

Neutral Citation Number: [2023] EWHC 3161 (Admin)

Case No: AC-2023-CDF-000029

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

Cardiff Civil Justice Centre,
2 Park Street, Cardiff, CF10 1ET

Date: 8 December 2023

Before:

HIS HONOUR JUDGE KEYSER KC
sitting as a Judge of the High Court

Between:

THE KING	
on the application of TUDUR DAVIES	<u>Claimant</u>
- and -	
VALE OF GLAMORGAN COUNCIL	<u>Defendant</u>
-and-	
(1) HAFOD HOUSING	<u>Interested</u>
(2) NATURAL RESOURCES WALES	<u>Parties</u>

Jonathan Darby (instructed by **Harrison Grant Ring**) for the **Claimant**
Heather Sargent (instructed by **Vale of Glamorgan Council**) for the **Defendant**
Hugh Flanagan (instructed by **Hugh James**) for the **First Interested Party**

Hearing date: 27 September 2023

Approved Judgment

This judgment was handed down remotely at 10.30am on 8 December 2023 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 KEYSER KC

His Honour Judge Keyser KC :

Introduction

1. By a decision made on 20 December 2022 the defendant, Vale of Glamorgan Council (“the Council”), granted planning permission for the following development (“the Scheme”) at the site of the former Cowbridge Comprehensive School, Aberthin Road, Cowbridge (“the Site”):

“Proposed demolition of existing school, development of 34 dwellings (30 flats and four houses) and associated works including the construction of bespoke bat roost, access/parking and landscaping”.

2. The planning permission was granted on the application of the first interested party, Hafod Housing¹ (“Hafod”), which is a not-for-profit organisation that provides affordable housing across Wales.
3. The claimant, Dr Tudur Davies (“Dr Davies”), lives near the Site. He objected to Hafod’s application for planning permission and addressed the Council’s Planning Committee in respect of the application. By his claim commenced on 31 January 2023 he seeks permission to apply for judicial review of what he identifies as two decisions of the Council: (1) the decision to grant planning permission; (2) the decision to decline to find that drainage approval would be required for the Scheme under the Flood and Water Management Act 2010 (“the 2010 Act”). He advances two grounds of challenge, one in respect of each identified decision:
 - 1) The decision to grant planning permission was made on a false or inconsistent basis, namely that a 2-metre fence along the western side of the proposed car park would not be erected and that a species licence would be granted as the Scheme would not harm the conservation status of the bat species; whereas in fact the objection to the Scheme on the part of the second interested party, National Resources Wales (“NRW”), had been resolved precisely on the basis that the 2-metre fence would be constructed for the purpose of preventing harm to the bat species.
 - 2) There was a legal requirement for drainage approval under the 2010 Act, because the Scheme did not comprise “construction work in respect of which, before 7 January 2019 ... a local planning authority received a valid application for planning permission”.
4. By order dated 31 May 2023 His Honour Judge Jarman KC, sitting as a Judge of the High Court, adjourned the application for permission to apply for judicial review and directed that it be listed as a “rolled-up hearing”. This is my judgment after that hearing.
5. I am grateful to Mr Darby, Ms Sargent and Mr Flanagan, counsel respectively for Mr Davies, the Council and Hafod, for their written and oral submissions. NRW did not file an acknowledgment of service or play any part in the proceedings.

¹ So named in the title of these proceedings. Its correct name is Hafod Housing Association Limited.

The Facts

6. The Site has an area of 0.53 hectares and is roughly rectangular, with boundaries on the north, south, east and west. The eastern side of the Site contains the former school buildings, which were constructed in the last decade of the nineteenth century and are regarded as being of local heritage interest. For the purposes of the resolution of the issues in these proceedings, a description of the existing buildings is unnecessary. However, it is relevant that the existing buildings are used as roosts by a number of bat species and for foraging by bats.

7. On 17 December 2018 Hafod submitted planning application 2018/01408/FUL for:

“Proposed demolition of existing school, development of 48 dwellings (43 flats and five houses) and associated works”.

The application underwent a series of amendments to address concerns expressed by the Council, and the development for which permission was eventually granted was for 30 flats (four 1-bed, wheelchair-accessible flats, six 2-bed flats, and twenty 1-bed flats) and four houses (one 4-bedroom house, one 2-bedroom house, and two 3-bedroom houses).

