



Neutral Citation Number: [2024] EWHC 2197 (Admin)

Case No: AC-2022-LON-003364

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/08/2024

Before :

HIS HONOUR JUDGE JARMAN KC

Sitting as a judge of the High Court

Between :

**PADSTOW CONSERVATION AREA
PROTECTION GROUP**

Claimant

- and -

CORNWALL COUNCIL

Defendant

-and-

NICHOLAS PRIDEAUX-BRUNE

**Interested
Party**

Ms Celina Colquhoun (instructed by **Addleshaw Goddard**) for the **Claimant**
Mr Sancho Brett (instructed by **Cornwall Council Legal Services**) for the **Defendant**
The interested party did not appear

Hearing date: 31 July 2024

Approved Judgment

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

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HIS HONOUR JUDGE JARMAN KC

HHJ JARMAN KC:

Introduction

1. The claimant challenges by judicial review the decision of the defendant as local planning authority (the authority) on 14 October 2022 to grant planning permission for a proposed use of a walled garden as a public, commercial garden with associated cafe on land at The Walled Garden, Duke Street, Padstow. The assessment and reasons for recommending the grant are set out in a report of a planning officer of the authority, and the head of planning then accepted the recommendation and made the grant under delegated authority.
2. The walled garden dates from the 19th century and served as a kitchen garden to the Grade I listed manor house known as Prideaux Manor some 400 meters to the west. The garden contains several heritage assets including the wall itself which is Grade II listed and a stone building known as the Bothy. There are other features such as greenhouses and hard standings. Some of the features, particularly the Bothy, have been renovated under previous permissions. The garden itself is not currently cultivated. It comprises some 3,500 square meters and is situated on an elevated site on the outskirts of Padstow and is visible from many parts of the town. It is especially prominent from New Street which runs through the town from the harbour and from the Plantation which is a large open area of local significance.
3. The garden falls within the Carnewas to Stepper Point Section of the Cornwall Area of Outstanding Natural Beauty (AONB) and the Padstow Conservation Area (CA). It is referred to in the CA statement as being an existing open space which is appreciable due to its distinctive walled garden nature which maintains the sense of enclosure but with open space behind which “forms an important part of the townscape in longer views over the settlement.” Its considerable visual contribution is referred to, made by its walls and spaces, with its visibility and “open nature” being appreciated in long views across the town. It is designated as “local green space” (LGS) within the Padstow Parish Neighbourhood Development Plan 2018-2030 (PPNDP) and falls outside the Padstow settlement boundary as therein defined. The local plan is the Cornwall Local Plan 2010-203 (CLP) and the garden comes within the definition of open countryside as set out in that plan, where development should be strictly regulated.
4. The reason for the designation in the PPNDP is given as:

“...as an important amenity area in a densely built area which provides a visually attractive, verdant backcloth to Padstow old town as viewed from the harbour and main visitor car park. The Conservation Area Statement notes how important the wall and the garden are to the character of Padstow.”
5. The garden is one of 15 such sites designated in Policy PAD5 of the PPNDP which then provides that “Inappropriate development in these areas will only be supported in very special circumstances.”

6. There are two grounds of challenge for which permission has been granted. Ground 1 alleges that when applying PAD5, in particular with regard to what amounts to ‘inappropriate development,’ the delegated officer failed to take into account the National Planning Policy Framework (NPPF) [146-147] and to assess the impact of the development on the openness of the garden. Ground 2 is that the delegated officer failed to apply the correct test to the impact of the development upon the AONB by acknowledging harm to the AONB from the visual intrusion to the landscape by the introduction of the public and the café/shop use and inappropriately offsetting that harm with alleged heritage benefits.
7. The quoted paragraphs of the NPPF provides:

“147. Inappropriate development is, by definition, harmful to the Green Belt and should not be approved except in very special circumstances.

