried out in a sensitive area. Column 1 includes under 3(h) installations for hydroelectric energy production. Although the application states the installation will generate 170kw of power and this falls below the 0.5megawatt threshold found in schedule II to the regulation. The Council officer confirms she did not screen the application because she considered it fell below this threshold. However 0.5mw threshold is not the full test for determining if the application needed to be screened. A sensitive area is defined as including—under (f)—an area of outstanding natural beauty designated as such by an order made by Natural England under section 82(1) of CROW and all applications in a sensitive area regardless of threshold need to be screened. The development falls within the two AONBs referred above.

16. Consequently the decision to grant planning permission without adopting a screening opinion was therefore in breach of the regulations and unlawful.

Ground 2

17. Ground two rests on two errors. The first is that the conclusions that the hydropower scheme would cause visual harm to the Goring and Streatley Conservation areas but have no negative impact on the AONB are irreconcilable. The decision was therefore irrational. The second is that the decision fails to have regard to the visual harm to the AONBs.

Visual Harm to the AONB

18. The Officer's Report ("OR") concludes that the hydropower scheme "is not considered to be harmful to the special landscape character of the Area of Outstanding Natural Beauty or the river corridor". This is adopted in the reasons for the decision at page 7. This accords with the statement at OR 6.3vi that "notwithstanding the landscape importance of the AONB the special landscape character of the river corridor, the proposed development... is not considered to have an adverse effect on its visual appearance over and above that of the existing weir." Nevertheless, paragraph 6.5ii makes clear that the site is visible from the Streatley and Goring Bridge from on the river and from the riverside areas to the north in neighbouring Streatley which "does not easily lend itself to discreetly housing the generators, as this part of the river is open in character and prominent in views from the river crossing". OR 6.5iii therefore states that, "ultimately there will be some alteration to the character of this part of the river and the contribution it makes to the Conservation Area". The report concludes that the impact on the visual amenity of the Conservation Areas constitutes "less than substantial harm".

19. It is, to say the least, extremely surprising that the report should find harm to the character of the historic area protected by the conservation area designation but not to the character of the landscape AONB.

20. There does not appear to be a formal conservation area appraisal for the designated Goring-on-Thames Conservation Area, but the Council is asked to confirm this (see request for further information below). However, the recently adopted Streatley Conservation Area Appraisal explicitly states at page 41 that "the conservation area makes an important contribution to the cultural and historic aspects of the natural beauty of the [North Wessex Downs] AONB and as such should be conserved and enhanced". In the absence of a formal conservation area appraisal for the Goring-on-Thames CA, it is reasonable to assume that similar considerations arise in relation the contribution Goring-on-Thames conservation area makes to the Chiltern Hills AONB on the Goring side of the river.

21. In light of the fact that the Streatley Conservation Appraisal states explicitly that the Conservation Area (which it is acknowledged would be harmed) contributes to the natural beauty of the North Wessex Downs AONB it was irrational (in the Wednesbury sense) to find harm to the conservation area but not to the AONB. The two findings are logically irreconcilable.

Other Harm to the AONB

22. The Officer's Report considers noise impact only from the perspective of the residential amenity of neighbouring dwellings (paragraph 6.7ii). However, the AONB Management Plan for the Chilterns Hills is explicit (page 23 point 29) that loss of tranquillity (which includes peace and quiet) will constitute harm to the AONB. The Defendant has failed to have regard to the fact that the noise generated by the development will harm the tranquillity (and therefore the character) of the AONB. This is a relevant material consideration to which the Defendant failed to have regard.

Statutory Duty and the NPPF

23. In doing so the Defendant was in breach of the statutory duty pursuant to section 85 of the Countryside and Rights of Way ('CROW') Act 2000 to have regard to the purposes of conserving and enhancing the landscape and scenic beauty of the Chiltern Hills and North Wessex Downs AONBs. Paragraph 115 of the National Planning Policy Framework (NPPF) requires 'great weight' to be given to conserving landscape and scenic beauty in AONB which have the highest status of protection in relation to landscape and scenic beauty. In erroneously determining that the proposal would cause no harm to the AONB the Defendant necessarily failed to give great weight to that harm as required by national policy.

24. The Defendant therefore erred in finding that there had been no harm to the Chiltern Hills and North Wessex Downs AONBs and in doing so failed to have regard to the policy contained in paragraph 115 NPPF. The Defendant's decision to grant planning permission breached the statutory duty imposed by s 85 CROW and was unlawful.

Ground 3

25. In order to give effect to the Statutory Duty under s 66(1) of section 72(1) of the Town and Country Planning (Listed Buildings and Conservation Areas) Act 1990 (LBCAA) decision makers must give "considerable importance and weight" to preserving and enhancing listed buildings and their settings. There is a strong presumption against granting planning permission for development which would cause harm to a listed building (including its setting) or a conservation area (*East Northamptonshire v Secretary of State for Communities and Local Government* [2014] EWCA Civ 137 per Sullivan LJ at [29] and [23].)

26. Nowhere in the OR, the Conservation Officer's representations, nor the reasons for the decision refer to the statutory duty to under s 72(1) of the LBCAA to pay special attention to the desirability of preserving or enhancing the character or appearance of the Goring and/or Streatley Conservation Areas.

27. Although the recent Court of Appeal decision in *Secretary of State for Communities and Local Government v Mordue* [2015] EWCA Civ 1243 has made clear that the burden of proof is on the Claimant to show that the local planning authority failed to apply the statutory presumption under s 66(1) and the policy requirement in NPPF paragraph 132[1], nevertheless, the decisions in *Barnwell Manor* and *Forge Field* make clear that a decision maker must give 'considerable importance and weight' to any harm (even that which is less than substantial) to a heritage asset. The OR does not take that approach. Rather it appears to treat harm to the conservation area as a matter to be weighed in the planning balance without any special consideration. This is the wrong approach and renders the decision unlawful.

28. Moreover, there are a number of listed buildings in the vicinity of the development, for example building 1 on Appendix IV the Streatley Conservation Area Appraisal is the grade II listed Swan Hotel. The Defendant does not appear to have paid any, let alone special, regard to the desirability of preserving this building's setting. The decision was therefore also in breach of the statutory duty imposed s 66(1) of the LBCA Act 1990. [2]

Ground 4

29. The Defendant did not seek its own expert hydrological advice but relied exclusively on the advice received from the Environment Agency (the EA), which in turn relies on the developer's 2010 Flood Risk Assessment V2. The EA's reliance on the 2010 FRA V2 produced by Peter Brett Associates (PBA) fails to take into account the effects from recent flood events — information which plainly would be known to the EA in its role as the relevant statutory advisor and also because it is the owner of the weir. In fact the EA has repeatedly issued flood warnings for Streatley and Goring, most recently in January 2014 for two periods:

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[1] The same approach will apply to the s 72.

[2] The Claimant's legal advisors are presently researching the full picture in relation to designated heritage assets on both sides of the River Thames which is made more difficult by the lack of a published Conservation Area Appraisal for the Goring-on-Thames Conservation Area and information will be requested in the PAP letter; the foregoing ground of claim is without prejudice to additional heritage assets which have not be considered by the Defendant in the OR.

there was a five-day alert in effect between 7 and 12 January and a further 9 day alert in effect between 8 and 17 January. Previously in 2012 according to information publicly available.

30. The Defendant for its part also failed to grapple with the issues raised by objectors (in particular but not exclusively the Streatley Flood Forum) which noted in its letter dated 11 October 2015 *inter alia*

> *"The Flood Risk Assessment is based on the South Oxfordshire/Vale of White Horse District Council Flood Risk Assessment, however nearly all of the flood plain and the properties at risk are in West Berkshire and we note that the [FRA] does not cover this point*
>
> *The [FRA] submitted is dated 2010 and takes no account of the recent floods in the winters of 2012/13 and 2013/14. The assessment only refers to a 1 in 100 year flood; it needs to cover all events. The flood events experienced in 1999. 2000, 2003, 2007, 2012/13 and 2013/14 have all been different which makes reliable modelling difficult."*

31. It is therefore logically impossible that the Defendant had proper regard to material considerations relating to flood risk and the NPPF duties when the FRA before the decision-maker was six years out of date and the so-called update relied on by the EA failed to deal with recent flood events. The Defendant was simply not in a position to consider the objections raised.

32. This failure is particularly egregious given that EA's own consultation response was seriously flawed, given the agency's reliance on the 2010 Flood Risk Assessment the lack of a competent update to deal with the recent and repeated flood events and the failure to give sufficient reasons how the conditions it required justify departing from its previous finding that the 2010 Flood Risk Assessment was inadequate.

33. Crucially the EA consultation response fails to make any reference to the validity of the assumptions in the flood risk assessment in relation to serious recent flood events identified by the Streatley Flood Forum to have taken place since 2010 and which plainly would be information well known to the EA in its capacity as statutory advisor who provides flood alerts. It also fails to deal with the Streatley Flood Forum's concerns that the modelling only addresses part of the flood plain and failed to consider the risk of flooding in West Berkshire.

34. The only document known to the Claimant dated after 2010 is the so-called FRA update. In reality this is a cover letter from the developer dated December 2015; it cannot rationally be said to be an update to the 2010 FRA since all the letter deals with is the repositioning of the building housing the generator equipment and unsupported claims that the changes to the scheme design would not exacerbate the flood risk and asserting that the introduction of the NPPF and PPG did not affect the conclusions of the 2010 FRA. There does not appear, as far as the Claimant is aware, to have been any further modelling work done post the floods in 2012, 2013 and 2014 to provide a credible update to the 2010 FRA.

35. Absent some indication that there has been statutory consideration of the recent events the 2010 FRA is wholly inadequate. The Decision was therefore based

upon a materially flawed FRA, failed to have proper regard to objections and the flawed document was unlawful.

36. If proceedings are lodged, the Claimant intends to name the EA as an Interested Party and seeks disclosure from it in this letter, see below. Depending on its response, and the further information, the Claimant may include the EA as a second Defendant given the egregious nature of its failings and the Council's reliance on the flawed EA advice.

Details of Legal Advisors Dealing with this Claim

Counsel

Details of Interested Party

39. Goring and Streatley Community Energy Ltd, Attn: Lisa Ashford, Yarnton House, High Street, Streatley, Berkshire RG8 9HY

40. Environment Agency, Attn.: David Griggs Howbery Park Benson Lane Wallingford Oxfordshire OX10 8BD

Details of Information Sought

41. You are required to make full and frank disclosure in judicial review proceedings.

42. We therefore require full information on how the Council has dealt with each of the points raised above.

Further information required

43. In relation to the EA, you are requested to provide the following information:

    i) A list of all flood alerts issued for the River Thames at Goring and Streatley from 2010 to present
    ii) Copies of all information relied on in relation to the letter dated 18 February 2016 and copies of all information relied on in relation to the previous comments referred to in the latter
    iii) Any information the EA would rely on to defend the claim that its advice was materially flawed in the event the EA is a defendant in these proceedings

44. We believe that the grounds included in this letter are more than sufficient to justify the quashing of the Decision, but we reserve our position in the light of your response and any document you may provide.

45. If there is any disagreement with the facts stated in the draft statement of facts and grounds, please provide any relevant documents that the Council and/or the EA relies on in this regard.

What the Council is requested to do

1. The Council is asked to agree to submit to judgment on the bringing of proceedings. If the Council disagrees, please explain why.

2. The Council is also asked to pay our legal costs.

Other applications

46. If the claim proceeds the claimant will apply for a protective costs order pursuant to CPR 45.43 on the basis that the claim is an environmental matter. *Venn v Sec State CLG* [2015] 1 WLR 2328. If you disagree this is an Aarhus matter or the making of a PCO please give your reasons,

Address for Reply and Service of Court Documents

cc Goring and Streatley Community Energy Ltd (at address above)
Environment Agency (at address above) (also by email)

Neutral Citation Number: [2016] EWHC 2898 (Admin)

Case No: CO/2122/2016

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/11/2016

Before:

THE HON. MR JUSTICE CRANSTON

- -

Between:

GORING-ON-THAMES PARISH COUNCIL	**Claimant**
- and -	
(1) SOUTH OXFORDSHIRE DISTRICT COUNCIL	**Defendants**
(2) THE ENVIRONMENT AGENCY	
- and -	
GORING AND STREATLEY COMMUNITY ENERGY LIMITED	**Interested Party**

- -
- -

Mr. Charles Streeten (instructed by **Richard Buxton**) for the **Claimant**
Mr. Jeremy Pike (instructed by **South Oxfordshire District Council**) for the **1st Defendant**

Hearing dates: 9 November 2016

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

THE HON. MR JUSTICE CRANSTON

Mr Justice Cranston:

Introduction

1. This is a claim for judicial review brought by Goring-on-Thames Parish Council ("Goring Parish Council") against a decision of the development control (planning) committee of South Oxfordshire District Council ("the Council") dated 9 March 2016. The Council decided to grant planning permission for a scheme to generate hydropower at Goring Weir for local usage, at full capacity some 107KW. Lang J gave permission to bring the claim on 25 July 2016.

2. The proposed scheme is to be located within the Goring-on-Thames Conservation Area and the Streatley Conservation Area. It is also located in the Chilterns and the North Wessex Downs Areas of Outstanding Natural Beauty ("AONB"). The former covers 324 square miles, the latter 668 square miles.

3. Goring Parish Council objected to the hydropower scheme for a number of reasons when the matter was before the Council's planning committee. The challenge in this judicial review focuses on harm from the scheme to the Chiltern and North Wessex Downs AONBs and the impact of noise from it upon tranquillity in the AONBs; the scheme's impact on listed buildings, their settings and the conservation areas; and the Council's failure to adopt a reasoned environment screening opinion in relation to it.

4. Shortly before the hearing Goring Parish Council confirmed its intention to file a notice of discontinuance as regards its claim against the Environment Agency. The consent order between the parties concerned the flood risk assessment and its adequacy. Thus the only claims which needed to be considered at the hearing were those against the Council.

Background

5. The villages of Goring and Streatley, as well as the River Thames which lies between them, have a rich, cultural history. The location of the two villages has marked a crossing of the River Thames since Celtic times. The first bridge was built in 1837 and replaced in 1923. The nearby Grade I listed church of St Thomas of Canterbury is a visible reminder of Goring's long parish history, dating as it does to Norman times. There are about a dozen Grade II listed buildings in the two villages. Throughout its history, the site has been connected with both art and literature. A Turner painting entitled 'Goring Mill and Church' hangs in the National Gallery. Books such as Jerome K Jerome's *Three Men in a Boat* and Kenneth Grahame's *Wind in the Willows* have descriptions of the villages or drew inspiration from the site of Goring Weir.

6. Goring Weir is located within a section of the River Thames where it divides into separate channels comprising the lock cut, a main channel split by an island with two separate weirs, Goring Weir and Streatley Weir, and an old mill channel. The lock, with associated buildings, is on the eastern bank. Goring Weir is located to the west of these. The eastern bank, in Goring, comprises residential properties with gardens leading down to the river. The western bank, in Streatley, is characterised by meadow land and marshy grassland, and includes the buildings forming the Swan Hotel. It is

Grade II listed. The B4009 road bridge over the River Thames is located 100 metres south of the weir, linking Goring and Streatley. The Thames footpath runs alongside the river on the western bank, and south of the Lock House on the eastern bank.

7. The weir itself has a sharp crest of approximately 59.5 metres in length with a series of steps to discharge the water downstream. There are three sluice gates and a fish pass is located in the centre of the weir. The large sluice gates in the middle of the weir are controlled by the Environment Agency to maintain the upper water level for navigation and flood control.

The planning application

8. The scheme involves demolishing part of the existing weir at Goring lock for a distance of approximately 18 metres and replacing it with three Archimedes screws. The screw turbines, each of 3.5 metres diameter, will then be installed directly on the site of the existing weir. These will be arranged side by side, directly on the section of the weir closest to the lock house. Water will flow into the screws across the site of the existing weir crest, and discharge close to the bottom of the existing weir. The screws will be fully visible, but the gearboxes, generators and control systems will be situated in a separate power house. The top of this building will be lower than the existing walkway. The concrete works are to be left exposed, and metalwork, including the Archimedes screws and the acoustic covers to the generators, will be painted 'Environment Agency' grey. A 2.1 metre wide fish pass, an eel pass and a three metre wide flood control gate for use by the Environment Agency are part of the scheme.

9. Goring and Streatley Community Energy, the Interested Party, and their consultants held pre-application discussions with the Environment Agency regarding an application for a hydropower scheme in 2010. They had had an Environment Report prepared by a consultant in 2009, which had some sections on landscape and visual amenity. As to landscape, the report said that the existing weir structure was functional in appearance. The addition of the hydropower plant to the weir would not significantly increase its size nor have an adverse effect on its visual character: "The hydropower plant will therefore have no significant adverse effect on the local landscape character." As to visual amenity, the report concluded that the view from the road bridge over the river and weir had a high sensitivity to change. So did the view from the river going upstream:

> "[A]dverse effects of high significance on visual amenity would be experienced mainly by river users travelling upstream and pedestrians viewing the river from the B4009 road bridge. In order to mitigate for the adverse impacts on these visual receptors, the colour of the hydropower plant and the control building would be sympathetic with the local landscape and the existing weir structure."

10. An initial planning application was made in 2012. There was a Noise Impact Assessment accompanying it dated September 2012. Paragraph 7 stated:

> "[I]t is appreciated that mechanical noise is substantially different from that of rushing water noise and transmits at

> higher frequencies. Therefore individual acoustic covers will be place[d] over all three drive trains to reduce the noise within 1m by at least 20dBA. This would result in a sound pressure level at the lock-house of no more than 47dBA and at the nearest residence on the Goring bank of just 30dBA, both of which are inaudible above the existing ambient sound levels at each location".