8. The Proposed Site Plan submitted with the planning application was on Drawing No. 3703/PA/210. In the course of the planning process Hafod submitted three revisions of 3703/PA/210: Revision C, Revision E, and Revision I. As is clear from those designations, there were other Revisions of 3703/PA/210 that were not submitted in the course of the planning process.

9. Revision C of 3703/PA/210 was submitted on 21 January 2020. The alterations made by Revision C are not material for present purposes.

10. Revision D of 3703/PA/210, which was dated 19 August 2021, introduced a significant alteration. It marked on the drawing a brown dotted line running north-south along the western part of the Site but to the east of the western boundary. The line was labelled: “2000mm high timber fence”; and the Boundary Key on the drawing stated that the line represented: “TYPE 07 – 2000mm high timber close boarded fencing”. To the south of the line denoting the timber fence, and again on a north-south axis, was another line, marked “2000mm high facing brick wall”. There was a corresponding entry for the brick wall in the Boundary Key. The statement of revisions on Revision D recorded: “2000mm high brick wall & timber fence added to western side of site”. The nature of the alterations on Revision D was, accordingly, clear.

11. However, Revision D was not submitted to the Council as part of the planning process; it was provided informally on 19 January 2023, after the grant of planning permission.

12. On 8 October 2021 Hafod submitted Revision E of 3703/PA/210, which was dated 4 October 2021. Revision E did not show the brown dotted line that had denoted the timber fence on Revision D; nor did it show the line that had denoted the brick wall on Revision D. It did, however, include the label, “2000mm high timber fence” (though not the corresponding label for the brick wall), and the Boundary Key repeated the entries for the timber fence and for the brick wall. The statement of revisions on

Revision E recorded: “2000mm high brick wall & timber fence removed to western side of site & trees added into native planting belt along western boundary”.

13. By October 2021 NRW had already made four consultation responses, the latest being on 2 March 2021. In that last response, NRW had reiterated requirements that it had previously set out:

- “• As detailed in our previous responses of the 25 January 2019 and 9 August 2019: ‘We advise that a detailed mitigation strategy would need to be submitted upfront in support of any planning permission sought. Mitigation should be appropriate and proportionate to the bat species and roost types on site.’ A detailed mitigation strategy must include:
 - o Details of the permanent bat house to be provided including: all dimensions of the bat house and volume of bat roost areas, details of bat access points, materials to be used (i.e. earth floors, double skin walls), internal structure, and human access points for monitoring, how the bat house sits within the surrounding landscape.
 - o Details of provisions for the long-term maintenance and site security of the permanent bat house.
- As detailed in our previous responses of the 25 January 2019 and 9 August 2019, we note that a complete lighting plan has not been submitted with the application as detailed in our previous response: ‘A lighting and landscaping plan would need to be submitted with a planning application. This should look to reduce lighting over the site as a whole and avoid lighting completely in proximity to the bat house and the boundaries of the site, ensuring that a vegetated dark corridor would be maintained to the bat house which connects to the wider landscape. The plans should also include: the type of luminaire (including the exact specification), the location and height of the luminaire.’ Due to the presence of several light intolerant species of bat on site we advise that this information will need to be provided prior to planning permission being given. We note that 3 pages of what appears to be a 24-page lighting report have been included in the appendix of the amended hibernation survey. Without the submission of the whole report, the submitted pages have no context and do not effectively demonstrate that adjacent habitat will remain unlit.”

NRW indicated that it had not received satisfactory information regarding either of these points. In respect of the lighting plan, it explained its concerns:

“We welcome the planting proposed for the western boundary in drawing 3703/PA/210 rev A and 3702/PA/010 that show the inclusion of 7 larger trees included along the western boundary

in addition lower level vegetation interspersed between them. However this does not appear to be consistent with the planting outlined in the ‘Planting plan 421.01 rev A’ which only indicates three large trees will be planted. All three plans are appended to the ‘the Hibernation Survey, Addendum report, dated 12 Nov 2019 by Soltys Brewster Ecology. In order to give greater confidence that the bat house can function in the south of the site, it should be demonstrated that a sufficient dark vegetated corridor will be retained.

We note that part of an amended lighting plan has been submitted, however we note that only 2 pages of a 20-page report have been submitted. In addition we note that the Isolux modelling was undertaken with a device maintain of 0.80 (80% of full power), rather than the 100% outlined in the meeting held between ourselves, the LPA and developer on the 27 March 2020. In addition we note that that the modelling shows that the majority of the western boundary of the site is still to be lit to over 1 lux. Given that 3 of the 5 species recorded using this site currently would be considered light sensitive, the success of the mitigation is reliant on the provision of a robust dark vegetated [corridor] along the western boundary of the site.”