148. When considering any planning application, local planning authorities should ensure that substantial weight is given to any harm to the Green Belt. ‘Very special circumstances’ will not exist unless the potential harm to the Green Belt by reason of inappropriateness, and any other harm resulting from the proposal, is clearly outweighed by other considerations.”
8. The NPPF at [150] lists exceptions, including so far as material:

“150. Certain other forms of development are also not inappropriate in the Green Belt provided they preserve its openness and do not conflict with the purposes of including land within it. These are:...e) material changes in the use of land (such as changes of use for outdoor sport or recreation, or for cemeteries and burial grounds)..”
9. Ms Colquhoun, for the claimant, accepts that some of the permitted development may amount to recreation, but submits that the café and shop does not fall within that exception.
10. It is important to note that the permitted development, apart from the placing of a vent in the Bothy to serve the café and shop, does not involve any physical changes to the garden but a material change of use to a mixed use as a public, commercial garden with associated café. The conditions to the permission place limitations on the permitted use. The public access is limited to the southern, and less visible, part of the garden apart from disability access (condition 3). The commercial garden use is limited to the growing of crops in the northern part of the garden (condition 10). The café is limited to the Bothy with capacity inside for 12 people and outside at tables on adjacent areas for 20 people and on a raised terrace for a further 40 people. The café use includes a shop. The opening hours are limited to Wednesday - Sunday from between the hours of 0900 and 1600 and between the hours of 1800 and 2200 on 2 evenings each week (condition 7). There are no limits on the hours of operation of the use as a commercial garden, on numbers of people attending the garden, or on the seating capacity of the café or shop. Paraphernalia, such as tables chairs and umbrellas, are to be stored when the garden is not open to the public (condition 5). External lighting is subject to approval

by the authority (see condition 11) [CB/121] with no detail provided with the application.

Legal principles

11. These were not in dispute before me. Decision makers are assumed to have a working knowledge of the statutory tests and the court will not readily draw an adverse inference that they acted unlawfully: *South Buckinghamshire v Porter* (No. 2) [2004] 1 WLR 1953.

12. The NPPF in its opening paragraph sets out its purpose:

“1. The National Planning Policy Framework sets out the Government’s planning policies for England and how these should be applied. It provides a framework within which locally-prepared plans for housing and other development can be produced.

2. Planning law requires that applications for planning permission be determined in accordance with the development plan, unless material considerations indicate otherwise. The National Planning Policy Framework must be taken into account in preparing the development plan, and is a material consideration in planning decisions. Planning policies and decisions must also reflect relevant international obligations and statutory requirements”

13. An officer’s report should be read with reasonable benevolence, fairly and as a whole, and without undue rigour, excessive legalism or criticism. The court does not expect to find a flawless discussion of every planning issue within an officer’s report, see for example *Mansell v Tonbridge and Malling Borough Council* [2017] EWCA Civ 1314 (para. 42). In *R (Whitley Parish Council) v North Yorkshire County Council* [2023] EWCA Civ 92, Lindblom LJ said at [37]:

“... the jurisdiction of the court in its supervisory role is to establish whether the authority's decision-making has been vitiated by any error of law ... The court will review the decision with realism and common sense, avoiding an excessively legalistic approach ... It will not focus merely on the precise phrasing of individual sentences or paragraphs in a planning officer's report, without seeking their real meaning when taken in context.

14. In *Braintree District Council v Secretary of State for Communities and Local Government* [2018] EWCA civ 610 at [16-17] Lindblohm LJ dealt with the interpretation of panning policy in the context of decisions of planning inspectors. It was not contended before me that these principles are not also applicable to reports of planning officers, as logically they are.

“16. The relevant legal principles are clear and uncontentious. They need not be set out at length. The interpretation of planning

policy, whether in the development plan or in statements of national policy, is ultimately a matter for the court. When the meaning and effect of a planning policy are contested, the court must avoid the mistake of treating the policy in question as if it had the force or linguistic precision of a statute – which it does not – and must bear in mind that broad statements of policy do not lend themselves to elaborate exegesis. The court's task is to discern the objective meaning of the policy as it is written, having regard to the context in which the policy sits (see the judgment of Lord Reed in *Tesco Stores Ltd. v Dundee City Council* [2012] UKSC 13, at paragraphs 19 to 22, Sullivan L.J.'s judgment in *Redhill Aerodrome Ltd. v Secretary of State for Communities and Local Government* [2015] P.T.S.R. 274, at paragraph 18, and the judgment of Lord Carnwath in *Suffolk Coastal District Council v Hopkins Homes Ltd.* [2017] UKSC 37, at paragraph 24, and the judgment of Lord Gill at paragraphs 72 to 74). The application of policy, however, is for the decision-maker, on a true understanding of what the policy means, but with freedom to exercise planning judgment as the policy allows or requires – subject to review by the court on *Wednesbury* principles alone (see my judgment in *Mansell v Tonbridge and Malling Borough Council* [2017] EWCA Civ 1314, at paragraphs 41 and 42).