11. The 2012 planning application was withdrawn following objection from the Environment Agency on the basis, inter alia, that the flood risk assessment was inadequate.

12. The current application was dated late August 2015. As a result of the application, the Council prepared a publicity checklist. "Affecting Conservation Area" was ticked, but not "Affecting setting of a Listed Building". There was also an *Environmental impact assessments* ("EIA") checklist, which indicated that the application fell under Schedule 2, was in a sensitive area but not over the threshold. The Council officer added a noted that the Swan Hotel at Streatley should be consulted.

13. The Council's conservation officer was consulted. In her response of 16 October 2015, she listed as relevant legislation and policy section 72 of the Planning (Listed Buildings and Conservation Areas) Act 1990, section 12 of the National Policy and Planning Framework ("NPPF") and Local Plan Policy CON7. She then stated that she had no objection to the principle of the application. Throughout history, the river has been used to generate power and she considered that the installation of the Archimedean screw generator was a modern progression of an historic tradition.

14. However, she said, the location at Goring Weir did not lend itself so well to discreet housing of the generators since this part of the river was open in character and was prominent in views from the river crossing. As such, it was important that the built structures be as small as possible in order to reduce their visual impact on views with the conservation area. The solid brick wall appearance of the power house in the proposal would dominate views. The conservation officer's recommendation was as follows:

> "Ultimately there will be some alteration to the character of this part of the river and the contribution it makes to the Conservation Area. If there is harm, it is certainly less than substantial as the special character and appearance of Goring that warrants its designation will not be completely lost. As such, where there is harm, the Local Authority should be satisfied that it is outweighed by the public benefits of this scheme as per paragraph 134 of the NPPF. I therefore suggest that either a redesign of the building or evidence that the most sympathetic design has been proposed should be obtained to inform the decision."

15. In October 2015 the conservation officer for West Berkshire Council also responded to the application. She agreed with what the Council's conservation officer had said. However, she was concerned that the proposal in its then form would harm the setting

of Streatley Conservation Area, contrary to the NPPF and Policies CS14 and CS19 of West Berkshire's Core Strategy 2006-2026. These concern protecting the historic environment from harmful development. She agreed that every effort should be made either through the use of different materials or a total redesign to help assist with reducing its visual impact.

16. There were a number of objections to the scheme. For example, the freeholder of Cleeve Court, further upstream, commented that whichever way one looked at the proposed development – from the bridge, the moorings and even from the Thames path – it would have a dreadful visual impact. The former chairman of Streatley Parish Council wrote in October 2016, mentioning the proximity of the Swan Hotel, a listed building, to the development.

17. A revised Design and Access Statement from the applicant was submitted in January 2016. It conceded that that 2015 application misjudged the concern with visual impact. Accordingly, there had been some redesign. The generators had been relocated and the control equipment was to be placed in a hut on the riverside by the lock-keeper's house. The statement addressed the main view of the scheme from the B4009 as follows:

> "It is recognised that the project is within the Goring conservation area and the view from the road bridge has played a significant part in determining details of the final design.
>
> The form of this scheme is dictated by its function, and as with the lock at Goring, there is little that can be done in some areas to hide the concrete structure. The troughs in which the Archimedes screws rotate, and the screws themselves are of steel construction and could be painted almost any colour that may be required. The proposed colour scheme is neutral, adopting the natural colour of concrete and the grey paint of the existing hardware associated with the lock and the weir."

The revised Design and Access Statement also contained some paragraphs on the implications for the Goring conservation area.

18. There was a further response from the Council's conservation officer on 19 January 2016 after the revised plans. She commented that the hut with the relocated control equipment would not look out of place as an ancillary garden structure to the lock-keeper's house. She added:

> "Recommendation:
>
> My recommendation remains unchanged. I support this application and consider the amendments further mitigate the visual impact of the proposal. The harm is less than substantial and subject to other planning considerations, should be outweighed as per paragraph 134 of the NPPF."

19. West Berkshire's conservation officer also responded following the redesign in January 2016:

> "The proposal has been amended such that the visual impact of the proposal on the character of the Streatley Conservation Area has been much reduced. I therefore have no objections."

In her witness statement of 14 June 2016 the Council's planning officer has said that West Berkshire's conservation officer had considered the potential for impact on the setting of listed buildings, in particular the Swan Hotel, and had not considered the scheme to be harmful or significant.

20. In its second response of February 2016, Goring Parish Council expressed its continued concern about the potential flooding risks associated with the scheme, especially since the villages of Goring and Streatley had suffered a number of serious flooding events in the recent past. Goring Parish Council was concerned, it said, about how the installation would be operated and maintained, the potential risk of debris affecting it and mechanical breakdown. Noise was also raised. After quoting paragraph 7 of the Noise Impact Assessment of 2012, its response added:

> "However it had been stated previously that noise levels would not truly be known until the installation was running, which raised further concerns so [Councillors] were still not reassured by this assessment."

As well as the possible detrimental impact on fish and the weir pools, Goring Parish Council reiterated that still no formal visual impact assessment had been prepared.

The officer's report and the decision

21. The application was referred to the Council's planning committee because of the objections from Goring Parish Council. The officer's report for its meeting on 9 March 2016 recommended approval of the scheme. At the outset it noted the objections of Goring Parish Council, before describing the application area (including the Swan Hotel) and the proposal. The report then summarised the representations from both the so-called "specialist" advisers (such as other councils) and the public as regards both the original and revised plans. With respect to the original plans, one supporter had said that the visual impact on the wider setting was less than substantial, whereas one objector referred to the visual impact on the landscape character of the AONBs and conservation areas.

22. Goring Parish Council was one of the specialist advisers and maintained its objections to the revised plans in summary, flood risk, noise impact, impact on biodiversity, visual impact on the AONB and conservation area, the lack of a visual impact assessment and financial viability of the scheme. Previously objecting to the original proposals, Streatley Parish Council now had no strong views: the visual impact of the amended proposal had a much reduced impact on the Streatley conservation area, and there were no objections in that regard. West Berkshire Council supported approving the revised scheme, taking the same view of visual impact as Streatley Parish Council.

> "The visual impact of amended proposal has a much reduced impact on the Streatley Conservation Area – no objections".

The Council's own conservation officer supported the revised application:

> "[T]he amendments further mitigate the visual impact of the proposal."

Its environmental protection team also supported approval: any potential noise issues could be addressed satisfactorily by imposing conditions prior to installation, with a detailed acoustic report, including mitigation measures.

23. As to the general public, there were four representations of support for the revised proposals. The reasons given were that the amended design was preferable to that originally submitted; that the Thames is a wonderful and historical source of clean energy; that the scheme looks like many other weirs already on the river; AONB and conservation area regulations do not prohibit development, but seek mitigation, and this is demonstrably feasible as shown by the photomontages; and that local communities should support green energy schemes of this kind.

24. There were 58 representations objecting to the scheme, even as revised. The reasons as summarised in the officer's report were that the revised plans did not address the concerns raised in the original consultation; the proposal conflicted with the Countryside and Rights of Way Act; the relocated control hut was highly visible from upstream and the lock viewing area; the proposed access was unsafe and inadequate over private land; other locations were more appropriate and far less destructive; and the acoustic enclosures would increase the height of the scheme, impacting on visual amenity.

25. The officer's report recorded that both the Chilterns and North Wessex Downs AONB boards were consulted but did not comment.

26. After referring to the planning history, the officer's report set out relevant planning policy and guidance. This included South Oxfordshire's strategy policies such as CSEN1, landscape (AONB) and CSEN3, Historic Environment, and local plan policies C3, The River Thames and its valley, C4, Landscape setting, CON7, Conservation areas and EP2, Noise and vibrations. There was a general reference to the NPPF and to specific paragraphs in the NPPF guidance. The officer's report then dealt with six main issues: renewable energy considerations, visual impact on the landscape character of the AONB, flood implications, the impact on the character and appearance of the conservation area, biodiversity and ecological considerations and noise impact.

27. As regards visual impact, the report referred to paragraph 116 of the NPPF, the AONBs, the visual impact assessment undertaken in 2009, the 2016 Design and Access Statement, and photographs of the site and stated:

> "6.3vi Notwithstanding the landscape importance of the AONB and the special landscape character of the river corridor, the proposed development should be viewed in the context of the existing weir structure and is not considered to have an adverse effect on its visual appearance, over and above that of the existing weir.
>
> The report, which considers the original proposal rather than the revised proposal, recommends that in order to mitigate the

> impact on highly sensitive areas, the colour of the hydropower plant and the control building would be sympathetic to the local landscape and the existing weir structure. The revised scheme minimises the impact on visual amenity further, by virtue of the control systems being removed from over the weir, and reducing the height of the proposed structure over the weir. Further to this point, a schedule of materials, finishes and detailing would be required by condition to ensure the finishes harmonise with the local landscape and the existing weir structure."

28. Turning to the character and appearance of the conservation area, the report noted that throughout its history the Thames had been used to generate power and the scheme was considered to be a modern progression of an historic tradition. The site was clearly visible from the bridge, from on the river and from the riverside areas to the north in neighbouring Streatley. Given the sensitivity of the area, revisions had been sought in the design. The report continued:

> "6.5iii Ultimately there will be some alteration to the character of this part of the river and the contribution it makes to the Conservation Area. The revised plans have reduced the visual impact of the weir construction on the river and the proposed Control Hut is of a design and scale that it would not look out of place as an ancillary garden structure to the Lock House. The Conservation Officer at West Berkshire Council has also assessed the impact of the revised proposal on the Streatley Conservation Area and has raised no objections. In order to mitigate visual impact further, a schedule of materials, finishes and detailing is recommended, which would be secured by condition."

29. In addressing the noise impact of the scheme, the report referred to planning policy and the 2012 noise impact assessment submitted. It noted that the Council's environmental health officer had advised that potential noise impact could be addressed by imposing a planning condition, requiring a detailed acoustic report prior to installation of the proposed development. The report explained:

> "6.7iii The condition would require the applicant to carry out a Noise Impact Assessment in accordance with BS 4142:2014 'Methods for rating and assessing industrial and commercial sound', by a suitably qualified acoustic consultant and testing in a variety of water flows. In the event that noise levels exceed standards levels, the applicant would be required to submit appropriate mitigation before the first use of the scheme. Noise attenuating features (principally the acoustic covers, insulation of building) are bespoke to the equipment installed, but noise reducing measures can be designed to achieve any reasonable level of attenuation that is required and the measures are of a small enough scale that they would not introduce further planning considerations.

> Subject to a detailed condition, the noise impact associated with the development can be satisfactorily managed to the extent that the residential amenity of neighbouring dwellings would be safeguarded."

30. The Council's planning committee considered the matter on 9 March 2016. A representative of Goring Parish Council spoke in opposition to the application, as did a local resident and Cllr Kevin Bulmer, the local ward councillor, who had been active in the cause. The application was put to vote and approved.

31. Formal planning permission was granted, subject to eleven conditions. Condition 5 requires that prior to the installation of any equipment associated with the development, a schedule of materials, finishes and detailing must be approved in writing by the Council. The reason is to

> "integrat[e] the visual appearance of the development with the existing weir structure, and to minimise impact on visual amenity of the sensitive landscape character of the area in accordance with Policy CSEN1 of the South Oxfordshire Core Strategy 2027 and Policies C3, C4 and D1 of the South Oxfordshire Local Plan 2011."

32. For the same reason there must be a full specification of the Archimedes screw hydroelectric power installation (condition 6).

33. Condition 10 deals with noise and reads as follows:

> "No development shall take place until a detailed scheme for protecting the surrounding area from noise arising from the development hereby permitted has been submitted to and approved in writing by the local planning authority. The scheme shall include an acoustic report produced broadly in accordance with BS 4142:2014 'Methods for rating and assessing industrial and commercial sound'. Thereafter, the development shall not be carried out other than in accordance with the approved details.
>
> The acoustic report shall be prepared by a competent person with a detailed knowledge of acoustics. It is recommended that an acoustic consultant qualified (as a minimum) to be an associate member of the Institute of Acoustics carry out this work. A list of accredited consultants can be found on the Institute of Acoustics' website www.ioa.org.uk or by telephoning 01727 848195.
>
> Reason: To protect the occupants of nearby residential properties from loss of amenity due to noise disturbance and in accordance with Policy EP2 of the South Oxfordshire Local Plan 2011."

34. The planning permission then sets out the reasons for the decision. These mirror the conclusions in the officer's report, which had been before the planning committee:

> "By virtue of the scale, layout and design of the development, the hydropower scheme is not considered to be harmful to the special landscape character of the Area of Outstanding Natural Beauty or the river corridor, as amplified by the Visual Impact Assessment.
>
> The impact on the historic merits of the Conservation Area and effect on visual amenity constitutes less than substantial harm, which is outweighed by the public benefit of the renewable energy generation and through the use of the existing water source. Subject to detailed information to be submitted for approval by condition, the scheme does not present planning issues with respect to ecological and environmental protection, flood risk and noise emission.
>
> Subject to conditions, the proposal accords with the [National Policy and Planning Framework] (2012) and National Planning Practice Guidance (2014), South Oxfordshire Core Strategy (2012), South Oxfordshire Local Plan (Saved policies, 2011) and the South Oxfordshire Design Guide (2008)."

Legal and policy framework

35. The *NPPF* in paragraph 115 requires that great weight be given to conserving landscape and scenic beauty in AONBs, which have the highest status of protection in relation to landscape and scenic beauty. It adds that the conservation of wildlife and cultural heritage are important considerations in all these areas. Paragraph 116 states that the conservation of cultural heritage is an important consideration in AONBs. Part 12 of the NPPF is entitled "Conserving and enhancing the historic environment". Paragraph 132 reads, in part:

> "132. When considering the impact of a proposed development on the significance of a designated heritage asset, great weight should be given to the asset's conservation. The more important the asset, the greater the weight should be. Significance can be harmed or lost through alteration or destruction of the heritage asset or development within its setting. As heritage assets are irreplaceable, any harm or loss should require clear and convincing justification. Substantial harm to or loss of a grade II listed building… should be exceptional…"

Section 134 of the NPPF states that where a proposal will lead to less than substantial harm to the significance of a designated heritage asset, the harm should be weighed against the public benefits of the proposal.

36. The Council has a number of relevant *planning policies*. Core Policy CSEN1, Landscape, provides that the district's distinct landscape character and key features will be protected against inappropriate development and, where possible, enhanced.

Where development is acceptable in principle, measures will be sought to integrate it into the landscape character of the area. High priority will be given to conservation and enhancement of the Chilterns and North Wessex Downs AONBs and planning decisions will have regard to their setting. In particular, the landscapes and waterscapes of the River Thames corridor will be maintained and where possible enhanced, as will the setting and heritage of the river for its overall amenity and recreation use.

37. Core Policy CSEN3, Historic Environment, states that the district's historic heritage assets will be conserved and enhanced for their historic significance and important contribution to local distinctiveness, character and sense of place. This will be carried out through, inter alia, conservation area appraisals/reviews and the determination of planning applications. The text to the policy notes the South Oxfordshire district has some 72 conservation areas.

38. Policy EP2 on noise states that proposals which would by reason of noise have an adverse effect on existing or proposed occupiers will not be permitted, unless effective mitigation measures are implemented.

39. *AONBs* now fall under the Countryside and Rights of Way Act 2000. They can be designated for the purposes of conserving and enhancing their natural beauty, and conservation boards established to pursue this purpose, in particular to draw up management plans to that end: ss.82, 86-87, 89. Section 85(1) imposes a duty on public bodies such as the Council to have regard to this purpose in exercising or performing any functions in relation to, or so as to affect, land in an AONB.

40. Section 1 of the Chilterns AONB management plan 2014-2019, reads:

> "The primary purpose of designating an area of countryside as an AONB is to conserve and enhance the natural beauty of its landscape. In this sense, the term 'natural beauty' refers not only to the scenic qualities of the landscape but to all those other elements which together produce the special character of the AONB. These elements include wildlife and man-made features such as its archaeological and built heritage."

A chapter of the management plan is devoted to the historic environment. The text to policy HE3 provides that the historic environment is irreplaceable and damage must be avoided, especially where the site's importance has been identified and protection conferred by some form of designation. Additionally, it is the setting of many sites which adds to their importance and the way they are appreciated. Policy HE9 provides:

> "The Chilterns has an extraordinary cultural heritage covering the historic environment and all that makes it special: a wealth of literary and military figures; the aristocracy; poets; religious leaders; politicians; innovators and notable business people all of whom have left their mark on the Chilterns. It is an essential ingredient of what makes a place different and is crucial to develop a sense of identity and local pride. It also provides a

> plethora of opportunities to promote the area to attract visitors and tourists."

41. *Conservation areas* fall under Part 2 of the Planning (Listed Buildings and Conservation Areas) Act 1990. Section 71 places on local planning authorities the duty to draw up and publish proposals for the preservation and enhancement of conservation areas in their areas. Section 72(1) imposes a duty in exercising planning functions to give

> "special attention… to the desirability of preserving or enhancing the character or appearance of [a conservation] area".

42. West Berkshire Council published its Conservation Area Appraisal for Streatley in 2010. There is a reference in this to the Swan Hotel in the 1870s. Among the conclusions from the appraisal are that the Streatley conservation area makes an important contribution to the cultural and historic aspects of the natural beauty of the AONB.

43. Although the Goring conservation area has been in existence for decades, there is no comparable conservation area appraisal as that for Streatley.

44. With regard to *listed buildings*, section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 imposes the duty in granting planning permission to have special regard to the desirability of preserving them or their setting or any features of special architectural or historic interest which they possess. A challenger must demonstrate substantial doubt as to whether a decision maker has complied with the duty: where the decision-maker has referred to the statutory duty, the relevant parts of the NPPF and any relevant policies in the development plan, there is an inference that the duty has been complied with, absent some positive indication to the contrary: *Jones* v. *Mordue* [2015] EWCA Civ 1243; *R (on the application of Palmer)* v. *Herefordshire Council* [2016] EWCA Civ 1061.