14. In summary, as regards lighting, NRW was concerned as at March 2021 that the bats at the Site should be protected from artificial lighting and considered that the solution lay in a combination of (a) an appropriate specification of the artificial lighting and (b) the provision of “a sufficient dark vegetated corridor” along the western boundary of the Site.
15. On 11 October 2021 the Council reconsulted NRW in respect of additional and amended drawings and documents; these included Revision E of 3703/PA/210, Revision A of Drawing No. 3703/PA/230 in respect of the proposed bat house (which did not relate to the timber fence or the lighting), and a letter from Soltys Brewster Ecology dated 23 August 2022 (scil. 2021) and headed “Cowbridge Comp, Aberthin Road—Bats and Lighting”.
16. The letter from Soltys Brewster Ecology sought to address the points that NRW had made in its consultation response on 2 March 2021. Having addressed the design and maintenance of the proposed bat house, the letter addressed NRW’s concerns regarding lighting:

“A revised lighting plan has been produced by Tamlite Ltd (Drawing no: 319/2/E1) to address these comments. A commitment has been made that:

- All external lights shall be 100% downward directional luminaires
- External lights to be contractor controlled as follows – western boundary to be switched off between 8pm and 6am (April to September) and dimmed to 25% (Oct to March).

- All other external lighting to be controlled via PIR and timer (set to 1min max).

With the adoption of these measures, the enclosed lighting plan demonstrates that a dark corridor can be maintained along the western boundary of the site, providing connectivity between the proposed bat house and the immediate local area. The lux plots illustrate that light reflected at ground level up to the red line boundary is around 1.0 lux, reducing further west. However it should be noted that the bollard lights are 1m high and throw light down and as such there would be virtually no lux level increase above a height of 1m. During the April – September period, these lights would be switched off and dimmed to 25% (i.e. a 75% reduction) from October to March thereby further reducing any risk of light spill and maintaining the dark corridor.”

The Tamlite Ltd drawing referred to by Soltys Brewster Ecology, No. 319/2E1, did not show a timber fence as part of the dark corridor along the western boundary of the Site. The letter from Soltys Brewster Ecology did not make any mention of a timber fence.

17. NRW gave its fifth and final consultation response on 23 November 2021. It stated:

“We continue to have concerns with the application as submitted. However, we are satisfied that these concerns can be overcome if the documents identified below are included in the approved plans and documents condition on the decision notice:

- ‘Proposed Bat Roost’ Drawing No 3703/PA/230 Revision A, dated Aug 19, by Pentan Architects
- ‘Proposed Site Layout Aberthin Road, Cowbridge’ Drawing No 3703/PA/210 Version E, dated Aug 19, by Pentan Architects
- Soltys Brewster Ecology Response Ltr dated 23 August 2022, uploaded as September 2021

Please note, without the inclusion of these documents we would object to this planning application.

...

We welcome the proposal, set out in the Soltys Brewster Ecology response letter to turn off the lights along the western boundary between 8pm and 6am between April and September inclusive. We also welcome the intention to dim the lights to 25% in the remaining months of the year.

Bats and their breeding sites and resting places are protected under the Conservation of Habitats and Species Regulations

2017 (as amended). Where bats are present and a development proposal is likely to contravene the legal protection they are afforded, the development may only proceed under licence issued by Natural Resources Wales, having satisfied the three requirements set out in the legislation. ...

On the basis of the documents submitted, we do not consider that the development is likely to be detrimental to the maintenance of the population of the species concerned at a favourable conservation status in its natural range. We recommend that planning permission should only be granted if the following submitted document is included within the scope of the condition, identifying the approved plans and documents on the decision notice [the three documents mentioned above are repeated].”