17. The court will not lightly accept an argument that an inspector has proceeded on a false interpretation of national planning policy or guidance (see Lord Carnwath's judgment in *Suffolk Coastal District Council*, at paragraph 25). Nor will it engage in – or encourage – the dissection of an inspector's planning assessment in the quest for such errors of law (see my judgment in *St Modwen Developments Ltd. v Secretary of State for Communities and Local Government* [2017] EWCA Civ 1643, at paragraph 7). Excessive legalism in the planning system is always to be deprecated (see my judgment in *Barwood Strategic Land II LLP v East Staffordshire Borough Council* [2017] EWCA Civ 893, at paragraphs 22 and 50)”

15. In *R (oao Boot) v Elmbridge BC* [[2017] EWHC 12 (Admin); [2017] 2 P. & C.R. 65, Supperstone J considered the predecessor to NPPF 2021 149(b) in respect of the provision of appropriate facilities (in connection with the existing use of land or a change of use) for outdoor sport, outdoor recreation, amounting potentially to appropriate development in the Green Belt. Supperstone J at [34] said:

“The conclusion of the Defendant that the proposal has a limited adverse impact on openness” of the Green Belt is not a finding that there has been compliance with the policy that requires openness to be preserved.”

16. In *R. (oao Lochailort Investments Ltd) v Mendip DC* [2020] EWCA Civ 1259, the Court of Appeal considered NPPF [101] which provides that policies for managing

development within a LGS should be consistent with those for Green Belts. At [10] of his judgment Lewison LJ said:

“The ordinary meaning of "consistent" is "agreeing or according in substance or form; congruous, compatible". What this means, in my judgment, is that national planning policy provides that policies for managing land within an LGS should be substantially the same as policies for managing development within the Green Belt. Accordingly, because para.101 aligns management of development within an LGS with management of development in the Green Belt, it is also necessary to refer to what the NPPF says about the latter. Paragraph 133 states: “The fundamental aim of Green Belt policy is to prevent urban sprawl by keeping land permanently open; the essential characteristics of Green Belts are their openness and their permanence.”

17. The concept of inappropriate development in the Green Belt was dealt with by Lindblohm LJ in *Hook v SSHCLG* [2020] EWCA Civ 486 at [7]:

“ The concepts referred to in NPPF policy for the Green Belt – "inappropriate development", "very special circumstances", the preservation of the "openness" of the Green Belt, the impact of development on "the purposes of including land within it", and so on – are not concepts of law. They are broad concepts of planning policy, used in a wide range of circumstances (see the judgment of Lord Reed in *Tesco Stores Ltd. v Dundee City Council* [2012] UKSC 13; [2012] 2 P. & C.R. 9 , at paragraph 19). Where a question of policy interpretation properly arises, understanding those concepts requires a sensible reading of the policy in its context, without treating it as if it were a provision of statute. Applying the policy calls for realism and common sense.”

18. In *R (on the application of Samuel Smith Old Brewery) v North Yorkshire CC* [2020] UKSC 3 Lord Carnwath, giving the lead judgment dealt with the concept of openness in the then current version of the NPPF, and concluded that the local planning authority had correctly granted permission for mineral extraction in the Green Belt. At [22] he said this:

“The concept of "openness" in para 90 of the NPPF seems to me a good example of such a broad policy concept. It is naturally read as referring back to the underlying aim of Green Belt policy, stated at the beginning of this section: "to prevent urban sprawl by keeping land permanently open ...". Openness is the counterpart of urban sprawl and is also linked to the purposes to be served by the Green Belt. As PPG2 made clear, it is not necessarily a statement about the visual qualities of the land, though in some cases this may be an aspect of the planning judgement involved in applying this broad policy concept. Nor does it imply freedom from any form of development. Paragraph 90 shows that some forms of development, including mineral

extraction, may in principle be appropriate, and compatible with the concept of openness. A large quarry may not be visually attractive while it lasts, but the minerals can only be extracted where they are found, and the impact is temporary and subject to restoration. Further, as a barrier to urban sprawl a quarry may be regarded in Green Belt policy terms as no less effective than a stretch of agricultural land.”

19. In the present case, objectors to the application for permission commissioned a report from a planning expert which raised many issues. There were references in that report to local green space and the desirability of maintaining nature of garden but no express reference to openness.