45. EIAs are provided for in the Town and Country Planning (Environmental Impact Assessment) Regulations 2011, 2011 SI No. 1824, as amended ("the EIA Regulations"). Part 2 of the EIA Regulations provides for screening opinions as to whether an EIA is required. In effect, Regulation 7(a) requires a planning authority to adopt a screening opinion if an application before them for determination is a Schedule 2 application. Included in the descriptions in column 1 of Schedule 2 are installations for hydroelectric energy production. Column 2 adds a threshold: "The installation is designed to produce more than 0.5megawatts". However, a column 1 development falls within the definition of a Schedule 2 development, whatever the threshold, if any part is to be carried out in a sensitive area, and a sensitive area by definition includes an AONB: regulation 2(1).

Issue 1: Impact on the AONB

46. For Goring Parish Council, Mr Streeten contended that the Council's finding that the development would cause no harm to the Chilterns or North Wessex Downs AONBs was *Wednesbury* unreasonable.

47. The first string to Mr Streeten's bow was that the finding that there would be some harm to the character of the river and the contribution it makes to the conservation area was inherently incompatible with the conclusion in paragraph 6.3vi in relation to the AONBs, that the development "is not considered to have an adverse effect on its visual appearance, over and above that of the existing weir". In his submission, the finding of no harm in this regard derived from what was flimsy analysis on the part of the 2009 consultants' report. There was little, if any, objective analysis in what was, after all, an environment report by an environmental scientist, not someone expert in analysing visual impacts or landscape. (This is a point strongly made by Catherine Hall, a chartered architect and member of Goring Parish Council.) Moreover, the report concluded that the hydropower plant would have no *significant* adverse effect on local landscape character, not that there were *no effects*.

48. I accept Mr Streeten's submission that there can be a substantial overlap between the factors relevant to assessing the impact of a proposed development upon an AONB and a conservation area. AONBs might be primarily concerned with potential landscape visual impact, and conservation areas with impact upon heritage, but as paragraph 116 of the NPPF indicates the conservation of cultural heritage is an important consideration in an AONB. Human occupation and patterns of habitation and cultivation have shaped the face of the English countryside. Cultural heritage is very much part of what Dame Fiona Reynolds describes as "the fight for beauty". Its importance is brought out clearly in the Chilterns AONB management plan. The acknowledged sensitivity of the area around Goring Weir, reflected in the various heritage and landscape designations, derives not only from the aesthetic beauty of the location but also from its cultural heritage.

49. The difficulty Mr Streeten faces is that his legal challenge on this score is a rationality challenge. I accept that the intensity of review varies with the subject matter, a point made in *Associated Provincial Picture Houses Ltd* v. *Wednesbury Corp* [1948] 1 KB 223 itself. But as Sullivan J said in *R (on the application of Newsmith Stainless Ltd)* v. *Secretary of State for the Environment, Transport and the Regions* [2001] EWHC Admin 74, an applicant alleging *Wednesbury* unreasonableness as regards decisions based on planning judgment faces a particularly daunting task. That was said of a decision by a planning inspector, but in my view there is no difference with the decisions of local planning authorities, when properly advised by their officers. On my reading, nothing in *R (on the application of Campaign to Protect Rural England)* v. *Dover DC* [2016] EWCA Civ 936 suggests otherwise.

50. In my judgment the Council's assessment in paragraph 6.5iii of the officer's report that there might be a degree of impact upon the Goring conservation area is not inherently incompatible with the assessment in paragraph 6.3vi that there might be no impact upon the AONB. That is despite Mr Streeten's submission, which I have said I accept, that heritage enters a planning assessment with an AONB.

51. In *R (on the application of Campaign to Protect Rural England)* v. *Dover DC* [2016] EWCA Civ 936, the court effectively struck down the grant of planning permission for an extensive housing development in an AONB. But that does not lead to a different conclusion in this case, since that was a reasons, not a rationality, challenge to the local planning authority's decision. "A local planning authority which is going to authorise a development which will inflict substantial harm on an AONB must

surely give substantial reasons for doing so": [21], per Laws LJ, with whom Simon LJ agreed.

52. Nor do I consider that *R (on the application of Lensbury Ltd)* v. *Richmond upon Thames LBC* [2016] EWCA Civ 814 is to the point. That again was not a rationality challenge, but was advanced as the failure to assess whether a planning application in an area designated as metropolitan open land for, as in this case a hydroelectric generating facility on a weir, was what under local planning policy was "inappropriate development". Because it did not address that issue, the Council did not then go on to ask itself the critical question whether under the policy very special circumstances existed to justify the grant of planning permission.

53. In his judgment in *Lensbury*, with which Beatson LJ agreed, Sales LJ recalled the danger of "death by a thousand cuts" identified by Sullivan J in *R (Heath and Hampstead Society)* v. *Camden LBC* [2007] EWHC 977 (Admin); [2007] 2 P&CR 19, [37], as he put it in that case, "a series of planning permissions being granted for developments each apparently reasonable in itself but having a serious cumulative detrimental effect on the important public interest in the continuing openness of MOL [metropolitan open land] and the Green Belt..." That applies to cultural heritage as well, even though in the context of these very large AONBs this was a very small development and any harm localised.

54. The important point is that there is no suggestion that the Council wrongly applied planning policies. The boards of the AONBs made no submissions on the proposal when invited to do so. The line of attack by those opposing the development was on the visual, not the heritage, impacts of the proposal. This was a classic matter of planning judgment, and the Council's assessment that there was no harm to the AONB cannot be said to be *Wednesbury* unreasonable.

55. The second string to Mr Streeten's AONB bow was acoustic harm. He submitted that the Council's consideration of noise impacts resulted in a lacuna in the decision-making process in that the harm which the noise would cause to the AONB was ignored. Among the special qualities of AONBs included their tranquillity, as recognised in the Chilterns AONB management plan. Mr Streeten underlined his submission in this regard with a telling passage from *Wind in the Willows*, where Mole is mucking about in a boat on the river listening to the pleasant sound of water lapping over a weir.

56. Mr Streeten continued that paragraph 6.3vi of the officer's report related to visual impact on the landscape character of the AONB, but said nothing about noise. While paragraph 6.7 dealt with noise impact, there was no reference there to the AONB or to landscape generally. The officer's report simply considered that development from the perspective of Policy EP2 of the South Oxfordshire Local Plan, which deals with the effect of noise on occupiers of residential properties. Those like Goring Parish Council were not confining their concern about noise to residential users.

57. I fully accept that amongst the special qualities of AONBs is their tranquillity. The Chilterns AONB management plan has a heading "Loss of tranquillity", underlining that it is a much valued quality but is constantly being lost with the noise from motor-ways, trunk roads and low flying aircraft. I also accept that tranquillity will be high on the list of priorities of many of those walk along the Thames Path or "muck about

on boats" on the river. The 2012 Noise assessment accepted that the mechanical noise which the turbines will produce will be different from the sound of running water presently heard at Goring weir. But it also went on to calculate that the sound from the scheme at the nearest residence would not be above the ambient sound.

58. Again the nature of the legal challenge, *Wednesbury* unreasonableness, is determinative. That challenge is not that the Council failed to take into account a material consideration. What the Council did was to apply its policy on noise, EP2, concerning residents, as it was obliged to do. The AONBs' management plans are not statutory planning policies. No one pointed to tranquillity in relation to the AONBs. The Swan Hotel was to be specially notified of the planning application. Nothing said by any of the specialist consultees could be characterized as a concern with loss of tranquillity. Even if a couple of the public responses to the planning application can be interpreted as raising noise in a broader sense than its impact on residents, it was not in terms of tranquillity or "mucking about in boats" in the AONBs.

59. The Council was entitled to reach the planning judgment it did in paragraph 6.3iv that there was no harm to the AONB from the scheme. There was nothing for it to have regard to under section 85 of the Countryside and Rights of Way Act 2000 or paragraph 115 of the NPPF. It was not irrational for it to reach the conclusions it did.

Issue 2: Impact on listed buildings

60. Mr Streeten submitted that there is no evidence that the Council had any regard to the heritage implications of the development. First, Goring and Streatley are home to a number of listed buildings, notably the Grade I listed church of St Thomas of Canterbury and the Grade II listed Swan Hotel. Given the finding of harm to the conservation area it was wrong, Mr Streeten submitted, that no finding of harm was made in relation to the setting of the listed buildings which lie within it and within the settings of which the development is plainly visible. The Council was in breach of what he contended were its duties to investigate whether there is such harm as required under sections 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990.

61. The Council's case in response, that no objector had referred to listed buildings in any representation, is somewhat undermined in that the publicity checklist did not include a 'tick' by 3 - 'affecting Setting of a listed building'. If a matter is not publicised, objectors may not raise it themselves when there are a range of other matters on the agenda. However, the Council is entitled to maintain its submission in this regard when knowledgeable groups like Goring Parish Council did not raise listed buildings and their settings as a concern. The duty to investigate under section 66, which I am prepared to accept, must be triggered by at least someone either in the Council or outside raising it as a potential issue. In the circumstances as I have described them that threshold cannot be regarded as having been reached.

62. It is not entirely true to say that none of the heritage assets in views of which the scheme will be visible were referred to in the officer's report. The Swan Hotel on the other side of the river in Streatley was mentioned, albeit not that it is Grade II listed. But the Council was entitled to regard any concern about it and its setting as having been allayed. After the revised plan in January 2016, Streatley Parish Council had withdrawn its objection to the application. We are also told that West Berkshire

Council's conservation officer had considered the potential for impact upon listed buildings, primarily one suspects the Swan Hotel, and concluded that there would be no harmful effect.

63. Apart from the Swan Hotel, the setting of listed buildings was never a main issue of the application. Therefore it was not necessary for the officer's report to identify each one simply to confirm that there would be no material impact upon it. As Evans LJ put it in *MJT Securities* v. *Secretary of State for the Environment* (1998) 75 P & CR 188, there is no need to refer to insignificant issues, only the main issues. Since there was no harm to any listed building which the Council was required to take into account, the duty in section 66 of the Planning (Listed Buildings and Conservation Areas) Act 1990 did not arise.

64. Mr Streeten's second point in this regard was that the officer's report recognised that there would be harm to the Goring and Streatley conservation areas but then went on to conclude that the harm was less than substantial and could be satisfactorily outweighed by the benefits of the scheme. No consideration was given to the statutory duty in sections 72 of the Planning (Listed Buildings and Conservation Areas) Act 1990 to have special regard to the desirability of preserving the conservation area or its setting.

65. For the Council, Mr Pike contended that the officer's report dealt with the potential for impact upon the Goring and Streatley conservation areas, referred to paragraph 134 of the NPPF and concluded that any harm to the conservation area, which it said was small, was "satisfactorily" outweighed by the factors in favour of the proposed development. He highlighted that the officer's report would have been informed by the view of the Council's conservation officer, who in her response referred to paragraph 134 of the NPPF and section 72 of the 1990 Act, and stated that "if" there was harm – implying that there may not in fact be any harm – it was less than substantial. After the revised proposals she thought that any impact upon the conservation area was reduced. The West Berkshire District Council's responses took the same view.

66. The difficulty I have with this is that what the Council needed to do under section 72 was to give considerable importance and weight to harm to the conservation area: see Sales LJ (with whom Richards and Floyd LJJ agreed) in *Mordue* v. *Secretary of State for Communities and Local Government* [2015] EWCA Civ 1243, [2016] 1 W.L.R. 2682, [22]. I observe in passing the absence of a Conservation Area appraisal for Goring, which if it had existed may have concentrated the collective mind of the Council. Historic England gives advice on conducting appraisals for conservation areas in its document *Conservation Area Designation, Appraisal and Management*. It states that the task need not be for overly long or costly.

67. Nothing in the officer's report suggests that special priority was given to harm to the conservation area in accordance with the Council's duty. Rather, reflecting the officer's report, the planning permission simply concluded that the impact on the historic merits of the conservation area and visual effect on amenity constituted less than substantial harm, which was outweighed by the public benefit of renewable energy generation through use of the Thames.

68. If the Council did fall down in fulfilling its section 72 duty, as I conclude it did, there is the separate question of whether "it appears… to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred": Senior Courts Act 1981, s. 31(2A). This, on the authorities, is a backward-looking provision: *Bokrosova* v. *London Borough of Lambeth* [2015] EWHC 3386 (Admin), [90], per Elizabeth Laing J; *R (Williams)* v. *Powys County Council* [2016] EWHC 480 (Admin), [25], per CMG Ockelton, sitting as a deputy High Court Judge; *R (Mark Logan)* v. *London Borough of Havering* [2015] EWHC 3193 (Admin), [55], per Blake J. If so satisfied, the court must refuse relief.

69. In my view it is highly likely that the outcome would not have been substantially different if the Council had applied the correct test. If there was any harm to heritage assets the response of both conservation officers, from the Council and West Berkshire Council, was that it was, at most, minor harm. That approach then became part of the officer's report. More importantly, the factors weighing in favour of the grant of planning permission were weighty, the opportunity of generating renewable energy from an existing water source. In my view there is simply no prospect that this issue would make any difference to the overall planning balance if the decision had been taken in accordance with section 72.

Issue 3: EIA screening opinion

70. The Council worked on the mistaken assumption that because the scheme would generate only 170kw of power, no screening opinion was necessary. This was development in a sensitive area, an AONB, involving a hydropower installation. The Council now concedes that, under the EIA Regulations, a screening opinion was necessary.

71. For the Council, Mr Pike contended that despite the procedural defect all of the potential impacts of the proposed development were considered in detail by the Council as local planning authority, especially given in the present case that the proposed development has been subject to consultation with various statutory consultees, including the Environment Agency, and the numerous representations made to the Council by the public, including the Goring Parish Council. No significant effects of any description, let alone likely significant environmental effects, were considered to arise.

72. Moreover, Mr Pike continued, all of the matters for a screening opinion in relation to a development proposal have now been considered in a report by the relevant officer. After considering some 27 different issues, she concludes that there are no likely significant environmental effects arising from the proposal.

73. One's confidence in this recent report is somewhat undermined by its assertion in the accompanying witness statement that it is a "second" screening opinion. The fact is that there never was a screening opinion. There is also Hickinbottom J's point in *R (Jedwell)* v. *Denbighshire County Council* [2016] EWHC 458 (Admin), at [94], that the court must be wary with such ex post facto evidence, that it may be produced under pressure, conscious or unconscious, to maintain the decision to grant planning permission. However, the statement in this case is wide-ranging, covering the matters which could conceivably arise. Importantly, Goring Parish Council have not

identified any new matter which could lead to a significant environmental impact. Its case under this head is that the Council's failure properly to screen the scheme may well have contributed to its subsequent failures to have regard to important relevant material considerations, including the harm to the AONB and the setting of more than one listed building. These matters, as I have held, were adequately addressed.

74. Accordingly I see no reason to conclude that if the matter was considered again the Council would issue a positive screening opinion, concluding that the proposed development was an "EIA development" and require the production of an Environmental Statement. There is high authority indicating that it is not in the public interest for a decision to be quashed, and taken again, where there is no substantial prejudice to the claimant and no realistic prospect that the planning authority would decide that the proposal was in fact an EIA development: *Walton* v. *Scottish Ministers* [2012] UKSC 44 [2013] PTSR 51 [132]-[133], [139]-[140] per Lord Carnwath, [155]-[156] per Lord Hope; *R (Champion)* v. *North Norfolk DC* [2015] UKSC 52, [2015] 1 WLR 3710, [54]-[62] per Lord Carnwath. Accordingly, despite the failure to screen the development under the EIA Regulations, I refuse to quash the Council's decision.

Conclusion

75. For the reasons I have given, I refuse judicial review. However, in advancing the case for Goring Parish Council Mr Streeten has expertly exposed flaws in the Council's approach to the grant of planning permission. I will consider the Council's written submissions on the matter but against that background my view at this stage is that it is not entitled to its costs.

CLAIM NO. CO / 2122 / 2016
[2016] EWHC 2898 (Admin)

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

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

BETWEEN:

R (ON THE APPLICATION OF GORING PARISH COUNCIL)

Claimant

-V-

(1) SOUTH OXFORDSHIRE DISTRICT COUNCIL
(2) THE ENVIRONMENT AGENCY

Defendants

GORING AND STREATLEY COMMUNITY ENERGY LIMITED

Interested Party

ORDER

UPON HEARING THE CLAIMANT AND THE FIRST DEFENDANT

IT IS ORDERED:

1. The court declares that the First Defendant's decision did not comply with the duty in section 72 of the Planning (Listed Buildings &tc) Act 1990, and did not comply with the duty in regulation 7 of the Town and Country Planning (Environmental Impact Assessment) Regulations 2011.
2. Otherwise the Claimant's application for judicial review is refused.
3. Permission to appeal is refused.
4. No order as to costs.

Dated: 29 November 2016

IN THE HIGH COURT
APPLICATION FOR LEAVE TO APPEAL
TO THE COURT OF APPEAL (CIVIL DIVISION)

Title of case/action:	**Action/case no.:**
Goring-on-Thames Parish Council v. South Oxfordshire District Council and the Environment Agency	CO/2122/2016
Heard before:	**Court no.:**
Mr Justice Cranston	18

Nature of hearing:

This was a claim for judicial review brought by Goring-on-Thames Parish Council against a decision of the development control (planning) committee of South Oxfordshire District Council dated 9 March 2016. The Council decided to grant planning permission for a scheme to generate hydropower at Goring Weir for local usage.