18. The third and final revision of 3703/PA/210 that was submitted as part of the planning application was Revision I, which was dated 11 May 2022. The alteration that it introduced was, “Tactile paving surface added & bus stop”. In all material respects, therefore, Revision I was unchanged from Revision E: that is, it did not show the brown dotted line for the timber fence or the other line for the brick wall; it included the label for the timber fence but not the label for the brick wall; and the Boundary Key included the entries for the timber fence and the brick wall, which however had no referents on the drawing.
19. The Planning Committee met, remotely, on 8 June 2022. The Officer Report addressed NRW’s position regarding the application:

“The Council’s Ecologist initially raised a holding objection stating that the applicant liaise with NRW regarding further survey required for bats and the provision of mitigation/compensation and that when NRW are satisfied with the proposals, and remove their significant concerns, LPA ecologist will then be in a position to assess the application with respect to bats and other protected/priority species and habitats. In addition, given the importance of the site for numerous light-sensitive species of bats, there is a requirement that the applicant design the (external) lighting for the scheme prior to determination.

...

Following re-consultation based on:

- Proposed Bat Roost’ Drawing No 3703/PA/230 Revision A, dated Aug 19, by Pentan Architects
- ‘Proposed Site Layout Aberthin Road, Cowbridge’ Drawing No 3703 / PA / 210 Version E, dated Aug 19, by Pentan Architects

- Soltys Brewster Ecology Response Ltr dated 23 August 2022, uploaded as September 2021

NRW are now satisfied that their concerns can be overcome, if the documents identified above are included in the approved plans and documents condition on the decision notice.

NRW welcome the proposal, set out in the Soltys Brewster Ecology response letter to turn off the lights along the western boundary between 8pm and 6am between April and September inclusive and the intention to dim the lights to 25% in the remaining months of the year.

Bats and their breeding sites and resting places are protected under the Conservation of Habitats and Species Regulations 2017 (as amended). Where bats are present and a development proposal is likely to contravene the legal protection they are afforded, the development may only proceed under licence issued by Natural Resources Wales, having satisfied the three requirements set out in the legislation. A licence may only be authorised if:

- i. The development works to be authorised are for the purpose of preserving public health or safety, or for other imperative reasons of overriding public interest, including those of a social or economic nature and beneficial consequences of primary importance for the environment.
- ii. There is no satisfactory alternative and
- iii. The action authorised will not be detrimental to the maintenance of the population of the species concerned at a favourable conservation status in its natural range.

Paragraph 6.3.7 of Technical Advice Note 5: Nature Conservation and Planning (TAN5) states that a Local Planning Authority should not grant planning permission without having satisfied itself that the proposed development either would not impact adversely on any bats on the site or that, in its opinion, all three conditions for the eventual grant of a licence are likely to be satisfied.

...

With regard to test no 3, as stated above, NRW do not consider that the development is likely to be detrimental to the maintenance of the population of the species concerned at a favourable conservation status in its natural range, subject to identifying the approved plans and documents on the decision notice.

In line with the ‘Dear CPO’ letter issued by Welsh Government on 1st March 2018, NRW request that an informative is attached to any planning permission granted, advising that planning permission does not provide consent to undertake works that require an EPS licence. This shall be secured by way of an Informative.”

Also of some, though less obvious, relevance is a section of the Officer Report that addressed the provision of amenity space within the proposed development. I shall not set out the text; I simply observe that the discussion of accessibility of the amenity space available to the occupiers of the flats was premised on the absence of the 2-metre-high timber fence that would have precluded free access.

20. There is a transcript of the meeting of the Planning Committee. Dr Davies was one of several objectors who addressed the meeting; it is unnecessary to recite here the points that they made, which related in the main to the loss of a building of local significance. The one mention of the fence came in the remarks of the planning officer, in the context not of protection of the bat population but of concerns regarding the ability of the proposed development to provide sufficient amenity space:

“In terms of the amenity space there are some instances where we get very little. This has actually got quite a reasonable amount of amenity space. But as a point of clarification that we made yesterday in the matters arising note, the plan does indicate a 2m high fence, which some concern was raised how this amenity space and this more informal area beyond be accessed, but there is no fence will be around here and all this will be ... you’ve got the seating area, but the rest will be albeit it’s supposed to be a dark corridor and quite naturalistic is going to form extended amenity space.”

The “matters arising note” to which the planning officer was referring stated in relevant part:

“The submitted Proposed Site Layout Plan Rev I shows a 2m high fence to the back edge of the parking area. The agent has confirmed that this is in fact a drafting error and is not shown in the coloured boundary key. The agent has therefore confirmed that this fence will not be erected. Furthermore, Notwithstanding the submitted plans, details of all means of enclosure are however required by condition (Condition 5).”