The officer's report

20. The officers' report is a very detailed document comprising 120 paragraphs which deal with the many issues which the application for permission raised. At [1-9] there is a summary of conclusions. At [3] the conclusion is that the proposal would involve minor harm on the AONB on one hand and moderate benefit on the other so would be beneficial to the AONB over all. At [5] it is stated that the wall and space of the site make a considerable contribution to conservation area, and there is reference to the verdant backdrop to the townscape. It is clear that throughout the report there is little or no express reference to openness.
21. The assessment of key planning issues starts at [31]. There is, in that part of the report, no express reference to LGS or AONB, but the character of the area and listed buildings and the CA are recorded as key issues. The PPNDP and the LGS policy PAD 5 is dealt with at [36 -38]. There is no reference to the relevant parts of the NPPF 2021 [101]. Because of the criticism levelled by the claimant at the report, it is necessary to cite some relevant passages at length.
22. At [36] the officer deals with the policy background to the garden:
- “The application site is designated as a ‘Local Green Space’ (LGS) by Policy PAD5 in the PPNP. PAD5 states that ‘inappropriate development on these sites will only be supported in very special circumstances’. The PPNP does not define ‘inappropriate development’ but supporting text states that ‘we are pleased to have the opportunity to recognise that the neighbourhood area has several green areas that contribute to the appearance and character of the local area...’; and that the LGS sites ‘are highly valued green areas that have recreational value/or contribute significantly to the amenity of the neighbourhoods and, as evidenced by the consultation we carried out, the community wants to ensure they continue to do so for a very long time. The application site is described in the same supporting text for PAD5 as ‘an historic site with restricted access, but serves as an important amenity area in a densely built area and provides a visually attractive, verdant backcloth to Padstow old town as viewed from the harbour and main visitor car park. The Conservation Area Statement notes how important

the wall and the garden are to the Padstow Parish Neighbourhood Plan, stating that it is visible from many parts of the town, but it is especially prominent from New Street and The Plantation'. Policy PAD5 indicates also that the site is an historic site with restricted public access."

23. The conclusions are then set out at [37]:

"As detailed below in this section and under the headings 'Character of the Area' and Listed Assets/Conservation Area', the proposal would result in a low level of intervention to existing heritage assets and use of the site as a commercial public garden which, when combined, would provide an incentive for the owners to ensure that the verdant and historic character of this important backcloth to Padstow is retained and enhanced whilst allowing the importance of this site to be appreciated from within rather than glimpsed from afar. This is not inappropriate development on this LGS."

24. Under those headings the report then says at [55-6]:

"The application site is located to the immediate north and east of the settlement boundary shown in the PPNP for Padstow. The site currently provides a visually attractive, verdant backcloth to Padstow town, as viewed from the harbour and main visitor car park. As detailed above, it is designated in the PPNP as a Local Green Space by reason of its positive impact to the setting of the adjoining town. 56. Planning policy and guidance requires the development proposed by this application to assimilate well to the character of the surrounding area. Policy 2 of the CLP sets out that development needs to be of high quality and to demonstrate a cultural, physical and aesthetic understanding of its location. Policy 12 states that development must ensure Cornwall's enduring distinctiveness and maintain and enhance its distinctive natural and historic character. This is supported in paragraph 130 of the NPPF which states that design should be visually attractive and add to the overall quality of the area."

25. The AONB is dealt with in detail in [57-71]. The policy background is outlined in the first of these paragraphs:

"The site is located within the Carnewas to Stepper Point section of an Area of Outstanding Natural Beauty (AONB). Policy 3 of the CLP states that development within the AONB will be supported where it is accordance with other policies in the CLP and can demonstrate that it conserves and enhances the landscape character and natural beauty of the AONB. Policy 23 of the CLP confirms that 'great weight will be given to conserving the landscape and scenic beauty within or affecting the setting of the AONB and 'that proposals must conserve and enhance the landscape character and natural beauty of the

AONB.' Paragraph 176 of the NPPF makes clear also that great weight should be given to conserving and enhancing landscape and scenic beauty of AONBs, which have the highest status of protection in relation to these issues. Policy PAD1 of the PPNP states that development proposals will be expected to have no significant adverse effect on the integrity or continuity of landscape features and habitats of local and national importance for wild flora and fauna”