Date of hearing/judgment:

Hearing date: 9 November 2016 – handed down: 17 November 2016

Results of hearing (attach copy of order):

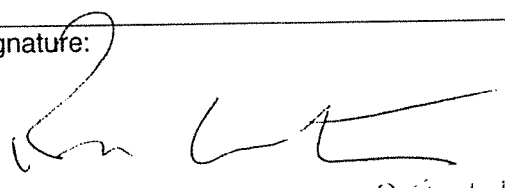
Judicial review refused.

Claimant's application for permission to appeal	**REFUSED**

Reasons for decision (to be completed by the Judge):

Appeal has no real prospect of success and there are no other compelling reasons (CPR 52.3(6)).

Judge's signature:



24.11.16.

Mr Justice Cranston

Note to the Applicant:
When completed this form should be lodged in the Civil Appeals Office on a renewed application for leave to appeal or when setting down an appeal

IN THE COURT OF APPEAL **Case No.**
CIVIL DIVISION

On Appeal from Mr Justice Cranston

B E T W E E N

THE QUEEN
on the application of
(GORING ON THAMES PARISH COUNCIL)

Appellant

-and-

(1) SOUTH OXFORDSHIRE DISTRICT COUNCIL

(2) THE ENVIRONMENT AGENCY

Respondents

-and-

GORING AND STREATLEY COMMUNITY ENGERY LTD

Interested Party

GROUNDS OF APPEAL

References in bold are to the Permission to Appeal Bundle in the following form: **[AB/Page No.]**

1. This appeal is brought against the decision of Cranston J dated 17 November 2016 refusing to quash the decision of South Oxfordshire District Council ('the **Council**') to grant planning permission for the demolition of the existing weir at Goring Lock for a distance of approximately 18m, its replacement with three Archimedes screws and associated housing for generators, control equipment and a 2.1m wide fish pass, eel pass and 3m wide flood control gate ('the **Development**') under application reference P/15/S2946/FUL.

2. The appeal is brought on 4 grounds. The issues under appeal are as follows:

   (a) Was Cranston J's approach to the construction and application of section 31(2A) of the Senior Courts Act 1981 and its interplay with section 72 of the Town and Country (Listed Buildings and Conservation Areas) Act 1990 ('the **1990 Act**') wrong in law?

   (b) Was Cranston J wrong to hold that the Council's finding that there would be no harm to the Chilterns and North Wessex Downs Areas of Outstanding Natural Beauty ('**AONB**'), despite the fact that there would be harm to the Goring and Streatley Conservation Areas, was lawful?

   (c) Was Cranston J wrong to find that the Council's approach to acoustic harm to the conservation area was lawful?

(d) Was Cranston J wrong to find that the duty to investigate potential harm to listed buildings under section 66 of the 1990 Act must be triggered by at least someone either in the Council or outside raising it as a potential issue?

3. In accordance with Practice Direction 52C these grounds seek only to identify the respects in which the decision of Cranston J was wrong. They should be read together with the skeleton argument for permission to appeal **[Appeal Bundle Tab 3]** which sets out the reasons underpinning the grounds set out below. A chronology of events is included as Appendix 1 to that skeleton.

Ground 1: The learned judge erred in finding that it was highly likely that the outcome would not have been substantially different if the Council had applied the correct test under section 72 of the 1990 Act.

4. In light of his finding at [66] – [67] that the Council had breached the statutory duty imposed under section 72 of the 1990 Act by failing to give considerable importance and weight to the harm the Development would cause to the Goring and Streatley Conservation Areas, the learned judge was wrong to hold at [69] that it is highly likely that the outcome would not have been substantially different if the Council had applied the correct test:

(a) Firstly, a breach of the statutory duty under section 72 of the 1990 Act is not the type of breach to which section 31(2A) was intended to or does apply. S 31(2A) was introduced to filter out claims brought on technicalities highly unlikely to have made a substantial difference. Failure to give considerable importance and weight to harm to a conservation area under s 72 cannot be regarded as such a technical failure.

(b) Secondly, as Cranston J accepts at [68], section 31(2A) is a backward looking provision it requires consideration of what the Council would have done. The judge is not being asked to second-guess the decision of the administrative body. Neither the Officer's Report to Committee nor the other evidence put forward by the Respondent suggests that the Council gave any special weight to the benefits of renewable energy. Absent such an indication, Cranston J's finding that "importantly, the factors weighing in favour of granting planning permission were weighty" constitutes the impermissible exercise of planning judgement by the court.

(c) Thirdly, the learned judge failed to apply the strong statutory presumption against granting planning permission which arises when section 72(1) is engaged, even where

harm is less than substantial (per Lord Bridge in *South Lakeland v Secretary of State for the Environment* [1992] 2 AC 141 at 146E-G). His reliance on the fact that the harm was 'minor' (his gloss) is indicative of treating less than substantial harm as a less than substantial objection contrary to approach set out by Sullivan LJ in *Barnwell Manor Wind Energy Limited v East Northamptonshire District Council* [2014] EWCA Civ 137 at [29].

5. For these reasons the learned judge's finding that it was highly likely that the outcome would not have been substantially different if the Council had applied the correct test was wrong.

Ground 2: The learned judge was wrong to hold that the conclusion that there would be no harm to the AONBs was lawful, despite admitted harm to conservation areas within, and acknowledged in policy to contribute to the special character of, those AONBs.

6. The learned judge erred in finding that the conclusion that there would be no harm to the Chilterns and North Wessex Downs Areas of AONBs was lawful, despite the fact that the Council had found harm to the Goring and Streatley Conservation Areas which fall within and form part of the respective AONBs. The Streatley Conservation Area is explicitly described in the Conservation Area Appraisal as "making an important contribution to the cultural and historic aspects of the natural beauty of the AONB and as such should be conserved and enhanced". The learned judge erred since:

    (a) He accepted at [53] that, by analogy with the line of cases concerning the green belt, localised harm to cultural heritage resulting from even a very small development within a large AONB is nevertheless harm. He also accepted at [48] that cultural heritage is very much a part of "the fight for beauty" and that its importance is brought out in the Chilterns AONB management plan. Having accepted this and that the development would harm the cultural heritage which forms part of the Chilterns and North Wessex Downs AONBs it was wrong to find that the harm caused to Goring and Streatley conservation areas did not necessitate a finding of harm to the AONBs.

    (b) Appellant's "broader submission" (as it was described in submissions before the High Court) was that the Council had taken the wrong approach to assessing harm to the AONB. The Councils pleaded case (skeleton §10 **[AB/494]**, Grounds of Resistence §19 **[AB/179]**) was always that "the factors which are relevant to assessments of impact upon these receptors are themselves different" with assessment in the AONB context concerned with

"potential landscape character and visual impact" and in the conservation area context with "impact upon the heritage significance of a conservation area". This reflected the approach taken by the Council as expressed in the Officer's Report. The learned judge accepted at [48] and [50] that "heritage enters a planning assessment with an AONB". In doing so he rejected the approach the Council had taken. This being so he should have held that the decision was unlawful.

Ground 3: The learned judge erred in finding that the Council's approach to acoustic harm to the AONB was lawful.

7. Cranston J accepted at [57] that amongst the special qualities of AONBs is their tranquillity. He also accepts that "*tranquillity will be high on the list of priorities of many of those walk [sic] along the Thames Path or "muck about in boats" on the river*." He records that the 2012 Noise impact assessment accepted that the mechanical noise which the turbines will produce will be different from the sound of running water presently heard at Goring Weir.

8. He then concludes at [58] that "the nature of the legal challenge, *Wednesbury* unreasonableness, is determinative" and records that "the challenge is not that the Council failed to take into account a material consideration." This is simply untrue. Ground 2(b) as set out in the Claimant's Statement of Facts and Grounds states the Council "failed to have regard to the detrimental impact noise from the development would have on the tranquillity of the Chiltern Hills AONB" **[AB/64]**

9. The learned judge then says that "*what the Council did was to apply its policy on noise, EP2, concerning residents, as it was obliged to do. The AONBs' management plans are not statutory planning policies*". Although not part of the Development Plan the AONB management plan is a relevant material consideration (especially given the duty upon local planning authorities under section 85 of the Countryside and Rights of Way Act 2000 to have regard to the purpose of conserving and enhancing the natural beauty of AONB.) It should have been taken into account and was not. It is wrong to suggest that "*no one pointed to tranquillity in relation to the AONBs*". Several of those who objected to the proposed development referred to noise (and in particular the frequency (measured in Hz) as opposed to intensity (measured in Db) of the sound). This should have been sufficient to bring the matter to the Council's attention. Either the Council failed to have regard to the effect of the noise from the Development on the tranquillity of the AONB or their conclusion that it would cause no harm whatsoever to the AONB was irrational.

Ground 4: The learned judge was wrong to conclude that the duty to investigate harm to listed buildings "must be triggered by at least someone either in the Council or outside raising it as a potential issue" and/or that it was not necessary for the officer's report to identify the listed buildings which may be harmed by the development.

10. Cranston J accepted at [61] the Claimant's submission that section 66 of the 1990 act imposes a duty upon local planning authorities to investigate whether or not a proposed development may impact the setting of a listed building. However, he held that that duty "*must be triggered by at least someone either in the Council or outside raising it as a potential issue*." As a matter of fact, at least one consultation response referred specifically to the potential harm to the Grade II listed Swan Hotel. Even on Cranston J's construction, this would have been sufficient to trigger the duty to investigate.

11. However, Cranston J was wrong to conclude that the duty to investigate must be triggered by someone raising harm to listed buildings as a potential issue. The duty is imposed by statute and is not conditional. Requiring it to be triggered would undermine its purpose; namely to ensure that potential harm to listed buildings is both taken into account (and subsequently given considerable importance and weight).

12. The effect of the statutory duty is to make the potential for harm to listed buildings an important relevant material consideration which, as such, required inclusion the officer's report. Even where the officer forms the view that there will be no harm to those buildings the duty under section 66 necessitate that the potential for harm to listed buildings be referred to in the report, so that members of the committee have the opportunity to investigate for themselves and to form their own view. Officers and committee members do not always agree. The statutory importance afforded to harm to listed buildings by section 66 necessitates identification of and at least passing reference to the potential for harm to listed buildings where development will be visible within the setting of a Grade I listed building (which is the highest possible statutory designation and applies to just 2.5% of all listed buildings).

CHARLES STREETEN
FRANCIS TAYLOR BUILDING
TEMPLE, EC4Y 7BY

IN THE COURT OF APPEAL, CIVIL DIVISION

REF: **C1/2016/4538/PTA**

The Queen on the Application of Goring Parish Council –v– **South Oxfordshire District Council and Others**

ORDER made by the Rt. Hon. Lady Justice Rafferty DBE

On consideration of the appellant's notice and accompanying documents, but without an oral hearing, in respect of an application for permission to appeal and a protective costs order

Decision: granted, refused, adjourned. An order granting permission may limit the issues to be heard or be made subject to conditions.

REFUSED

Reasons

I can identify no flaw in the reason of Cranston J which imperils the decision he made. It depended on an application of the legal framework to the facts and his analysis was clear and is unassailable. At paragraph 50 he explained that a degree of impact identified by the officer is not inherently incompatible with an assessment that there might not be an impact on the AONB and at para 54 identified the important point that there was no suggestion of the Council applying the wrong policies. He was justified in concluding, at paragraph 59, that the Council was entitled to reach the decision it did, having rehearsed why that was his view, and for the avoidance of doubt also excluding any need for regard to have been had to S85 CRWA 2000 or to the NPPF. There was as he said nothing irrational in the decision and there is thus nothing irrational in his conclusion.

As to listed buildings he at para 63 excluded the requirement that each should be identified for nothing other than an exercise in particularity. At para 67 he excluded special priority to harm, rather there was a conclusion that harm consequent upon the impact was less than substantial which in any event was outweighed by the public benefit. Having found a failure by the Council in its S72 duty he went on to find the outcome highly unlikely to have been substantially different even if it had not failed. This is not flawed reasoning.

His conclusion, having stood back, that a reconsideration even on the terms most favourable to you in the context of his findings, was thus inevitable and is unimpugnable.

Information for or directions to the parties

This case falls within the Court of Appeal Mediation Scheme automatic pilot categories*. Yes ☐ No ☐

Recommended for mediation Yes ☐ No ☐

If not, please give reason:

Where permission has been granted, or the application adjourned

a) time estimate (excluding judgment)
b) any expedition

Signed: Rafferty LJ

Date: 9th February 2017

Notes

(1) Rule 52.6(1) provides that permission to appeal may be given only where –

a) the Court considers that the appeal would have a real prospect of success; or

b) there is some other compelling reason why the appeal should be heard.

(2) Where permission to appeal has been refused on the papers, that decision is final and cannot be further reviewed or appealed. See rule 52.5 and 54(4) of the Access to Justice Act 1999.

(3) Where permission to appeal has been granted you must serve the proposed bundle index on every respondent within 14 days of the date of the Listing Window Notification letter and seek to agree the bundle within 49 days of the date of the Listing Window Notification letter (see paragraph 21 of CPR PD 52C).

Case Number: **C1/2016/4538/PTA**

DATED 9TH FEBRUARY 2017
IN THE COURT OF APPEAL

GORING PARISH COUNCIL
- and -
SOUTH OXFORDSHIRE DISTRICT COUNCIL
- and -
THE ENVIRONMENT AGENCY
- and -
GORING AND STREATLEY COMMUNITY ENERGY LIMITED

ORDER

Copies to:

Richard Buxton Environmental & Public Law
19b Victoria Street
Cambridge
CB1 1JP
Ref: GPC1-001/LF

Goring And Streatley Community Energy Ltd
Yarnton House
High Street
Streatley
Berkshire
RG8 9HY
Ref: LISA ASHFORD

Sharpe Pritchard
DX 353
London/Chancery Lane
Ref: TG

The Environment Agency
Legal Department
Sapphire
550 Streetsbrook Road
Solihull
B91 1QT
Ref: PENNIE YORATH

Lower Court Ref: CO21222016

2017/PI/1041 9

N244

Application notice

For help in completing this form please read the notes for guidance form N244Notes.

Name of court	Claim no.
Court of Appeal	C1/2016/4538/PTA /A
Fee account no. (if applicable)	**Help with Fees – Ref. no.** (if applicable)
PBA0087096	H W F - -
Warrant no. (if applicable)	
Claimant's name (including ref.) Goring on Thames Parish Council	
Defendant's name (including ref.) (1) South Oxfordshire District Council (2) Goring and Streatley Community Enery Ltd (IP)	
Date	2 March 2017

1. What is your name or, if you are a legal representative, the name of your firm?

Richard Buxton Environmental & Public Law

2. Are you a ☐ Claimant ☐ Defendant ☑ Legal Representative ☐ Other *(please specify)*

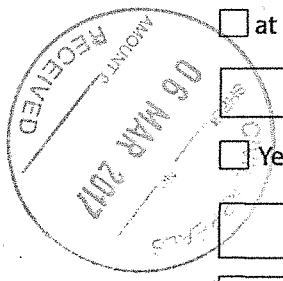
If you are a legal representative whom do you represent? Appellant

3. What order are you asking the court to make and why?

The Appellant seeks, for the reasons explained in the attached grounds, to have the Court of Appeal case re-opened pursuant to CPR Pt 52.30

4. Have you attached a draft of the order you are applying for? ☐ Yes ☑ No

5. How do you want to have this application dealt with? ☑ at a hearing ☐ without a hearing ☐ at a telephone hearing



6. How long do you think the hearing will last? ☐ Hours ☐ Minutes

Is this time estimate agreed by all parties? ☐ Yes ☐ No

7. Give details of any fixed trial date or period

8. What level of Judge does your hearing need? Lord Justice

9. Who should be served with this application? Interested Party - see para 32 of grounds

9a. Please give the service address, (other than details of the claimant or defendant) of any party named in question 9.

10. What information will you be relying on, in support of your application?

- ☐ the attached witness statement
- ☐ the statement of case
- ☑ the evidence set out in the box below

If necessary, please continue on a separate sheet.

The attached grounds fully explain the application.

Statement of Truth

(I believe) (The applicant believes) that the facts stated in this section (and any continuation sheets) are true.

Signed J Foster. Dated 2 March 2017

Applicant('s legal representative)('s litigation friend)

Full name Lisa Foster

Name of applicant's legal representative's firm Richard Buxton Environmental & Public Law

Position or office held Partner

(if signing on behalf of firm or company)

11. Signature and address details

Signed J Foster. Dated 2 March 2017

Applicant('s legal representative's)('s litigation friend)

Position or office held Partner

(if signing on behalf of firm or company)

Applicant's address to which documents about this application should be sent

Richard Buxton Environmental and Public Law
19B Victoria Street
Cambridge

Postcode CB1 1JP

If applicable	
Phone no.	01223 328933
Fax no.	01223 301308
DX no.	
Ref no.	GPC1-001/LF

E-mail address	lfoster@richardbuxton.co.uk

IN THE COURT OF APPEAL
CIVIL DIVISION

Case No.C1/2016/4538/PTA

On Appeal from Mr Justice Cranston
And the Order Made By Lady Justice Rafferty on 10 February 2017

B E T W E E N

THE QUEEN
on the application of
(GORING ON THAMES PARISH COUNCIL)

Appellant

-and-

(1) SOUTH OXFORDSHIRE DISTRICT COUNCIL

Respondent

-and-

(2) GORING AND STREATLEY COMMUNITY ENGERY LTD

Interested Party

CPR 52.30 APPLICATION TO REOPEN
DECISION TO REFUSE PERMISSION TO APPEAL

The references in this Application to the Application Bundle ("AB") are in the format ***[AB/Tab/page/paragraph]***

1. The Appellant has not lightly taken the decision to apply to re-open the Order of Rafferty LJ dated 9 February 2017[1] refusing, without an oral hearing, permission to appeal ('the **Permission Decision**'). The Court of Appeal's jurisdiction to re-open an appeal following its final determination is exceptional. It arises only where to do so is necessary to avoid real injustice, where the circumstances are exceptional, and where there is no alternative effective remedy. This is one of the rare cases that satisfies that test. It is a case in which, as Court of Appeal put it in *Re U* [2005] EWCA Civ 52 at [18], "*the litigation process has been critically undermined*". If the appeal is not reopened the integrity of the justice system will be compromised. Not only will justice not appear to have been done, it will not have been done.