21. The minutes of the Planning Committee’s meeting record that planning application 2018/01408/FUL was approved “[s]ubject to the conditions as contained within the report and with amended and additional informatives” (not of present relevance).
22. On 20 December 2022 the Council granted planning permission for the Scheme, under planning application 2018/01408/FUL, “in accordance with the application and plans registered by the Council on 5 October 2021” and subject to 23 conditions. Condition No. 2 was that the development be carried out in accordance with specified plans and

documents. Condition No. 5, imposed in order to safeguard the amenity and privacy of adjoining occupiers and in the interests of visual amenity, was:

“Notwithstanding the submitted plans, prior to the commencement of development (including any demolition) full details of all means of enclosure around and within the site, including details of any existing enclosures which are to be retained/altered, in addition to details of the works to reinstate / alter the existing low level stone wall, stone piers and railings and a 1.8m high stone wall along eastern boundary of Plot 1 shall be submitted to and approved in writing by the Local Planning Authority. Where the agreed means of enclosure forms the site boundary with adjacent dwellings, this means of enclosure shall be erected prior to the commencement of development (including any demolition). All other means of enclosure as approved shall be completed in accordance with the approved details prior to first beneficial occupation of the respective houses and flats and shall thereafter be so retained. Notwithstanding the provisions of the Town and Country Planning (General Permitted Development) Order 1995 (as amended for Wales) (or any order revoking and re-enacting that Order with or without modification), no other fences, gates or walls shall be erected within the site other than those agreed.”

Condition No. 22, imposed to ensure the provision of effective drainage facilities and to prevent overloading of the public sewerage system, pollution, environmental damage, the increase of flood risk and harm to the health and safety of existing residents, provided:

“Other than demolition, no construction works shall commence on site until a detailed scheme for the surface water drainage of the site, showing how road and roof / yard water will be dealt with has been submitted and approved in writing by the LPA. If infiltration techniques are used, then the plan shall include the details of field percolation tests. Any calculations for onsite attenuation or discharge should also be included together with the details on the management of the drainage system. The approved scheme shall be implemented prior to first beneficial occupation of any unit.”

The reasons for the grant of planning permission stated that,

“whilst the proposal will result in the loss of a building which is considered to be of architectural / historic merit, the proposal would result in the delivery of much needed affordable housing, the merits of which are considered to outweigh the loss of the building and the scheme is considered acceptable having regard to the design, scale and visual impact of the buildings, impact on residential amenity and privacy, parking, highway safety, traffic, noise and odour ecology, archaeology and drainage.”

23. The planning permission was published on the Council’s website on 5 January 2023.

Discussion

24. In the light of this survey of the facts, I turn to consider the proposed grounds of challenge, which are set out in paragraph 3 above.

Ground 1: the timber fence

25. The complaint under ground 1 is that, although the Planning Committee understood that the 2-metre timber fence along the western side of the proposed car park would not be erected, it failed to appreciate or have regard to the fact that NRW’s objection to the Scheme had been (or might have been) resolved precisely on the basis that the 2-metre fence would be constructed for the purpose of preventing harm to the bat species.
26. On behalf of Dr Davies, Mr Darby submitted that, on the basis of Revision E, NRW might reasonably have assumed that the timber fence was being proposed and that this might have been the reason why it was prepared to remove its objection. Revision E contained a label clearly stating that a 2-metre fence would be provided in the car park. As Revision D had not been provided to NRW, it could not make the easy comparison between Revision D and Revision E and see that the fence-line on the former had not been replicated on the latter. The assumption that NRW understood that the label referring to the 2-metre fence was a drafting error rests on supposing that it noticed both the absence of the fence-line on the drawing and the small-print annotation concerning the removal of the fence. Revision E (reproduced, for present purposes, in Revision I) was sufficiently confusing to require the planning officer to provide clarification of the drafting error to the Planning Committee; no such clarification was provided to NRW. The obvious purpose of the timber fence was to protect the so-called “bat corridor” from vehicle lights, and it therefore went to the heart of NRW’s concerns. As the Council has not adduced evidence in the proceedings, it cannot invite inferences from NRW’s decision not to become involved in the proceedings.
27. Although ground 1 was advanced clearly and forcefully by Mr Darby, I regard it as completely hopeless and refuse permission for it.
28. The version of Drawing No 3703/PA/210 that NRW had when it gave its consultation response on 23 November 2021 was Revision E. That drawing did not show the timber fence. It did indeed have the label, “2000mm high timber fence”. But that label did not correlate with any feature on the drawing. Further, the list of revisions at the top of the drawing explained clearly that the brick wall and fence had been removed. There is no reason to imagine that there was any misunderstanding on the part of NRW, which was concerned with the bat corridor and paid meticulous attention to the finest details of the Scheme as it might affect the bats.² No plan provided to NRW—whether the Landscaping Plan (the “Planting Plan”, drawing no. 421.01), or the Site Lighting Plan (drawing no. 319/2/E1) appended to the Soltys Brewster Ecology Response letter dated