26. After detailed consideration the conclusions are set out in the last four paragraphs:

“68. Due to the site’s elevated position in the local landscape, the introduction of chattels associated with the proposed use and patrons visiting the site will be readily visible in the locality and surrounding townscape views. The intensification of people on the site, alongside with paraphernalia and general disturbance to the tranquillity of the site and area, would result in minor harm to the distinctive landscape and special qualities of the surrounding AONB. This harm is tempered to a significant extent as the proposal retains the garden use of the site; the use itself is limited in scale to the lower half of the site, excluding the planted garden areas, which, particularly at the southern end and where the Bothy is located, is not highly prominent in the landscape; the proposal does not introduce new buildings and conditions can ensure that light spill and noise is not unreasonable (the issue of noise is discussed further below under ‘Neighbour Impact’). It is noted that the site would have historically had present a number of staff members cultivating the garden during its use as a kitchen garden for the Prideaux Estate and, more recently, a reduced number of gardeners in line with the site’s reduced production. Importantly, the presence of persons on this site is not considered to be unusual. Additionally, the site itself is not fully undeveloped, with a number of structures clearly visible from within the site including, outbuildings, potting sheds, raised terraces and remaining glass house. Chairs and tables were present at the northern end of the site when planning officers visited. The introduction of more tables and chairs would intensify the presence of these chattels on areas which are already associated with the built form on the site.

69. The proposal would also result in benefits to the AONB. The use of the site as a commercial public garden would provide an incentive for the owners to ensure that the verdant character of this important backcloth to Padstow is retained and enhanced whilst allowing the importance of both this designated asset and important landscape feature to be appreciated from within rather than glimpsed from afar. In this regard, the proposal helps to maintain the local distinctiveness of the site and contributes to the sense of place by responding to the local historical, cultural

and landscape context. This application provides a mechanism to retain and enhance features on the site which contribute positive to the landscape and to support the public understanding of the historic narrative of heritage landscape within the AONB.

70. It is adjudged that the benefits of the proposal to the AONB are far greater than the harm. Overall, this proposal, subject to planning conditions, would result in moderate benefit to the surrounding AONB which weighs in favour of approving the application.

71. The proposal is clearly not ‘major development’ in the AONB under paragraph 177 of the NPPF. Major development in the AONB is defined in Footnote 60 of the NPPF as development which could have a significant adverse impact on the purposes for which the area has been designated or defined. This is not the case with this application as the nature and scale of the proposal relates well to the sensitivity of the receiving AONB landscape and the actual outcome of the proposal, when considered in its entirety, is a positive impact to the AONB.”

27. The report goes on to deal with listed assets and the CA in [72-88], again in some detail. At [74] this is said:

“Padstow Conservation Area Statement, at section 4.07, states that the Walled Garden on the application site is one of few remaining open spaces within the Conservation Area and is subject to development control which should, therefore, adequately protect the site from unsympathetic development. It states also that ‘if the large walled gardens should become disused and neglected, efforts should be made to find a sympathetic new use for them similar to existing uses, thus ensuring that the spaces and characteristic walls are maintained’. It continues, by stating that that ‘the walls and spaces make a considerable visual contribution to the character and quality of the Conservation Area and for visual and historic association reasons there should be a presumption in favour of the gardens remaining unaltered. However, schemes for their development have already been proposed and pressure on the gardens may mount, as their status as the only remaining open spaces in the town creates a conflict between their historic and visual’ value; and their value as development land’. It concludes by stating that ‘the desirability of maintaining the nature of the gardens leads to the conclusion that any development should be minimal rather than comprehensive, subservient to the walls that enclose the gardens.’”

28. Public benefits of the proposal are set out in [89-97] and then other matters are dealt with in detail, such as neighbour impact, highways and access, and ecology.