2. The basis of this application is twofold:

   (a) The Permission Decision failed to address the Appellant's principal primary ground of appeal (pleaded as 'Ground 1' in the Appellant's skeleton argument for permission to appeal).[2] That ground not only had a real prospect of success, but raised an important point of legal principle upon which there is conflicting High Court authority. It demands consideration.

   (b) The Permission Decision discloses fundamental legal errors which critically undermine the integrity of the decision taken.

3. For these two reasons the Appellant seeks an order:

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[1] **AB/7**
[2] **AB/3/22-26/8-22**

(a) Re-opening this appeal; and
(b) directing that the question of permission to appeal:
    i. be determined at an oral hearing; and
    ii. that the oral hearing be heard by a single Lord Justice of appeal with planning or administrative law expertise.

Application in a Nutshell

4. The Permission Decision failed to grapple with the Appellant's principal ground of appeal and incorporated fundamental legal errors. It appears that the court did not have the opportunity properly to consider the Appellant's skeleton argument, or, if it did, to comprehend the submissions contained within it. This is precisely the sort of *"corruption"* of the judicial process with which the *Taylor v Lawrence*[3] jurisdiction was intended to grapple.

5. Unlike any of the other cases concerning the principle decided in *Taylor v Lawrence*, this is the first such case in which the Appellant has not had the opportunity to appear and make oral arguments to the court. That right, which was lost on 3 October 2016, would have avoided any need for this application. Without that opportunity, described by Laws LJ in *Sengupta v Holmes* [2002] EWCA Civ 1104 as "central" to the English legal system, the Appellant has been denied justice.

6. The single Lady Justice's failure to address the Appellant's principal ground of appeal and the basic legal errors in the Permission Decision, combined with the fact that the Appellant has had no opportunity to appear before the court make this case where the Appellant has suffered exceptional injustice such that the application pursuant to CPR 52.30 and should be granted. Failure to do so would undermine the integrity of and confidence in the English legal system.

Background

7. For the purposes of this application only brief background is necessary. On 20 March 2016 the Appellant, Goring on Thames Parish Council, brought a claim for judicial review of the decision of South Oxfordshire District Council ('the **Council**') to grant planning permission to construct a hydropower station, consisting of three Archimedes screws 3.5m in diameter as well as housing for associated control equipment etc. on the River Thames at Goring in the Chilterns Area of Outstanding Natural Beauty ('**AONB**'). The claim was brought against the Council on three grounds: (1) a challenge to the Council's finding that the development would cause no harm to the Chilterns and North Wessex Downs AONBs, in relation to specific protections for AONBs in the **Countryside and Rights of Way Act 2000** and the **National Planning Policy Framework**; (2) a challenge to the Council's findings in relation to harm to the setting of listed buildings and conservation areas, pursuant to heritage protections contained in the **Listed Buildings and Conservations Areas Act 1990 ('LBCAA')**; and (3) a challenge to the Council's failure to carry out a screening opinion pursuant to Regulation 7 of the Town and Country Planning (Environmental Impact Assessment) Regulations 2010 ('the **EIA Regulations**').

8. Lang J granted permission for judicial review on the papers on 25 July 2016, Cranston J heard the substantive claim on 9 November 2017. On 17 November 2016 Cranston J handed down judgment. He found, in accordance with the Appellant's submissions on grounds (2) and (3) above, that the Council had failed to give considerable importance and weight to harm to the conservation areas, in breach of its duty under s 72 of the LBCAA, and that the Council had failed to carry out a screening opinion as required by the EIA Regulations. He made a declaration to that effect but refused to quash the grant of planning permission. However, the judge unusually advised in his judgment that the defendant was

[3] [2002] EWCA Civ 90

not entitled to its costs as a consequence of the flaws exposed in the Council's handling of the application. In relation to the failure to carry out a screening opinion Cranston J exercised his discretion not to quash the decision. No appeal was made against that exercise of discretion.

9. In relation to the established breach of the duty pursuant to s 72 LBCAA Cranston J relied upon s 31(2A) of the Senior Courts Act 1981 (as amended). The Appellant's principal ground of appeal was targeted at his decision so to do in relation to the heritage ground.

10. On 8 December 2016 the Appellant made an application for permission to appeal. That application was made on four grounds: (1) Cranston J erred in his interpretation and application upon s 31(2A) of the Senior Courts Act 1981; (2) Cranston J erred in finding that the Council could lawfully conclude there would be harm to the Conservation Area but not the AONB; (3) Cranston J erred in finding the Council's approach to acoustic harm to the AONB was lawful and (4) Cranston J was wrong to hold that the duty to investigate whether there was harm to listed buildings pursuant to s 66 of the LBCAA "must be triggered by someone raising it as a potential issue".

11. On 9 February 2017 Rafferty LJ refused permission to appeal on the papers for the reasons set out in the Permission Decision. She did not adjourn the application for consideration at an oral hearing. That decision: (1) fails to grapple with the Appellant's principal and first ground of appeal, and (2) discloses fundamental legal errors, which undermine its integrity.

12. Following the introduction of the Civil Procedure (Amendment No. 3) Rules 2016/788, as of 3 October 2016 where permission is refused on the papers it cannot be orally renewed. There is no appeal to the Supreme Court against a refusal of permission to appeal.

(1) Failure to address the Appellant's principal ground of appeal

13. The Appellant's principal ground of appeal was that s 31(2A) of the Senior Courts Act 1981 (as amended) does not properly apply to *substantive* errors (such as a breach of s 72 of the LBCAA). It applies only to *defects of procedure* (to which alone the term 'conduct' can be applied.

14. Section 31(2A) is a relatively new statutory provision. It was introduced into the Senior Courts Act 1981 by s 84 of the Courts and Criminal Justice Act 2015 and took effect on 13 April 2015. It imposes a statutory duty on the court to refuse relief "*if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the* ***conduct*** *complained of had not occurred"* (emphasis added).

15. There was a real prospect that the Appellant would succeed in showing that this section, properly construed, does not apply to circumstances where the claimant in a judicial review succeeds in establishing a substantive error of law as opposed to a minor procedural technicality. The reasons for this are:

    (a) The duty imposed by section 31(2A) has the effect of partially ousting the jurisdiction of the High Court in claims for judicial review. It should be given a narrow interpretation. As Lord Phillips of Worth Matravers MR stated in *R (G) v Immigration Appeal Tribunal* [2004] EWCA Civ 1731,

> *"The Common law power of the judges to review the legality of administrative action is a cornerstone of the rule of law in this country and one that the judges guard jealously. If Parliament attempts by legislation to remove that power, the rule of law is threatened. The courts will not readily accept that legislation achieves that end: see Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147"*

The court should not, therefore, readily interpret s 31(2A) as excluding its jurisdiction to quash decisions where (as in the present case) a substantive error of law has been established.

(b) The natural and ordinary meaning of the word "conduct" (especially if narrowly construed) does not encapsulate substantive errors of law. The word "conduct" encapsulates the procedure adopted by a decision maker but not the substance of its decision. An error in the weight given to a relevant material consideration (which is the error of law Cranston J accepted the Council had made) cannot be said to be an example of 'misconduct' by the Council. Rather it was a substantive error of law.

(c) In *R (Mark Logan) v London Borough of Havering* [2015] EWHC 3193 (Admin) the High Court suggested that s 31(2A) applies only to "*somewhat trivial procedural failings*" and stated that interpreting s 31(2A) as allowing reliance upon "*post-decision speculation" would "undermine the effect of judicial review as an instrument to ensure that the rule of law applies to decision making by public authorities*". Such a "*draconian modification of constitutional principles*" was rejected.

(d) The drafting history of s 31(2A) supports the narrow construction contended for by the Appellant. In *Mark Logan*, the High Court intimated that recourse might be had to the drafting history of that section. Lord Faulks QC (then minister of state for justice promoting the bill in the House of Lords) made a statement (during a debate in which Lord Woolf of Barnes, Lord Phillips of Sudbury and Lord Pannick criticised the section of the Bill which became s 31(2A)). That statement satisfies the rule in *Pepper v Hart* [1992] UKHL 3. Lord Faulks QC made clear that the section was aimed at "*technicalities*" and that "*the judge is not being asked to second guess the decision of the administrative body*".[4] This again supports the Appellant's construction of s 31(2A) and the argument that it does not apply to substantive errors of law (such as a breach of the statutory duty imposed by s 72 of the LBCAA to give considerable importance and weight to harm to a conservation area).

16. This was the principal and first ground upon which the Appellant appealed to the Court of Appeal. The arguments in support of this ground, including reference to the decision in *Mark Logan*[5] as well as to the drafting history of s 31(2A)[6], and the passage referred to above, were set out in detail at paragraphs 8-22 of the Appellant's skeleton argument for permission to appeal.[7]

17. The Appellant's skeleton argument for permission to appeal also highlighted that there was conflicting authority on the construction and application of s 31(2A)[8] and that the approach taken by Cranston J offended against the principle, fundamental in planning law, that matters of planning judgment are within the sole competence of the primary decision maker (per Lord Hoffmann at 780H and Lord Keith of Kinkel at 764G in *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759).

18. For these reasons and in particular: the conflicting authorities in relation to s 31(2A), the consequent lack of clarity regarding its meaning, and the constitutional significance of the section, the Appellant made clear that this ground raised an important point of law, the

[4] Hansard, House of Lords, 9 December 2014 Column 1738
[5] **AB/3/23/11-12**
[6] **AB/3/23-24/13-14**
[7] **AB/3/22-26/8-22**
[8] **AB/3/26/21**

opportunity to determine which, in and of itself, was a good reason to grant permission to appeal.[9]

The Permission Decision

19. The Permission Decision makes no reference to any of the arguments outlined above. The sum total of the learned judge's consideration of the matter is to say "*he [Cranston J] went on to find the outcome highly unlikely to have been substantially different even if it [the Council] had not failed. This is not flawed reasoning.*" The substance of the appeal was directed at the construction of s 31(2A) not Cranston J's logic. Rafferty LJ makes no reference to how s 31(2A) should be construed, no mention of the meaning given to that section in *Mark Logan* and no mention of the Act's drafting history. In short the Permission Decision does not engage meaningfully, or at all, with the Appellant's first ground.

20. This has resulted in a substantial injustice to the Appellant. The most important issue referred to the Court of Appeal for determination has not been determined. This is exceptional. It has long been trite law that adequate and intelligible reasons must be given for judicial decisions and that those reasons must address the principal important and controversial issues.[10] The importance of those reasons is not only that they enable the parties to the proceedings to understand why the decision that has been made was made, but also because they focus the mind of the decision maker when determining an application. Nothing in the Permission Decision suggests that Rafferty LJ directed her mind to the legal submissions made in support of the Appellant's principal ground of appeal.

21. This is especially surprising since:

    (a) This was the Appellant's principal and first ground of appeal (pleaded as 'Ground 1')

    (b) The Appellant identified conflicting approaches to the construction and application of s 31(2A) in other High Court cases

    (c) The construction and application of s 31(2A) is plainly a matter of wide public, legal and constitutional importance.

22. In light of the above, the only reasonable conclusion is that the judge determining the application did not properly consider the written arguments put forward in support of the Appellant's application for permission to appeal. Had she done so, even if she disagreed with the argument's put forward above, she would have explained why. Even if a single Lord Justice of Appeal does not agree with the Appellant's submissions, in circumstances where (i) there is conflicting High Court authority, and (ii) no relevant appellate authority, it would be extremely surprising for permission to be refused. The legal and constitutional significance of Ground 1 and the arguments put forward to support it demanded some consideration. In the absence of such consideration the decision creates the impression that the single Lady Justice did not turn her mind to the Appellant's submissions.

23. By not grappling with the Appellant's principal ground of appeal, the Permission Decision undermines the integrity of the legal system, to use Lord Hewart's apothegm, justice does not appear to have been done.[11] It causes the Appellant real injustice. There is no longer any opportunity to renew a written refusal of permission orally (despite the fact that a large number of appeals refused permission on paper, but subsequently granted permission at an oral hearing, were ultimately successful). The Appellant has therefore been 'locked out' of

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[9] **AB/3/19 and 26/2 and 22**

[10] see *Flannery v Halifax Estate Agencies* [2000] 1 WLR 377 and *English v Emery Reimbold and Strick Ltd* [2002] 1 WLR 2409.

[11] *R v Sussex Justices ex p. McCarthy* [1924] KB 256

pursuing its main ground of appeal without the Court having properly considered its submissions or giving any reasons for rejecting its argument. This is a real and substantial interference with the Appellant's right of access to justice and to a fair hearing. It is also exceptional. Previously, where the decision on permission on the papers omitted to deal with a matter of substantial importance, that omission could be dealt with at the renewal hearing. The duty on the single judge considering an application for permission to appeal on the papers conscientiously to consider the arguments put forward and properly to dispose of them is heightened in the absence of the opportunity orally to renew.

24. The fact that the decision in this case has deprived the Appellant of the opportunity to pursue a ground which raised a real point of public importance, and upon which it had a real prospect of success, not only in the Court of Appeal but also (if necessary) in the Supreme Court, without the Court ever properly having engaged with that ground, critically undermines the appellate process. In the absence of any reference to the matter in issue under Ground 1 or to the arguments set out in support that ground, the impression created is that the learned judge overlooked all, or at least the relevant part, of the Appellant's skeleton argument. This would be a paradigmatic example of a 'corruption' of the justice system permitting the reopening of a final appeal decision in accordance with the decision in *Taylor v Lawrence* .

25. In any event, acknowledging that the test for re-opening a final appeal decision is the same whether that decision was made at the permission stage or following a final hearing, and that it is not enough to show that the wrong result was reached or that the point is of general importance to displace the need for finality,[12] this is an exceptional case in which the court should exercise that jurisdiction. The previous cases concerning the *Taylor v Lawrence* jurisdiction all have one thing in common; the Appellant had had the opportunity to appear (represented by counsel) before the court and to explain his argument. In *Sengupta v Holmes* Laws LJ referred at [38] to,

> *"the central place accorded to oral argument in our common law adversarial system. This…is important, because oral argument is perhaps the most powerful force there is, in our legal process, to promote a change of mind by the judge. That judges in fact change their minds under the influence of oral argument is not an arcane feature of the system; it is at the centre of it."*

26. It is one thing for an appellant to be faced with a decision of the Court of Appeal which, even after having had the opportunity to address the court orally, appears wrong. It is another to be faced, as the Appellant is, with a decision of the court which does not address the central plank of the appeal and to have no opportunity orally to revisit that omission before the Court. Whilst the former may not undermine the integrity of the justice system so as to outweigh the importance of finality, the latter does. For this reason permission to reopen this appeal should be granted.

(2) Fundamental legal errors in the Permission Decision

27. The fact that the Permission Decision contains obvious and irrefutable legal errors underscores the fact that, in this case, it was reached without proper consideration being given to the Appellant's submissions. It is, at best, an inaccurate summary of Cranston J's decision.

28. In particular:

(a) In the context of the duty under s 72 of the LBCAA, the learned judge held that,

> *"At para 67* ***he*** *[Cranston J]* ***excluded special priority to harm****, rather there was a conclusion that harm consequent upon the impact was*

[12] *Lawal v Circule 33 Housing Trust* [2014] EWCA Civ 1514

less than substantial which in any event was outweighed by the public benefit."

This is wrong:

i. The 'harm' referred to is harm to a conservation area. S 72 of the LBCAA requires that "*special attention shall be paid to the desirability of preserving or enhancing the character or appearance [of a conservation area]*". This creates a special presumption against granting planning permission for development which would cause harm to a conservation area: per Sullivan LJ in *Barnwell Manor Wind Energy Limited v East Northamptonshire District Council* [2014] EWCA Civ 137 at [23].

ii. As Sullivan LJ also made clear in *Barnwell Manor* at [29], even less than substantial harm should not be treated as a less than substantial objection to granting planning permission. This principle was set out explicitly in the Appellant's skeleton argument at paragraph 7(d).[13]

iii. With the greatest of respect to the learned judge, it is very difficult to see how, had she properly read the Appellant's skeleton argument or been aware of the substance of the legal duty under s 72 and/or the interpretation of that duty in *Barnwell Manor* she could possibly have reached the conclusion that Cranston J "*excluded special priority to harm*" and still uphold the decision. The clear inference from this error is that the learned judge did not fully comprehend the decision at first instance (since Cranston J did accord special priority to harm and held that the Council had breached its duty to do so). She did not properly read the Appellant's skeleton argument, and/or did not grasp the fundamental principles set out within it.

(b) The Permission Decision also states,

"*He [Cranston J] was justified in concluding at paragraph 59, that the Council was entitled to reach the decision it did, having rehearsed why that was his view, and for the avoidance of doubt also* ***excluding any need for regard to have been had to s 85 CRWA 2000 or to the NPPF***"

This again cannot be right since:

i. S 85 of the Countryside and Rights of Way Act 2000 places a general duty on public bodies exercising their functions in relation to or so as to affect land in an area of outstanding natural beauty "*to have regard to the purpose of conserving and enhancing the natural beauty of the area of outstanding natural beauty*". Given that the development was in an area of outstanding natural beauty and was held to harm the conservation area that duty was undoubtedly engaged.

ii. Paragraph 115 of the NPPF states "*great weight should be given to conserving landscape and scenic beauty in National Parks, the Broads and Areas of Outstanding Natural Beauty, which have the highest status of protection in relation to landscape and scenic beauty*". The same point therefore applies. Development which would harm a conservation area within an AONB must engage that paragraph of the National Planning Policy Framework ('**NPPF**').