² It is unnecessary to demonstrate this attention by detailed references. By way only of example, NRW’s consultation response of 2 March 2021 identified an apparent inconsistency in respect of proposed tree-planting between drawing 3703/PA/210 Revision A and drawing 3702/PA/010 on the one hand and Planting Plan 421.01 Revision A on the other. The paragraph concluded, “In order to give greater confidence that the bat house can function in the south of the site, it should be demonstrated that a sufficient dark vegetated corridor will be retained.”

23 August 2022 (scil. 2021), or any other plan—showed the fence. Soltys Brewster made no mention of the fence. Not one of NRW’s consultation responses refers to the fence. NRW’s decision to withdraw its objection was on the basis of Revision E and the Soltys Brewster Ecology Response letter.

29. Although it is not necessary for my decision, I add that I regard NRW’s decision not to become involved in these proceedings as significant. NRW was a statutory consultee. If it considered that it had been misled, or that the Council had proceeded on the basis of a misunderstanding of its advice, it would have said so as a responsible public body. Indeed, in the course of the hearing I was shown an email from NRW in response to the intimated claim, in which NRW simply referred to the advice it had already given in its response to the statutory consultation. This tends to confirm what I should regard as obvious on other grounds, namely that the Council and NRW were not at cross-purposes.

Ground 2: drainage approval under the 2010 Act

30. Ground 2 requires some explanation by reference to the legislative provisions and some further facts.
31. Schedule 3, paragraph 7, to the 2010 Act provides in part:

“(1) Construction work which has drainage implications may not be commenced unless a drainage system for the work has been approved by the approving body.

(2) For the purposes of sub-paragraph (1)—

(a) construction work means anything done by way of, in connection with or in preparation for the creation of a building or other structure, and

(b) construction work has drainage implications if the building or structure will affect the ability of land to absorb rainwater.

...

(5) For the avoidance of doubt, anything that covers land (such as a patio or other surface) is a structure for the purposes of sub-paragraph (2)(a).”

An application for approval may be combined with the application for planning permission for those construction works or made separately: Schedule 3, paragraph 8. Schedule 3, paragraph 11(1), provides:

“(1) On considering an application for approval the approving body must—

(a) grant it, if satisfied that the drainage system if constructed as proposed will comply with national standards for sustainable drainage, or

(b) refuse it, if not satisfied.”

32. Schedule 3 to the 2010 Act was brought into force on 7 January 2019: article 3 of the Flood and Water Management Act 2010 (Commencement No. 2) (Wales) Order 2018.

33. Article 5 of the Sustainable Drainage (Approval and Adoption) (Wales) Order 2018 contains transitional provisions:

“(1) Subject to paragraph (2), the requirement for approval under paragraph 7(1) of Schedule 3 does not apply to any construction work in respect of which, before 7 January 2019—

(a) planning permission was granted or deemed to be granted (whether or not subject to any condition as to a reserved matter), or

(b) a local planning authority received a valid application for planning permission but by that date had not finally determined it.

(2) The exception in paragraph (1) does not apply to construction work in respect of which planning permission was granted before 7 January 2019 if—

(a) the grant was subject to a condition as to a reserved matter, and

(b) an application for approval of the reserved matter is not made within the period of 12 months beginning with 7 January 2019.

(3) For the purposes of this Order, a valid application for planning permission is received before 7 January 2019 if it is made before that date and complies with the Town and Country Planning (Development Management Procedure) (Wales) Order 2012.”

34. In pre-application advice provided to Hafod in August 2018, the Council had advised that an application received after 7 January 2019 would entail the need for sustainable drainage approval. Planning application 2018/01408/FUL was made on 17 December 2018, before 7 January 2019. It is clear that Hafod made the application then in order that there would be no requirement for sustainable drainage approval. The development proposed in the application comprised three buildings: one 4-storey block of 43 flats, one terraced building of five houses, and a bat house.