Ground 1

29. Ms Colquhoun submits that the benefits identified of providing an incentive to ensure that the garden is kept in good condition, has nothing to do with openness. The purpose of designation as a LGS involves openness and visual amenity. She accepts that there are references in the report to the NPPF, but not in assessing inappropriate development in a LGS. She also accepts that there is reference to the garden as an LGS when dealing with the character of the area, but submits that there is no reference to openness. Treating the report as benevolently as possible, she submits, there is no substantive assessment of openness or analysis as to the correct approach to that concept. The fact that the report says that there is no definition of inappropriate development shows a clear misunderstanding of the need to reference NPPF and Green Belt. However Ms Colquhoun realistically accepts that openness and inappropriate development are broad concepts.
30. Mr Brett submits that the officer did assess the impact of the proposal on the LGS and separately on the AONB. That assessment involves the heritage assets as they are part of the LGS and the AONB but the officer did not conflate these. The weight to be given to a material consideration is a matter for the decision maker. The PPNDP was promoted by the district council which supported this application for permission. Although there is no reference in the report to the NPPF or to the concept of openness, but there did not need to be. The officer would have been familiar with the development plan and the NPPF. Although the NPPF is a material consideration, an officer's report does not have to set out every material consideration. The focus of the report read fairly as whole was about retaining the garden as a garden. The officer clearly addressed PAD5 and the reason for designation which refers to the garden as a verdant backdrop.
31. In my judgment, reading the officer's report fairly as a whole and applying common sense, there are adequate indications to show that the broad concept of openness was firmly in mind. The references to the LGS designation and the reasons for it, the fact that it provides a verdant backdrop, the open nature of the garden referred to in the CA statement, and the reference to open space in the report all show that this is so.
32. There were many references to the NPPF in the report, although not to those cited above dealing with the Green Belt. There are no such designations in Cornwall although there are many designations of LGSs, going back to 2016. In my judgment the concept of "green space" itself suggests an element of openness. In any event the planning officers of the authority are to be taken to be familiar with the NPPF, including those paragraphs relating to the Green Belt, unless there is an indication to the contrary, and in my judgment there is none in the officer's report. What indications there are, as indicated above, are that openness was kept in mind.
33. The very particular change of use permitted in this case, as limited by the conditions, may as a whole be taken as recreational despite the commercial element. Even if that is not so, it is not difficult to see why the officer concluded that it is not inappropriate for this LGS.
34. In my judgment ground 1 fails.

Ground 2

35. In respect of the AONB, Ms Colquhoun submits that the issues identified in the report as benefits of the proposal are the same as those creating the harm to the AONB. Although she accepts that the report refers to the great weight to be attached to protecting the AONB, she submits there is in substance no real analysis of this need. The focus of the analysis is on the heritage assets.
36. Mr Brett submits that the officer was entitled to consider heritage assets. Policy 23 of the CLP was referred to accurately by the officer, who came to a clear conclusion that the benefits of the proposal to AONB outweighed the harm, after correctly giving great weight to the need to preserve the AONB. The officer assessed the minor harm of the proposal on the AONB but also the benefits including the incentive to preserve this important back drop. The officer assessed the impact of the proposal on the AONB and then separately assessed the impact on heritage assets, applying the correct test in each.
37. Again, reading the officer's report fairly as a whole, I am not persuaded that the assessment of the impact of the proposal on the AONB discloses a legal error. The policy background is accurately set out. Great weight is attached to preserving the AONB and again, in this context the verdant nature of the garden is referred to. Again, having regard to the very particular nature of the permitted change of use as limited by the conditions, the officer was entitled to conclude that the benefits of the proposal to the AONB, including the preservation of the garden, far outweigh the minor harm.
38. It follows that both grounds fail and the claim is dismissed.

Relief

39. That means it is unnecessary to deal with the authority's alternative submission that to the extent that there are errors then it is highly likely that the outcome would not have been substantially different without them, within the meaning of section 31 of the Senior Courts Act 1981.
40. The threshold to be met before coming to that conclusion is a high one. Moreover Lindblohm LJ in *Plan B Earth v SST* [2020] PTSR 1446 said this at [273]:

"... courts should still be cautious about straying, even subconsciously, into the forbidden territory of assessing the merits of a public decision under challenge by way of judicial review. 16 If there has been an error of law, for example in the approach the executive has taken to its decision-making process, it will often be difficult or impossible for a court to conclude that it is "highly likely" that the outcome would not have been "substantially different" if the executive had gone about the decision-making process in accordance with the law. Courts should also not lose sight of their fundamental function, which is to maintain the rule of law."
41. I adopt that cautious approach. Nevertheless, in my judgment even if the errors relied upon were made out, in my judgment on the particular facts of this case the necessary assessments have in substance been carried by the officer. I rely upon that assessment and not on my own. I would if necessary apply the section. There is no exceptional public interest which dictates otherwise.

42. Counsel helpfully indicated that any consequential matters not agreed can be dealt with on the basis of written submissions. A draft order, agreed as far as possible and any such submissions, should be filed within 14 days of hand down of this judgment.