[13] **AB/3/22/7(d)**

iii. The NPPF is *the* national planning policy document. It is of central importance to planning decisions and a relevant material consideration when determining applications for planning permission. It is fundamental that local planning authorities must have regard to relevant material considerations.

iv. In light of the above, it is again extremely difficult to see how, if the learned judge had properly read the Appellant's skeleton argument and/or grasped even the most fundamental principles of planning law, she would have made these errors.

29. The errors are not minor trivialities. They show a fundamental lack of understanding of even the most basic of planning law principles. This vitiates the integrity of the Permission Decision. The errors by a non-planning judge demonstrate the exceptional nature of the injustice suffered by the Appellant. Whilst fewer lawyers may have been exposed to planning law than are to contract law, no one would deny an exceptional injustice had been suffered if the Court of Appeal (without any explanation) refused permission on the basis that offer and acceptance are not required for the formation of a valid contract; so it is exceptional and unjust that the Court of Appeal should say that there was no duty to have regard to the National Planning Policy Framework or to give special priority to harm to a conservation area in a planning case. This failure demonstrates such a deep-rooted misunderstanding of even the most basic principles of planning law as to satisfy the requirements of CPR 52.30.

30. This injustice is exacerbated (and to some degree created) by the fact that the Appellant has no right orally to renew its application. At an oral hearing counsel (for either party) is able to assist the court. Legal concepts with which the court is not familiar can be explained. In this case, despite an apparent lack of familiarity with the legal principles engaged, the learned judge did not adjourn the decision on permission to an oral hearing, the importance of which is set out above. Rather, she refused permission to appeal on the papers and on the basis of reasoning infected by basic legal errors. The exceptional nature of these errors means that on the particular facts of this case, the public interest in the finality of appellate decision making, is outweighed by the injustice to the Appellant.

Conclusion

31. The Appellant therefore seeks an order:

(a) Re-opening this appeal; and

(b) directing that the question of permission to appeal:
i. Shall be determined at an oral hearing; and
ii. that oral hearing shall be heard by a single Lord Justice of appeal with planning or administrative law expertise.

32. In addition, PD52A 7.2 suggests that this application should not be served on any other party. The Appellant is concerned this means the Interested Party will be unaware of this application and may rely upon its planning permission. This may cause prejudice to the Interested Party, if it commences development in accordance with a planning permission the lawfulness of which is subsequently called into question. Unless, within the next 14 days, the court directs otherwise, the Appellant will therefore serve notice of this application on the Interested Party, but not on the Defendant (unless the court so Directs).

CHARLES STREETEN
FRANCIS TAYLOR BUILDING
TEMPLE, EC4Y 7BY

28 February 2017

Neutral Citation Number: [2018] EWCA Civ 860

Case No: C1/2016/4538

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT
PLANNING COURT
MR JUSTICE CRANSTON
[2016] EWHC 2898 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25 April 2018

Before:

Sir Terence Etherton M.R.
Lord Justice McCombe
and
Lord Justice Lindblom

- -

Between:

R. (on the application of Goring-on-Thames Parish Council)	**Applicant**
- and -	
South Oxfordshire District Council	**Respondent**
- and –	
Goring and Streatley Community Energy Ltd.	**Interested Party**

- -
- -

Mr Charles Streeten (instructed by **Richard Buxton Environmental and Public Law**) for the **Applicant**
Mr Jeremy Pike (instructed by **South Oxfordshire District Council**) for the **Respondent**
The interested party did not appear and was not represented.

Hearing date: 20 March 2018

- -

Approved Judgment

Sir Terence Etherton M.R., Lord Justice McCombe and Lord Justice Lindblom:

Introduction

1. This is the judgment of the court.

2. The application before us is an application under CPR 52.30 to re-open a decision of this court refusing permission to appeal on the papers.

3. The applicant is Goring-on-Thames Parish Council. In a claim for judicial review it challenged a planning permission granted by the respondent, South Oxfordshire District Council, for a development of turbines at Goring Weir on the River Thames, to generate hydropower for local use. The application for planning permission was made by the interested party, Goring and Streatley Community Energy Ltd. Planning permission was granted on 9 March 2016. The claim for judicial review came before Cranston J. at a hearing on 9 November 2016. In an order dated 29 November 2016 the judge made a declaration that the district council's decision "did not comply with the duty in section 72 of [the Planning (Listed Buildings and Conservation Areas) Act 1990 ("the Listed Buildings Act")], and did not comply with the duty in regulation 7 of the Town and Country Planning (Environmental Impact Assessment) Regulations 2011". No other relief was granted. The judge refused the parish council's application for permission to appeal. An application for permission to appeal was subsequently made by the parish council to this court. It was dealt with by Rafferty L.J. on paper. In an order dated 10 February 2017 she refused it.

4. The application to re-open Rafferty L.J.'s decision was made by an application notice issued on 27 March 2017. The district council and Goring and Streatley Community Energy Ltd. were given the opportunity to make representations in writing on the application, and the court subsequently ordered that the application would be dealt with at an oral hearing.

The issues on the application to re-open

5. The parish council's grievance is stated in this way, under the heading "Application in a Nutshell", in the grounds of its application to re-open Rafferty L.J.'s decision:

> "4. The Permission Decision failed to grapple with the Appellant's principal ground of appeal and incorporated fundamental legal errors. It appears that the court did not have the opportunity properly to consider the Appellant's skeleton argument, or, if it did, to comprehend the submissions contained within it. This is precisely the sort of *"corruption"* of the judicial process with which the … jurisdiction [under *Taylor v Lawrence* [2002] EWCA Civ 90] was intended to grapple.
>
> 5. Unlike any of the other cases concerning the principle decided in [*Taylor v Lawrence*], this is the first such case in which the Appellant has not had the opportunity to appear and make oral arguments to the court. That right, which was lost on 3 October 2016, would have avoided any need for this application. Without that opportunity, described by Laws LJ in [*Sengupta v Holmes*] [2002] EWCA Civ 1104 as "central" to the English legal system, the Appellant has been denied justice.

6. The single Lady Justice's failure to address the Appellant's principal ground of appeal and the basic legal errors in the Permission Decision, combined with the fact that the Appellant has had no opportunity to appear before the court make this case where the Appellant has suffered exceptional injustice such that the application pursuant to CPR 52.30 and should be granted. Failure to do so would undermine the integrity of and confidence in the English legal system."

6. The first and main issue in the application is whether Rafferty L.J. failed to address the parish council's "principal ground of appeal", namely ground 1 in the appellant's notice. That ground asserted that, in performing the duty under section 31(2A) of the Senior Courts Act 1981 ("the Senior Courts Act"), Cranston J. was wrong to find it was highly likely that the outcome of the district council's decision-making would not have been substantially different if it had followed the correct approach to proposals for development in a conservation area under section 72 of the Listed Buildings Act.

7. The second issue is whether Rafferty L.J.'s decision "discloses fundamental legal errors which critically undermine the integrity of the decision taken". The essential complaints here are that Rafferty L.J. misunderstood the duty in section 72 of the Listed Buildings Act and Cranston J.'s relevant conclusions, and that she also misunderstood the duty of a local planning authority, under section 85 of the Countryside and Rights of Way Act 2000 ("the Countryside and Rights of Way Act"), to have regard to the purpose of conserving and enhancing the natural beauty of an Area of Outstanding Natural Beauty.

The court's jurisdiction under CPR 52.30

8. Under the heading "Reopening of Final Appeals", CPR 52.30 states:

> "52.30 – (1) The Court of Appeal or the High Court will not reopen a final determination of any appeal unless –
>
> (a) it is necessary to do so in order to avoid real injustice;
>
> (b) the circumstances are exceptional and make it appropriate to reopen the appeal; and
>
> (c) there is no alternative effective remedy.
>
> (2) In paragraphs (1), (3), (4) and (6), "appeal" includes an application for permission to appeal.
>
> …
>
> (5) There is no right to an oral hearing of an application for permission unless, exceptionally, the judge so directs.
>
> (6) The judge must not grant permission without directing the application to be served on the other party to the original appeal and giving that party an opportunity to make representations.
>
> (7) There is no right of appeal or review from the decision of the judge on the application for permission, which is final.
>
> (8) The procedure for making an application for permission is set out in Practice Direction 52A."

9. This rule enshrines the residual jurisdiction, confirmed by a five-judge constitution of the Court of Appeal in *Taylor v Lawrence*, to re-open an appeal so as to avoid real injustice in circumstances that are exceptional. In confirming the existence of this jurisdiction, the court

emphasized (in paragraph 55) "… the greatest importance … that it should be clearly established that a significant injustice has probably occurred and that there is no alternative remedy".

10. The note in the White Book Service 2018 describing the scope of the rule states, at paragraph 52.30.2:

> "… Rule 52.30 is drafted in highly restrictive terms. The circumstances described in r.52.30(1) are truly exceptional. Both practitioners and litigants should note the high hurdle to be surmounted and should refrain from applying to reopen the general run of appellate decisions, about which (inevitably) one or other party is likely to be aggrieved. The jurisdiction can only be properly invoked where it is demonstrated that the integrity of the earlier proceedings … has been critically undermined. … ."

11. We would endorse those observations, which are justified by ample authority in this court. The relevant jurisprudence is familiar, but the salient principles bear repeating here.

12. Giving the judgment of the court in *In re Uddin (A Child)* [2005] 1 W.L.R. 2398, Dame Elizabeth Butler-Sloss, the President of the Family Division, observed that the hurdle to be surmounted in an application to re-open under CPR 52.17 (now CPR 52.30) was much greater than the normal test for admitting fresh evidence on appeal. She observed (in paragraph 18 of her judgment) that the *Taylor v Lawrence* jurisdiction "can in our judgment only be properly invoked where it is demonstrated that the integrity of the earlier litigation process, whether at trial or at the first appeal, has been critically undermined". And she added this (in paragraph 22):

> "22. … In our judgment it must at least be shown, not merely that the fresh evidence demonstrates a real possibility that an erroneous result was arrived at in the earlier proceedings (first instance or appellate), but that there exists a powerful probability that such a result *has in fact* been perpetrated. That, in our view, is a necessary but by no means a sufficient condition for a successful application under CPR r.52.17(1). It is to be remembered that apart from the requirement of no alternative remedy, "The effect of reopening the appeal on others and the extent to which the complaining party is the author of his own misfortune will also be important considerations": *Taylor v Lawrence* [2003] QB 528, para 55. Earlier we stated that the *Taylor v Lawrence* jurisdiction can only be properly invoked where it is demonstrated that the integrity of the earlier litigation process, whether at trial or at the first appeal, has been critically undermined. That test will generally be met where the process has been corrupted. It may be met where it is shown that a wrong result was earlier arrived at. It will not be met where it is shown only that a wrong result may have been arrived at."

13. In *Barclays Bank plc v Guy (No.2)* [2011] 1 W.L.R. 681 Lord Neuberger M.R. said (in paragraph 36 of his judgment):

> "36. … If a party fails to advance a point, or argues a point ineptly, that would not, at least without more, justify reopening a court decision. If it could be shown that the judge had completely failed to understand a clearly articulated point, it is possible that his decision might be susceptible to being reopened (particularly if the facts

were as extreme in their nature as a judge failing to read the right papers for the case and never realising it). … ."

14. In *Lawal v Circle 33 Housing Trust* [2014] EWCA Civ 1514, Sir Terence Etherton, then the Chancellor of the High Court, summarized the principles relevant to an application under CPR 52.30 (in paragraph 65 of his judgment):

> "65. … The following principles relevant to [the] application [of CPR 52.17, as the relevant rule then was] to this appeal appear from *Re Uddin (A Child)* … and *Guy v Barclays Bank plc* … . First, the same approach applies whether the application is to re-open a refusal of permission to appeal or to re-open a final judgment reached after full argument. Second, CPR 52.17(1) sets out the essential pre-requisites for invoking the jurisdiction to re-open an appeal or a refusal of permission to appeal. More generally, it is to be interpreted and applied in accordance with the principles laid down in *Taylor v Lawrence* … . Accordingly, third, the jurisdiction under CPR 52.17 can only be invoked where it is demonstrated that the integrity of the earlier litigation process has been critically undermined. The paradigm case is where the litigation process has been corrupted, such as by fraud or bias or where the judge read the wrong papers. Those are not, however, the only instances for the application of CPR 52.17. The broad principle is that, for an appeal to be re-opened, the injustice that would be perpetrated if the appeal is not reopened must be so grave as to overbear the pressing claim of finality in litigation. Fourth, it also follows that the fact that a wrong result was reached earlier, or that there is fresh evidence, or that the amounts in issue are very large, or that the point in issue is very important to one or more of the parties or is of general importance is not of itself sufficient to displace the fundamental public importance of the need for finality."

Sir Terence Etherton C went on to say (in paragraph 69):

> "69. … [The] appellants' reasons for re-opening the application for permission to appeal Judge May's possession order amount, on one view, to no more than a criticism that Arden LJ's decision to refuse permission to appeal was wrong. That is not enough to invoke the *Taylor v Lawrence* jurisdiction."

15. For completeness, there should be added to that summary of the principles in *Lawal* the requirement that there must be a powerful probability that the decision in question would have been different if the integrity of the earlier proceedings had not been critically undermined.

The judgment of Cranston J.

16. Cranston J. identified three issues in the claim for judicial review. His conclusions on two of them, "Issue 1: Impact on the AONB" and "Issue 2: Impact on listed buildings", are relevant to the application to re-open.

17. On "Issue 1: Impact on the AONB", Mr Charles Streeten – who appeared for the parish council both in the court below and before us – submitted to Cranston J. that the district council's conclusion that the development would cause no harm to the Chilterns or North

Wessex Downs Areas of Outstanding Natural Beauty was *Wednesbury* unreasonable. The judge disagreed. He concluded (in paragraph 50 of his judgment):

> "50. In my judgment the Council's assessment in paragraph 6.5iii of the officer's report that there might be a degree of impact upon the Goring conservation area is not inherently incompatible with the assessment in paragraph 6.3vi that there might be no impact upon the AONB. That is despite Mr Streeten's submission, which I have said I accept, that heritage enters a planning assessment with an AONB."

and (in paragraph 54):

> "54. The important point is that there is no suggestion that the Council wrongly applied planning policies. The boards of the AONBs made no submissions on the proposal when invited to do so. The line of attack by those opposing the development was on the visual, not the heritage, impacts of the proposal. This was a classic matter of planning judgment, and the Council's assessment that there was no harm to the AONB cannot be said to be *Wednesbury* unreasonable."

18. The judge then turned to the second part of Mr Streeten's argument, which related to "acoustic harm". Mr Streeten had submitted that the district council's consideration of noise impacts "resulted in a lacuna in the decision-making process in that the harm which the noise would cause to the AONB was ignored" (paragraph 55 of the judgment).

19. The judge rejected that argument. He concluded (in paragraphs 58 and 59):

> "58. Again the nature of the legal challenge, *Wednesbury* unreasonableness, is determinative. That challenge is not that the Council failed to take into account a material consideration. What the Council did was to apply its policy on noise, EP2, concerning residents, as it was obliged to do. The AONBs' management plans are not statutory planning policies. No one pointed to tranquillity in relation to the AONBs. The Swan Hotel was to be specially notified of the planning application. Nothing said by any of the specialist consultees could be characterized as a concern with loss of tranquillity. Even if a couple of the public responses to the planning application can be interpreted as raising noise in a broader sense than its impact on residents, it was not in terms of tranquillity or "mucking about in boats" in the AONBs.
>
> 59. The Council was entitled to reach the planning judgment it did in paragraph 6.3iv that there was no harm to the AONB from the scheme. There was nothing for it to have regard to under section 85 of the Countryside and Rights of Way Act 2000 or paragraph 115 of the [National Planning Policy Framework ("the NPPF")]. It was not irrational for it to reach the conclusions it did."

20. On "Issue 2: Impact on Listed Buildings" Mr Streeten had submitted to the judge that there was nothing to show that the district council had considered the implications of the proposed development for listed buildings, in particular the grade I listed Church of St Thomas of Canterbury and the grade II listed Swan Hotel. The district council was in breach of its "duties to investigate" under section 66(1) of the Listed Buildings Act.

21. Cranston J. did not accept that argument. He concluded (in paragraph 63):

> "63. Apart from the Swan Hotel, the setting of listed buildings was never a main issue of the application. Therefore it was not necessary for the officer's report to identify each one simply to confirm that there would be no material impact upon it. As Evans LJ put it in *MJT Securities* v. *Secretary of State for the Environment* (1998) 75 P & CR 188, there is no need to refer to insignificant issues, only the main issues. Since there was no harm to any listed building which the Council was required to take into account, the duty in section 66 of [the Listed Buildings Act] did not arise."

22. In his report to committee the district council's planning officer had recognized that there would be harm to the conservation areas in Goring and Streatley, but had concluded that the harm was "less than substantial" and could be "satisfactorily outweighed" by the benefits of the scheme. Mr Streeten submitted to the judge that no consideration had been given to the duty in section 72 of the Listed Buildings Act to pay "special attention … to the desirability of preserving or enhancing the character or appearance of [the conservation area]". For the district council, Mr Jeremy Pike submitted that the officer had dealt appropriately with the possibility of impact on the conservation areas. The judge was unpersuaded by that submission. He said (in paragraphs 66 and 67):

> "66. The difficulty I have with this is that what the Council needed to do under section 72 was to give considerable importance and weight to harm to the conservation area: see Sales LJ (with whom Richards and Floyd LJJ agreed) in *Mordue v. Secretary of State for Communities and Local Government* [2015] EWCA Civ 1243, [2016] 1 W.L.R. 2682. … .
>
> 67. Nothing in the officer's report suggests that special priority was given to harm to the conservation area in accordance with the Council's duty. Rather, reflecting the officer's report, the planning permission simply concluded that the impact on the historic merits of the conservation area and visual effect on amenity constituted less than substantial harm, which was outweighed by the public benefit of renewable energy generation through use of the Thames."