35. The Council’s planning officers made clear that they would recommend refusal of the application on the grounds that the scale of the proposed development was excessive. They invited Hafod to withdraw the application and submit a new application. Hafod was reluctant to do this. Its reasons, as explained in an email to the Council in May 2019 and as later summarised by the Council, included the following:

“A withdrawal and resubmission would require a new scheme to comply with Sustainable Drainage legislation brought in in January 2019. The applicant’s competitive bid for the site was based on pre-application advice and as the number of dwellings had already been significantly reduced through negotiation, it was considered that incorporating sustainable drainage on site could render a new scheme unviable.”

Instead, Hafod proposed to amend the application, and during 2019 discussions took place concerning possible amendments.

36. On 17 January 2020 Hafod submitted a new application form with a new suite of supporting documents in respect of the Scheme, which comprised five buildings: two 3-storey blocks of a total of 30 flats, two pairs of semi-detached houses, and the bat house. The Council accepted this as an amendment of application 2018/01408/FUL and re-registered it with that reference number. The potential implications of the Scheme having been subject of a fresh application were remarked on by the planning officer at the meeting of the Planning Committee:

“I think some mention was made about the drainage being deficient. The drainage certainly isn’t deficient. As correctly said, I can’t remember who raised it but the scheme was submitted prior to SAB [Sustainable Drainage Approval Body]. Nevertheless, we can’t help that. And as a result of that, the scheme will be dealt with under planning and the relevant planning conditions as opposed to being dealt with by the separate SAB body. In essence, if it was to go down the SAB route, it would possibly likely mean that more open space and both surface drainage features would have to be provided, which would mean as a result you would probably have less of the area that could be developed, less parking, so you could even perhaps get the same number of units, but you wouldn’t have any provision for parking, which would actually—being in a sustainable location—would be not necessarily be a problem with as offices.”

37. In advancing ground 2, Mr Darby was careful to distinguish between, on the one hand, the question whether the Council was entitled to accept the Scheme as an amendment to the original planning application and, on the other, the question whether drainage approval is required under the 2010 Act. He did not contend that the Scheme submitted in January 2020 was not properly an amendment to the planning application submitted on 17 December 2018. However, he submitted that, as a matter of the proper construction of the 2010 Act, the Scheme was not “construction work in respect of which ... a local planning authority received a valid application for planning permission” before 7 January 2019. The Scheme clearly comprises construction work that has drainage implications. But it is not (he submitted) the construction work in respect of which the application was made on 17 December 2018. He submitted that the touchstone was the materiality of the alteration of the drainage implications and that, in the present case, the Scheme has materially different drainage implications from those of the development originally proposed and therefore requires drainage approval. In his skeleton argument Mr Darby contended:

“This outcome accords with the purpose of the [2010] Act and the transitional provisions. The Act required a new system of drainage approvals meeting national standards because the problems of flooding could not be left just to the planning system. The transitional provisions protect existing planning permissions and applications for construction works which were being considered at the time. They do not protect a different scheme which is put forward later, as the amended application was. There is no transitional protection for new schemes if an earlier scheme had planning permission: if the 48 dwelling planning application had been approved then [if] a planning application was made for the 34 unit scheme it would need drainage approval.”

38. The relief sought pursuant to ground 2 is a declaration that drainage approval under the 2010 Act would be required for the Scheme.
39. The fundamental problem with ground 2 is that it does not relate to any decision. This difficulty is evident from section 3 of the claim form, which identifies as the decision to be challenged only the decision to grant planning permission. Ground 2 is, rightly, not advanced as a ground for challenging the planning permission. The Statement of Facts and Grounds, paragraph 1, seeks judicial review of *two decisions*, the second of which is the decision “to decline to find that drainage approval would be required” under the 2010 Act. However, there was no such decision. The Council had received only an application for planning permission. It did not have before it any application for drainage approval. It did not make or purport to make or decide not to make any decision in respect of drainage approval. The most that can be said is that the planning officer gave oral advice to the Planning Committee to the effect that the requirement of drainage approval did not apply. Whether that advice was right or wrong, it did not constitute a decision of the Council and was not reflected in any decision of the Council.
40. In his oral submissions, Mr Darby appeared to accept that ground 2 did not relate to any actual decision. However, he submitted that the ground addressed a live dispute as to the legal position with practical significance and that, as it raised a narrow issue of statutory interpretation in the context of known facts, it was in the best interests of all that it be determined in these proceedings.
41. Although this court undoubtedly has the power to make an advisory declaration, I decline to do so in this case or to determine the issue to which the proposed declaration relates. Although the Council is both the local planning authority and, for the purposes of paragraph 6 of Schedule 3 to the 2010 Act, the approving body for a drainage system in respect of any development at the Site requiring drainage approval, its statutory functions are separate and distinct under the two legislative schemes. The Council’s role under the 2010 Act has not been engaged. More importantly, perhaps, if Mr Darby is correct in his submission that the question whether the Scheme was “construction work in respect of which” the Council had received a valid planning application before 7 January 2019 turns on the materiality of the alteration of the drainage implications, I would be incapable of answering the question in these proceedings. The evidence before me does not enable any assessment of the materiality of the difference between the drainage implications of the original proposal and the drainage implications of the Scheme. Mr Darby’s submissions evaded this difficulty by a merely specious