23. Having reached those conclusions, the judge went on to perform the duty under section 31(2A) of the Senior Courts Act. He said (in paragraphs 68 and 69):

> "68. If the Council did fall down in fulfilling its section 72 duty, as I conclude it did, there is the separate question of whether "it appears … to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred": Senior Courts Act 1981, s. 31(2A). This, on the authorities, is a backward-looking provision: *Bokrosova* v. *London Borough of Lambeth* [2015] EWHC 3386 (Admin), [90], per Elizabeth Laing J; *R (Williams)* v. *Powys County Council* [2016] EWHC 480 (Admin), [25], per CMG Ockelton, sitting as a deputy High Court Judge; *R (Mark Logan)* v. *London Borough of Havering* [2015] EWHC 3193 (Admin), [55], per Blake J. If so satisfied, the court must refuse relief.
>
> 69. In my view it is highly likely that the outcome would not have been substantially different if the Council had applied the correct test. If there was any harm to heritage assets the response of both conservation officers, from the Council and

> West Berkshire Council, was that it was, at most, minor harm. That approach then became part of the officer's report. More importantly, the factors weighing in favour of the grant of planning permission were weighty, the opportunity of generating renewable energy from an existing water source. In my view there is simply no prospect that this issue would make any difference to the overall planning balance if the decision had been taken in accordance with section 72."

The parish council's grounds of appeal

24. In its written grounds of appeal, ground 1 of the parish council's appeal was this:

> "Ground 1: The learned judge erred in finding that it was highly likely that the outcome would not have been substantially different if [the district council] had applied the correct test under section 72 of [the Listed Buildings Act]."

That ground was amplified as follows:

> "4. In light of his finding at [66] – [67] that the Council had breached the statutory duty imposed under section 72 of [the Listed Buildings Act] by failing to give considerable importance and weight to the harm the Development would cause to the Goring and Streatley Conservation Areas, the learned judge was wrong to hold at [69] that it is highly likely that the outcome would not have been substantially different if the Council had applied the correct test:
>
> (a) Firstly, a breach of the statutory duty under section 72 of [the Listed Buildings Act] is not the type of breach to which section 31(2A) was intended to or does apply. [Section] 31(2A) was introduced to filter out claims brought on technicalities highly unlikely to have made a substantial difference. Failure to give considerable importance and weight to harm to a conservation area under [section] 72 cannot be regarded as such a technical failure.
>
> (b) Secondly, as Cranston J accepts at [68], section 31(2A) is a backward looking provision[;] it requires consideration of what the Council would have done. The judge is not being asked to second-guess the decision of the administrative body. Neither the Officer's Report to Committee nor the other evidence put forward by the Respondent suggests that the Council gave any special weight to the benefits of renewable energy. Absent such an indication, Cranston J's finding that "importantly, the factors weighing in favour of granting planning permission were weighty" constitutes the impermissible exercise of planning judgement by the court.
>
> (c) Thirdly, the learned judge failed to apply the strong statutory presumption against granting planning permission which arises when section 72(1) is engaged, even where harm is less than substantial (per Lord Bridge in [*South Lakeland v Secretary of State for the Environment*] [1992] 2 AC 141 at 146E-G). His reliance on the fact that the harm was 'minor' (his gloss) is indicative of treating less than substantial harm as a less than substantial objection contrary to [the] approach set out by Sullivan LJ in [*Barnwell Manor Wind*

Energy Limited v East Northamptonshire District Council] [2014] EWCA Civ 137 at [29].

5. For these reasons the learned judge's finding that it was highly likely that the outcome would not have been substantially different if the Council had applied the correct test was wrong."

Further elaboration of ground 1 was provided in Mr Streeten's skeleton argument in support of the application for permission to appeal.

25. There were three further grounds. Ground 2 was that "[the] learned judge was wrong to hold that the conclusion that there would be no harm to the AONBs was lawful, despite admitted harm to conservation areas within, and acknowledged in policy to contribute to the special character of, those AONBs". Ground 3 was that "[the] learned judge erred in finding that the Council's approach to acoustic harm to the AONB was lawful". And ground 4 was that "[the] learned judge was wrong to conclude that the duty to investigate harm to listed buildings "must be triggered by at least someone either in the Council or outside raising it as a potential issue" and/or that it was not necessary for the officer's report to identify the listed buildings which may be harmed by the development". Each of those grounds was amplified in the written grounds of appeal and elaborated in the skeleton argument.

Rafferty L.J.'s decision on the application for permission to appeal

26. Rafferty L.J.'s reasons for refusing permission to appeal were these:

> "I can identify no flaw in the reason of Cranston J which imperils the decision he made. It depended on an application of the legal framework to the facts and his analysis was clear and is unassailable. At paragraph 50 he explained that a degree of impact identified by the officer is not inherently incompatible with an assessment that there might not be an impact on the AONB and at para 54 identified the important point that there was no suggestion of the Council applying the wrong policies. He was justified in concluding, at paragraph 59, that the Council was entitled to reach the decision it did, having rehearsed why that was his view, and for the avoidance of doubt also excluding any need for regard to have been had to S85 CRWA 2000 or to the NPPF. There was as he said nothing irrational in the decision and there is thus nothing irrational in his conclusion.
>
> As to listed buildings he at para 63 excluded the requirement that each should be identified for nothing other than an exercise in particularity. At para 67 he excluded special priority to harm, rather there was a conclusion that harm consequent upon the impact was less than substantial which in any event was outweighed by the public benefit. Having found a failure by the Council in its S72 duty he went on to find the outcome highly unlikely to have been substantially different even if it had not failed. This is not flawed reasoning.
>
> His conclusion, having stood back, that a reconsideration even on the terms most favourable to you in the context of his findings, was thus inevitable and is unimpugnable."

How may the court's jurisdiction under CPR 52.30 be engaged by a refusal of permission to appeal?

27. Mr Streeten submitted that the court's jurisdiction under CPR 52.30 has two objectives, both of them relevant here: first, to ensure that injustice is avoided, and second, to maintain public confidence in the integrity of the justice system. He acknowledged, however, that the scope for the court to re-open an application for permission to appeal in the exercise of its jurisdiction under CPR 52.30 is extremely narrow, and that, if the jurisdiction is to be engaged, more must be shown than simply that the decision to refuse permission was wrong. He accepted that most applications for permission to appeal can be justly determined without an oral hearing. He did not argue that the removal under CPR 52.5(1) of an entitlement to an oral renewal hearing of an application for permission to appeal to the Court of Appeal (for appeals filed on or after 3 October 2016) has had the effect of making more onerous the duty to give reasons for a decision to refuse permission on the papers.

28. Mr Streeten did submit, however, that this change to the rules accentuates the importance of the applicant being able to understand why permission was refused – citing decisions of this court (see, for example, *Flannery v Halifax Estate Agencies Ltd.* [2000] 1 W.L.R. 377 and *English v Emery Reimbold and Strick Ltd.* [2002] 1 W.L.R. 2409, where Lord Phillips of Worth Matravers M.R., as he then was, said (in paragraph 16 of his judgment) that "justice will not be done if it is not apparent to the parties why one has won and the other has lost"). The reasons given for a refusal of permission to appeal on paper, Mr Streeten accepted, will normally be short and will not generally be vulnerable to criticism simply on the ground that they do not deal expressly with every argument put forward on behalf of the applicant. The essential task of the Lord or Lady Justice dealing with an application on paper, however, was to make clear that the main arguments identified in the applicant's grounds of appeal had been addressed. As Lord Neuberger M.R. had pointed out in *Barclays Bank v Guy* (at paragraph 36), where a judge has demonstrably failed to understand an argument, this can be enough to engage the CPR 52.30 jurisdiction.

29. In our view, Mr Streeten was right to concede as much as he did. The court's jurisdiction under CPR 52.30 is, as we have said, a tightly constrained jurisdiction. It is rightly described in the authorities as "exceptional". It is "exceptional" in the sense that it will be engaged only where some obvious and egregious error has occurred in the underlying proceedings and that error has vitiated – or corrupted – the very process itself. It follows that the CPR 52.30 jurisdiction will never be engaged simply because it might plausibly or even cogently be suggested that the decision of the court in the underlying proceedings, whether it be a decision on a substantive appeal or a decision on an application for permission to appeal, was wrong. The question of whether the decision in the underlying proceedings was wrong is only secondary to the prior question of whether the process itself has been vitiated. But even if that prior question is answered "Yes", the decision will only be re-opened if the court is satisfied that there is a powerful probability that it was wrong.

30. These principles apply to all applications under CPR 52.30, and with equal force to both applications to re-open substantive appeals and applications to re-open applications for permission to appeal. The authorities cited in argument before us have all concerned the application of the *Taylor v Lawrence* principles in cases where there has been a substantive decision of the court in the preceding litigation, rather than a decision to refuse permission to appeal from a decision in a lower court. It would be wrong, however, to suppose that the rigour of the principles applying to *Taylor v Lawrence* applications is in any way relaxed

where the decision under consideration is a decision, on the papers, to refuse permission to appeal to the Court of Appeal rather than a substantive decision of this court on an appeal itself.

31. In the context of an application for permission to appeal whose consideration is said to have been critically undermined or corrupted, the first question will be whether the judge whose decision is the subject of the application to re-open has sufficiently confronted and dealt with the grounds of appeal. Secondly, if the conclusion is reached that the process has been critically undermined it will still be necessary for the court to consider whether, had that not been so, that it is highly likely, in the sense of there being a powerful probability, that the decision on the application for permission to appeal would have been different and that permission to appeal would have been granted.

32. It should also be understood, and this case provides an opportunity to dispel any doubt there may be on the point, that the principles governing the CPR 52.30 jurisdiction have not been modified or relaxed in response to the change in the procedure for the determination of applications for permission to appeal that was brought about, with effect from 3 October 2016, in CPR 52.5.

33. The effect of CPR 52.5(1) and (2) is that an application for permission to appeal to the Court of Appeal will be determined on paper without an oral hearing, except where the judge considering the application on paper directs that the application is to be dealt with at an oral hearing. It is for the judge to decide whether the application cannot be fairly determined on paper without an oral hearing. This procedure has replaced the previous arrangements in Practice Direction 52C, under which an application for permission to appeal was normally dealt with by the court on paper in the first instance, but if the application was refused the applicant would be entitled to have the decision reconsidered at a hearing, except where the rules provided otherwise – for example, where the application had been found to be "totally without merit".

34. The new procedure under CPR 52.5 has considerable advantages in the saving of time, cost and uncertainty for the parties – both applicants and respondents – and in relieving pressure on the court's resources, whilst ensuring that applications continue to be fairly and justly determined. It has not created a procedural vacuum that needs to be filled by an expansion of the jurisdiction under CPR 52.30. Legal representatives advising applicants for permission to appeal should not think, and should not encourage applicants to think, that CPR 52.30 provides a default procedure for challenging the court's decision to refuse the application for permission to appeal, whether on paper or at an oral hearing, if one is held.

35. Under the new procedure it remains the duty of the Lord or Lady Justice determining an application for permission to appeal on paper, if the decision is to refuse permission, to address in his or her reasons the essential issues raised in the applicant's grounds of appeal. The reasons will seldom need to be lengthy provided that an adequate explanation is given for the refusal of permission on each ground (cf. the judgment of this court in *Wasif v Secretary of State for the Home Department* [2016] EWCA Civ 82, at paragraphs 19 to 22). This applies both to applications to appeal in first appeals, under CPR 52.6, and to applications in second appeals, under CPR 52.7. In short, the applicant must be able to understand why, on the appropriate test under the rules, the intended appeal is not being permitted to proceed.

36. A corollary of that principle is that advocates settling grounds of appeal ought to take care to draft each ground crisply and clearly as a properly formulated ground of appeal. Discursive, repetitive or prolix grounds are unhelpful and add unnecessarily to the burdens of a judge dealing with an application for permission to appeal. Each main issue in the proposed appeal should be succinctly identified in a separate ground. Where this has not been done, it is likely to be more difficult for an applicant to complain that a particular point has not been addressed by the judge.

37. In planning cases, and generally, this court has urged a straightforward approach to the drafting of grounds in claims for judicial review and statutory challenges (see, for example, *Barwood Strategic Land II LLP v East Staffordshire Borough Council* [2017] EWCA Civ 893, at paragraph 50). The same should apply to the drafting of grounds of appeal.

The parish council's "principal ground of appeal" – section 31(2A) of the Senior Courts Act

38. Section 31(2A) of the Senior Courts Act was introduced by section 84 of the Criminal Justice and Courts Act 2015, coming into effect on 13 April 2015. It provides:

> "(2A) The High Court –
>
> (a) must refuse to grant relief on an application for judicial review …
>
> …
>
> if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred."

The forms of relief referred to in section 31(1)(1) include "(a) a mandatory, prohibiting or quashing order" and "(b) a declaration or injunction under subsection (2)". Subsections (2B) and (2C) state:

> "(2B) The court may disregard the requirements in subsection (2A)(a) and (b) if it considers that it is appropriate to do so for reasons of exceptional public interest.
>
> (2C) If the court grants relief … in reliance on subsection (2B), the court must certify that the condition in subsection (2B) is satisfied."

39. The parish council now contends, although it did not do so before Cranston J., that section 31(2A) of the Senior Courts Act has no application when a claimant succeeds in establishing a substantive error of law as opposed to "a minor procedural technicality". This is so, it argues, because the duty imposed by section 31(2A) partly ousts the High Court's jurisdiction in claims for judicial review, and should therefore be narrowly construed (see the judgment of Lord Phillips of Worth Matravers M.R. in *R. (on the application of G) v Immigration Appeal Tribunal* [2005] 1 W.L.R. 1445, at p.1452). It is thus a provision of "constitutional significance". The natural and ordinary meaning of the word "conduct", construed as narrowly as it should be in this statutory context, does not encompass substantive errors of law. An error in the decision-maker's approach, such as Cranston J. found the district council had committed in failing properly to apply the duty under section 72 of the Listed Buildings Act – in effect, to give "considerable importance and weight" to

harm to a conservation area, would not be the kind of "conduct" contemplated by section 31(2A).

40. Support for these submissions is to be found, Mr Streeten contended, in the judgment of Blake J. in *Logan* (in particular, at paragraph 55), and in observations made about the scope of the provision that became section 31(2A) made by Lord Faulks Q.C., the then Minister of State for Justice, in the course of debate in the House of Lords during the passage of the Bill through Parliament – admissible, Mr Streeten submitted, under the rule in *Pepper v Hart* [1993] A.C. 593. In any event, he argued, there is conflicting authority at first instance on the construction and application of section 31(2A). This was, he said, the "principal ground" on which the parish council had sought permission to appeal to the Court of Appeal, as ought to have been apparent from his skeleton argument in support of the application for permission (in particular, in paragraphs 8 to 22). It raised, he said, an important point of law but Rafferty L.J. had failed to address it.

41. Mr Streeten's second argument was that, in performing the section 31(2A) duty, Cranston J. had ventured into the planning merits, offending the basic principle that questions of planning judgment lie within the sole competence of the planning decision-maker, subject only to the court's intervention on public law grounds (see the speech of Lord Hoffmann in *Tesco Stores Ltd. v Secretary of State for the Environment* [1995] 1 W.L.R. 759, at p.780H, and the speech of Lord Keith of Kinkel, at p.764G). To describe the factors weighing in favour of planning permission, including the benefit of generating renewable energy, as "weighty", which the judge did (in paragraph 69 of his judgment), was to attribute weight of his own choosing to those considerations. This was, Mr Streeten submitted, an impermissible exercise of planning judgment by the court. The error was clearly raised as an argument in support of ground 1 in the parish council's grounds of appeal. Once again, however, Rafferty L.J. had not grappled with the submissions made.

42. The third argument here was that, in deciding not to quash the planning permission, Cranston J. had failed to recognize the strength of the statutory presumption, under section 72 of the Listed Buildings Act, against granting planning permission where harm would be caused to a conservation area, even where that harm would be, in the words of paragraph 134 of the NPPF, "less than substantial", or, as the judge had put it (in paragraph 69 of his judgment), "at most, minor harm" (see the speech of Lord Bridge of Harwich in *South Lakeland District Council v Secretary of State for the Environment*, at p.146E-G, and the judgment of Sullivan L.J. in *Barnwell Manor Wind Energy Ltd.*, at paragraphs 23 and 29). The strength of the section 72 presumption was enough to displace the section 31(2A) duty, unless the harm to the conservation area was "trivial" or "negligible". At least in the circumstances of this case, if the strength of the statutory presumption had been appreciated, it would not have been reasonably open to the court to find it was highly likely that the outcome would not have been substantially different. Rafferty L.J. had failed to tackle this argument too.

43. The only reasonable conclusion, Mr Streeten submitted, is that Rafferty L.J. did not properly consider the main arguments put forward in support of the parish council's application for permission to appeal. If she had considered those arguments and rejected them, she would have had to explain why. Given the significance of the issues raised, a decision to refuse permission to appeal on the second limb (in CPR 52.6(1)(b)) would have been very surprising, whatever conclusion was reached on the first (in CPR 52.6(1)(a)). Mr Streeten submitted that this failure had caused the parish council a real injustice. It had not had the

chance to reverse Rafferty L.J.'s decision before another Lord or Lady Justice at an oral hearing. It had been denied access to justice. This, said, Mr Streeten, exemplifies the "corruption" of the justice system that will engage the *Taylor v Lawrence* jurisdiction.

44. For the district council, Mr Pike submitted that Rafferty L.J. plainly did not misunderstand the parish council's position on section 31(2A). To the parties, familiar with the case, it was clear from her reasons why she saw nothing in ground 1. In the absence of any authority to suggest otherwise, she obviously accepted that the section 31(2A) duty did apply here, and, no less obviously, that the judge had complied with it. This was enough. There was no warrant here for re-opening her decision.

45. We cannot accept Mr Streeten's submissions. It is, in our view, impossible to conclude that Rafferty L.J. failed to understand ground 1 of the parish council's intended appeal, or that she failed to deal with it sufficiently in her reasons.

46. Mr Streeten's three arguments evolved somewhat in his written and oral submissions. It seems fair to say, however, that they are, at best, ambiguous on the construction and scope of the duty in section 31(2A). The first argument urges the conclusion that the duty is simply inapplicable to a legal error of the kind identified by Cranston J. in his conclusion that the district council had failed lawfully to apply the presumption in section 72 of the Listed Buildings Act. On the other hand, the premise in the second and third arguments appears to be that, in principle, the duty did apply, and the complaint is that the judge failed lawfully to discharge it. One must keep in mind, therefore, that ground 1 itself, as formulated in the written grounds of appeal, asserts that the judge "erred in finding that it was highly likely that the outcome would not have been substantially different if the council had applied the correct test under section 72 of [the Listed Buildings Act]", which is a contention predicated on the assumption that the section 31(2A) duty was in play – not the argument that it was not.

47. We remind ourselves that our starting point here is not to consider the merit of Mr Streeten's argument on the scope of the duty in section 31(2A). We are not re-making the permission decision, or even at this stage considering whether there is a "powerful probability" that Rafferty L.J.'s decision to refuse permission was wrong. In our view, however, the proposition that the section 31(2A) duty applies only to "conduct" of a merely "procedural" or "technical" kind, and not also to "conduct" that goes to the substantive decision-making itself, is a surprising concept. The duty has regularly been applied to substantive decision-making across the whole spectrum of administrative action, including in the sphere of planning, both at first instance and in decisions of this court (see, for example, the judgment of Lindblom L.J. in *R. (on the application of Williams) v Powys County Council* [2017] EWCA Civ 427, at paragraphs 71 to 73). Although we did not hear full argument on the point, we would be prepared to say that the narrow construction of section 31(2A) contended for by the parish council is, on the face of it, mistaken. It does not seem to us to gain any real support in the first instance decisions on which Mr Streeten relied. The concept of "conduct" in section 31(2A) is a broad one, and apt to include both the making of substantive decisions and the procedural steps taken in the course of decision-making. It is not expressly limited to "procedural" conduct. Nor, in our view, is such a qualification implied. But this, we must stress, is not a necessary conclusion for the purposes of our decision on the application to re-open.

48. In our view ground 1 of the proposed appeal was sufficiently and clearly dealt with by Rafferty L.J. in her reasons.

49. On this ground, as on the others, her reasons referred explicitly to the relevant passages of Cranston J.'s judgment. The passage of the judgment to which ground 1 related was in paragraphs 66 to 69. In the penultimate sentence of the second paragraph of her reasons, Rafferty L.J. expressly acknowledged the judge's conclusion that there had been, as she put it, "a failure by the Council in its S72 duty". This was a true reflection of what the judge said at the beginning of paragraph 68 of his judgment. In the previous sentence of her reasons Rafferty L.J. referred to the judge's conclusion in paragraph 67 of his judgment. In that paragraph Cranston J. said that "[nothing] in the officer's report suggests that special priority was given to harm to the conservation area in accordance with the Council's duty" – a reference to the section 72 duty, which he had accurately described in paragraph 66. And he then referred to what the district council's officer had said in her report to committee, and the balance she had struck between "less than substantial harm" and "the public benefit of renewable energy generation through use of the Thames".

50. It was clearly to this passage in Cranston J.'s judgment that Rafferty L.J. was referring when she said that "[at] para 67 he excluded special priority to harm, rather there was a conclusion that harm consequent upon the impact was less than substantial which in any event was outweighed by the public benefit". Properly understood, this was to recognize, and accept, the judge's conclusion that the section 72 duty had not been complied with. By her use of the word "excluded", Rafferty L.J. did not mean, and cannot have meant, that Cranston J. had ignored the district council's failure to do what section 72 required it to do, or had absolved it from that error of law. She can only have meant what Cranston J. had actually said, which she paraphrased in the way she did.

51. Rafferty L.J.'s crucial conclusion on ground 1 is in the last two sentences of the second paragraph of her reasons, where she said that the judge, having found the district council had failed in its duty under section 72, "went on to find the outcome highly unlikely to have been substantially different even if it had not failed", and that this, as she put it, was "not flawed reasoning". It is, in our view, significant that Rafferty L.J. was deliberately using the language of section 31(2A) of the Senior Courts Act in stating those conclusions. So too had Cranston J. in paragraph 69 of his judgment, having quoted the section accurately in paragraph 68. It is quite clear from what she said that Rafferty L.J. was unimpressed by the criticism of Cranston J.'s approach and conclusions as a basis for an appeal to this court, and accordingly that permission to appeal should not be granted on ground 1. The expression "not flawed reasoning" was a clear enough way of stating that view. But Rafferty L.J.'s reasons did not end there. In the third and concluding paragraph she endorsed as "unimpugnable" the judge's conclusion, "even on the terms most favourable" to the parish council, that the same outcome to the district council's decision-making would have been "inevitable" if the error of law had not been made. This was not merely to say that the judge's "reasoning" was secure, but also that his approach and conclusions were unassailable in substance.

52. Although Rafferty L.J. did not explicitly deal with the argument that section 31(2A) of the Senior Courts Act was inapplicable in this case, it was necessarily implicit in her reasons that she rejected that concept. If she had accepted it, she could not have stated her reasons in the way she did. Having in mind the duty in section 31(2A), which she demonstrably did, and having recognized that the judge, for his part, had the duty in mind, had applied it, and

had discharged it lawfully, she did not need to go on and say that this straightforward analysis was based on her conclusion that the duty applied because the "conduct" of the district council in failing to apply the presumption in section 72 of the Listed Buildings Act was "conduct" within the reach of section 31(2A). That was obviously inherent in her analysis. She did not have to spell it out. She was focusing, quite properly, on ground 1 as it had been pleaded, which alleged that the judge had "erred in finding that it was highly likely that the outcome would not have been substantially different if the Council had applied the correct test under section 72 of [the Listed Buildings Act]". She squarely confronted that allegation, and, in doing so, disposed effectively of the several arguments advanced in support of it.

53. But there is, we think, a further point that can fairly be made here. As we suggested to Mr Streeten while he was making his submissions to us, his argument on the construction and scope of section 31(2A) faces a fatal difficulty, which is that ultimately it proves too much – both for the purposes of the parish council's appeal on ground 1 and for the purposes of its application to re-open Rafferty L.J.'s decision. If the argument was right, and the concept of "conduct" in section 31(2A) does not extend to substantive as well as to procedural errors of law, so that the duty in that section did not apply in this case, the court would still have had its discretion as to relief, which it would have had to exercise in accordance with the well established principles in *Simplex GE (Holdings) Ltd. v Secretary of State for the Environment* (1989) 57 P. & C.R. 306. It would then have had to consider whether there was any realistic possibility of the district council's decision being different but for the error of law (see Lord Carnwath's judgment in *Walton v Scottish Ministers* [2012] UKSC 44, at paragraphs 111 and 112, his judgment in *R. (on the application of Champion) v North Norfolk District Council* [2015] UKSC 52, at paragraphs 54 to 66, and the discussion in De Smith's Judicial Review, eighth edition, paragraphs 18-047 to 18-050 and 18-057). In purporting to discharge the duty under section 31(2A), the judge, in effect, did exactly that. At the end of paragraph 69 of his judgment he concluded that there was "simply no prospect that this issue would make any difference to the overall planning balance if the decision had been taken in accordance with section 72". This was to go considerably further than section 31(2A) required, and as far as the *Simplex* approach demands. If, therefore, section 31(2A) did not apply, the result of the claim for judicial review on this ground would still have been what it was, namely a declaration, not an order to quash the planning permission. It would follow that even if Cranston J. and Rafferty L.J. were both in error in accepting the relevance of section 31(2A), the parish council suffered no injustice.

54. As to Mr Streeten's submission that Rafferty L.J. did not grapple with the argument that Cranston J., in performing the duty under section 31(2A), had descended into the planning merits, our conclusion is essentially the same as on the first argument, and for essentially the same reasons.

55. The mistake in Mr Streeten's submissions here is that, in the context of a challenge to a planning decision, they fail to recognize the nature of the court's duty under section 31(2A). It is axiomatic that, when performing that duty, or, equally, when exercising its discretion as to relief, the court must not cast itself in the role of the planning decision-maker (see the judgment of Lindblom L.J. in *Williams*, at paragraph 72). If, however, the court is to consider whether a particular outcome was "highly likely" not to have been substantially different if the conduct complained of had not occurred, it must necessarily undertake its own objective assessment of the decision-making process, and what its result would have been if the decision-maker had not erred in law.

56. It is, in our view, clear from Rafferty L.J.'s reasons that she was not persuaded there was a real prospect of establishing that, in performing the section 31(2A) duty, Cranston J. had trespassed into the forbidden territory of planning judgment. She did not need to say more than she did to make this clear. Mr Streeten highlighted Cranston J.'s use of the word "weighty" in paragraph 69 of his judgment to describe the factors seen by the district council's officer as going in favour of the grant of planning permission, and outweighing the harm to the conservation area. Rafferty L.J., however, was plainly unpersuaded that this was anything other than the judge's description of the officer's own planning assessment, supported, to the extent it was, by the conservation officer's response. She plainly also accepted that the officer's assessment had, quite legitimately, informed, but not dictated, the judge's own conclusion in performing the section 31(2A) duty. Otherwise, her conclusion would have had to be different.

57. A similar answer can be given to Mr Streeten's third submission, that Rafferty L.J. did not confront the argument that Cranston J. failed to recognize the strength of the presumption in section 72 of the Listed Buildings Act, and failed, in particular, to discern that it was powerful enough to displace the section 31(2A) duty, either in every case or, at least, in this one. This submission, it seems to us, is untenable. There is no basis for it in the statutory provisions themselves, in authority, or in principle. Cranston J. referred, in paragraph 66 of his judgment, to the requirement under section 72, as he put it, "to give considerable importance and weight to harm to the conservation area", and he took care to refer to relevant authority in this court – in *Mordue*. In paragraph 67, he acknowledged that "special priority" had not been given to the harm to the conservation area "in accordance with the Council's duty". It is necessarily implicit in Rafferty L.J.'s reasons, and in particular in her reference to Cranston J.'s conclusion in paragraph 67 of his judgment, that she saw no arguable error in his understanding of the section 72 duty. We need go no further than that.

58. We therefore reject Mr Streeten's various arguments on section 31(2A) of the Senior Courts Act as a basis for re-opening Rafferty L.J.'s decision.

59. Finally here, we would add this. Although the point was not raised before us, it might be said to follow from Cranston J.'s conclusions in paragraphs 68 and 69 of his judgment that in granting declaratory relief in his order he went further than section 31(2A) would permit, unless he certified under subsection (2C) that "for reasons of exceptional public interest" it was appropriate to grant relief in reliance on subsection (2B). That, however, was not a point argued before us, and we do not need to decide it.

Fundamental legal errors?

60. Mr Streeten submitted that there were fundamental legal errors in Rafferty L.J.'s treatment of the issues raised in the grounds of appeal. He identified two in particular: first, that Rafferty L.J. failed to comprehend the full force of the statutory presumption in section 72 of the Listed Buildings Act, as explained in the relevant authorities, including, in particular, Sullivan L.J.'s judgment in *Barnwell Manor Wind Energy Ltd.*; and secondly, that she misunderstood the effect of the requirement in section 85(1) of the Countryside and Rights of Way Act that, "[in] exercising or performing any functions in relation to, or so as to affect, land in an area of outstanding natural beauty, a relevant authority shall have regard the purpose of conserving and enhancing the natural beauty of the area of outstanding

natural beauty", and also government policy in paragraph 115 of the NPPF, which says that "[great] weight should be given to conserving landscape and scenic beauty in … Areas of Outstanding Natural Beauty, which have the highest status of protection in relation to landscape and scenic beauty".

61. We do not agree with either of those two arguments.

62. The first argument, concerning the section 72 duty, seems to repeat much of the substance of Mr Streeten's second and third arguments on section 31(2A), which we have already rejected, and to depend on a false meaning being given to Rafferty L.J.'s reference to Cranston J. having "excluded special priority to harm". The suggestion that she must have misled herself in reading the passages of Cranston J.'s judgment where he set out his own understanding of section 72 and how it operated in this case, because otherwise she would have had to conclude that permission to appeal should be granted on ground 1, is, in our view, wrong. As we have said, it is clear that she accepted those passages of Cranston J.'s judgment as indisputably correct, did not doubt his understanding of section 72, and did not find anything arguably wrong in his performance of the duty under section 31(2A). There is nothing approaching a "fundamental legal error" in that part of her reasons.

63. Nor do we accept that there is any such error in Rafferty L.J.'s reasons for rejecting the grounds of appeal relating to the judge's conclusions on the arguments concerning the Areas of Outstanding Natural Beauty.

64. The point in ground 2 was that Cranston J. was wrong to uphold the district council's conclusion that there would be no harm to the Areas of Outstanding Natural Beauty, despite the admitted harm to the conservation area. Rafferty L.J. addressed that point appropriately in the first paragraph of her reasons, where she explained why she rejected the point as unarguable. That betrays no "fundamental legal error". Rafferty L.J. referred to, and approved, the critical part of Cranston J.'s relevant conclusions, in paragraph 50 of his judgment, where he said there was nothing "inherently incompatible" between a finding of "a degree of impact upon the Goring conservation area" and a finding of "no impact upon the AONB". That was right.

65. The point in ground 3 was that the judge erred in finding nothing legally amiss in the district council's approach to "acoustic harm to the AONB". Mr Streeten submitted that, in paragraph 58 of his judgment, Cranston J. failed to distinguish an irrationality challenge from a challenge asserting a failure to have regard to a material consideration, which this was, and that Rafferty L.J. fell into the same error. The effect of the proposed development on the tranquillity of the Areas of Outstanding Natural Beauty was a material consideration. The district council had failed to take it into account. The judge had not found, as he should have done, that this was what the parish council was saying, and Rafferty L.J. had not confronted the point. Mr Streeten also submitted that Rafferty L.J. made the basic error of concluding that the district council was not under the duty in section 85 of the Countryside and Rights of Way Act, and did not have to take into account government policy in paragraph 115 of the NPPF.

66. We reject those submissions. They do not demonstrate any "fundamental legal error".

67. In paragraph 58 of his judgment Cranston J. explained why, in the absence of any relevant conflict with development plan policy, and given that "[no] one pointed to tranquillity in

relation to the AONBs", this part of the parish council's claim had to be regarded as a "*Wednesbury* unreasonableness" challenge, rather than an alleged failure to take into account a material consideration. This being so, and the district council having found no other harm to the Areas of Outstanding Natural Beauty, Cranston J. concluded in paragraph 59 of his judgment that "[there] was nothing for it to have regard to under section 85 of the Countryside and Rights of Way Act 2000 or paragraph 115 of the NPPF", and that "[it] was not irrational for it to reach the conclusions it did".

68. Rafferty L.J.'s relevant reasons are, once again, a sufficient explanation of her decision to refuse permission to appeal. In the penultimate sentence of her first paragraph she referred to paragraph 59 of Cranston J.'s judgment, observing that he was "justified" in concluding as he did. Necessarily, this involved the judge's conclusion that the thrust of this assault on the district council's decision was irrationality, and that it did not succeed. Rafferty L.J. agreed. There can be no sensible dispute about that. In the final sentence of that paragraph she made absolutely plain her own conclusion that there was, as Cranston J. had found, "nothing irrational in the decision …". That conclusion is not flawed by any "fundamental legal error". The same can be said of the observation that the judge was justified in concluding as he did in paragraph 59 of his judgment, "… excluding any need for regard to be have been had to S85 CRWA 2000 or to the NPPF". Once again, Rafferty L.J. was endorsing Cranston J.'s conclusion, not differing from it, or seeking to modify it. On a fair reading of her reasons and the judge's conclusion in paragraph 59, in the light of the district council's consideration of the possible effects of the development on the Areas of Outstanding Natural Beauty, they were both saying, in effect, that the requirement in section 85 of the Countryside and Rights of Way Act and the policy in paragraph 115 of the NPPF had been substantially complied with. Rafferty L.J. did not formulate her reasons in that way, we accept. But that does not amount a "fundamental legal error".

69. For the sake of completeness, we should say, finally, that Rafferty L.J.'s reason for refusing permission on ground 4, which concerns the judge's handling of the ground in the claim alleging a misapplication of the duty in section 66 of the Listed Buildings Act, affords no basis for a re-opening of her decision. Rafferty L.J. dealt with that point appropriately in the first sentence of the second paragraph of her reasons, where she referred to paragraph 63 of Cranston J.'s judgment. The decisive conclusion there, as Rafferty L.J. must have understood, was that "[since] there was no harm to any listed building which the [district council] was required to take into account, the duty in section 66 of [the Listed Buildings Act] did not arise". Her remark that the judge "excluded the requirement that each [listed building] should be nothing other than an exercise in particularity" was obviously a reference to what Cranston J. said in the second sentence of paragraph 63: that "… it was not necessary for the officer's report to identify each one simply to confirm that there would be no material impact upon it". That was correct.

Conclusion

70. For those reasons we conclude that the application to re-open falls well short of meeting the requirements of CPR 52.30(1). The parish council has suffered no "real injustice". The application is therefore dismissed.