argument, which was to the effect that materiality was amply demonstrated both by Hafod's reasons for not submitting a new application (paragraph 35 above) and by the planning officer's remarks to the Planning Committee (paragraph 36 above). However, the most that this evidence can show is that the Scheme has drainage implications, such that if it is construction work in respect of which a planning application was made after 7 January 2019 it requires drainage approval. What Mr Darby would need to show (if his basic legal argument were sound) is that the Scheme is materially different in its drainage implications from the development initially proposed in the application made on 17 December 2018. This he cannot show and I cannot determine on the evidence.

42. For these reasons, I refuse permission on ground 2.
43. In the circumstances, the underlying question whether the Scheme requires drainage approval does not fall for my determination. Nor does the issue of statutory construction. What follows in the rest of this section of the judgment is not part of the decision and is offered, by way of preliminary view, in the hope that it may be of assistance to the parties and those who advise them.
44. The development under the Scheme clearly constitutes construction work with drainage implications. The question, therefore, relates to the transitional provisions and is whether the work is construction work "in respect of which" the Council received a valid application for planning permission before 7 January 2019. The grant of planning permission for the Scheme was pursuant to a valid planning application: the contrary has not been argued.
45. It is common ground that the Scheme was introduced as a valid amendment to the original application. In *R, on the application of Holborn Studios Limited v The Council of the London Borough of Hackney* [2017] EWHC 2823 (Admin) John Howell QC, sitting as a deputy High Court judge, said:

"65. There are three ways in which a planning permission may be granted for such a development [i.e. a development other than that for which an application was originally made]: the initial application may itself be amended; permission may be granted only for part of the development applied for; and permission may be granted subject to a condition that modifies the development applied for. Quite apart from any requirements for notification and consultation, there are substantive limitations on the changes that can be effected by such methods. These limitations have been variously described but they are all concerned with whether the result is the grant of permission for a development that is in substance something different from that for which the application was initially made. That is because the legislation only gives power to local planning authorities to determine the application describing the development for which permission is sought which was made to them in the prescribed form and manner: see paragraphs [8]-[12] and [20] above."
46. It follows that, if in consequence of an amended application planning permission is validly granted for a development other than that for which the application was originally made, the permitted development is not in substance anything different from

that for which the application was originally made. The transitional provisions for the application of Schedule 3 to the 2010 Act answer the question of the application of Schedule 3 by reference to the date of the application for planning permission. It makes little sense to suppose that the question whether the amended proposal is one “in respect of which” the original application was made can receive a different answer from that to the question whether the amended proposal is in substance something not different from the original proposal: that is, it seems to me that, if the amended work is in substance the same as the original work (i.e. is a valid amendment), it is work “in respect of which” the initial application was made. If the work is in substance the same for planning purposes, it is improbable that it is different for the purposes of the transitional provisions, when the latter operate by reference to valid planning applications and not to other criteria. The transitional provisions are to be presumed to cohere with the planning regime to which they expressly relate. Further, the contrary position would be highly inconvenient in practice, because it would mean that, in applying the transitional provisions, the approving body would have not merely to identify the date of the planning application but also to make a comparison—different in nature from any comparison that the local planning authority might have had to make—between different proposals for development. The more obvious construction of the transitional provisions, which I favour, does not lead to such unnecessary difficulties.

Conclusion

47. I refuse permission on ground 1 and on ground 2.