Neutral Citation Number: [2025] EWHC 350 (Admin)

Case No: AC-2023-LON-003804

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/02/2025

Before :

MR JUSTICE KERR

- -

Between :

THE KING on the application of PATRICK MORAN	**Claimant**
- and -	
MEDWAY COUNCIL	**Defendant**

- -
- -

Mr Wayne Beglan (instructed by **Holmes & Hills LLP**) for the **Claimant**
Mr James Neill (instructed by **Legal Services Medway Council**) for the **Defendant**

Hearing date: 22 January 2025

- -

Approved Judgment

This judgment was handed down remotely at 11am on 20 February 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

MR JUSTICE KERR

Mr Justice Kerr :

Introduction

1. This is another case about section 70C of the Town and Country Planning Act 1990 (**the 1990 Act**). The defendant local planning authority (**the council**) invoked section 70C in the decision challenged (stated in a letter of 9 November 2023) declining to determine a planning application submitted by the claimant in September 2023.

2. A local planning authority (**LPA**) can do that under section 70C(1) of the 1990 Act:

> "if granting planning permission for the development would involve granting, whether in relation to the whole or any part of the land to which a pre-existing enforcement notice relates, planning permission in respect of the whole or any part of the matters specified in the enforcement notice as constituting a breach of planning control."

3. A "pre-existing enforcement notice" in relation to any particular application for planning permission, or permission in principle, is (by section 70C(2)):

> "an enforcement notice issued before the application was received by the local planning authority."

4. Section 70C bears the heading "[p]ower to decline to determine retrospective application". Its meaning and effect have been considered in several cases. The parties disagree about the effect of the cases. They agree that the purpose or one of the purposes of section 70C is to prevent repeat planning applications being used to delay or frustrate enforcement action by taking many "bites of the cherry". They also agree that section 70C(1) confers a discretion on the LPA and that the discretion must be exercised lawfully.

5. As for the facts, it is agreed that there was a "pre-existing enforcement notice" in respect of the relevant land, issued in 2017, before the claimant became the owner of that land (or a sufficient part of it) in 2022. In 2017, an attempt was made by a person who was not the then owner of the relevant land to appeal against the enforcement notice. The Planning Inspectorate rejected that appeal, not on its merits, but on the ground that the appellant had no legal right to appeal.

6. The council has issued several previous section 70C decisions declining to determine applications for similar development at the same site. The planning merits, raised in those applications, have never been determined by the council. The claimant does not say that of itself makes the decision unlawful. He submits that the discretion was exercised unlawfully because mandatory relevant considerations were disregarded and because the decision frustrates the statutory purpose. The council submits that the decision was lawful.

The Facts

7. The claimant is the freehold owner of Plot C, Sharps Green, Lower Rainham Road, Rainham, Kent (**Plot C**). He meets the legal definition of a gypsy or traveller. There are three other plots at Sharps Green (together, **the site**). Friends and family members own the other plots. The total area of the site is 0.7 hectares. The council is the LPA

in respect of the site. It is responsible for the Medway Local Plan, adopted on 14 May 2003 (**the local plan**).

8. Mr Wayne Beglan, for the claimant, showed me certain policies in the local plan. Without setting them out in full, I record that these were policies BNE25 (development in the countryside); BNE33 (special landscape areas); BNE34 (areas of local landscape importance); BNE35 (international and national nature conservation sites); BNE45 (undeveloped coast); H13 (gypsy caravan sites and travelling showpeople's quarters); and CF13 (tidal flood risk areas).

9. Mr Beglan also referred me to the 2015 version of the Department for Communities and Local Government's *Planning policy for traveller sites*, a policy document recently updated in 2024 to broaden the definition of "gypsies and travellers", but current at the relevant times in this case. Mr Beglan relied on policy C in that document, on sites in rural areas and the countryside; and policy H, on determining planning applications for traveller sites.

10. On 3 May 2017, the council served an enforcement notice in respect of the then owners' use of the site. The notice identified breaches of planning control by unauthorised change of use to residential use, stationing caravans and mobile homes, laying hard surfacing, storing and breaking vehicles and stockpiling hardcore and aggregate; all without planning permission. The notice required the site to be cleared and restored to its former state within six months.

11. The notice was served on, among others, Mr Fred King. The abortive appeal then followed. The breaches of planning control identified in the enforcement notice continued. The site was not cleared and restored to its previous condition. In February 2018, the council's planning committee resolved to take direct action to secure compliance with the enforcement notice. The council agreed to reconsider that decision after a judicial review was intimated.

12. On 7 May 2018, an application was made for change of use to keeping horses, with residential use for three Romani gypsy families, three static caravans, three touring caravans, parking for six vehicles with associated hardstanding, development and water treatment plants. The applicants were the then occupants of the site, a Ms Sarah Penfold and others.

13. An officer's report dated 28 August 2018, prepared in response to that planning application, recommended that the council decline to determine the application, under section 70C of the 1990 Act. The report referred to a "previous application for permission by the current applicants" having been "declined under s70C". I do not have details of the latter application.

14. At some point, an injunction was granted requiring certain occupants to move off the land. On 24 August 2018, a circuit judge made an order committing Ms Penfold and her companions to prison, suspended on terms that they leave the site by 21 September 2018. The council then decided on 28 August 2018 to decline to determine the planning application of 7 May 2018, under section 70C. It appears that was the second time the council had done so.

15. The persons subject to the injunction did, it appears, leave the site by 21 September 2018, thereby avoiding committal to prison. The council started taking enforcement action to clear the site. Its decision not to determine the planning application of 7 May 2018 was then challenged in an application for judicial review, made by Ms Penfold and others on 9 October 2018. However, Mr John Howell QC, as he then was, sitting as a judge of this court, refused permission on the papers on 8 November 2018.

16. Nothing of note happened during 2019. On 1 April 2020 (according to a later "partly retrospective" planning application in 2021 to which I am coming), building work started at the site. The building work was (I infer from that later application) work for a "change of use to residential caravan site to include stationing of 3 … caravans (two static caravans and one touring caravan) laying / refurbishment of hard standing and works to access".

17. That work was therefore ongoing when a planning agent called WS Planning and Architecture (**WSP**) wrote to the council on 15 October 2020 enclosing an application on behalf of its client, Mr Fred King, for change of use for the siting of one static caravan "and the erection of utility building" at the site. The covering letter from Mr Brian Woods of WSP referred to some of the policies in the local plan dating from 2003.

18. Three days later, on 18 October 2020, an application was made, apparently in the name of the claimant (though he has since denied knowledge of it) for the siting for "one Gypsy family" of one mobile home and one touring caravan on Plot C at the site. The address given was Plot C at the site. The applicant stated that work had begun at the site only the same day, on 18 October 2020. The existing use was described as a field for a pony; that use, the applicant said in the application, would end on 19 October 2020.

19. Yet further, a Mr James Golby, giving his address as Plot A at the site, signed a planning application almost identical to that of the claimant. There was clearly a concerted effort from occupants of the different plots at the site. The council produced an officer's report on 22 October, recommending a decision under section 70C of the 1990 Act. This was followed by a letter from the council to WSP the next day, invoking section 70C in the case of Mr King's application.

20. On 26 October 2020, officers from the council visited the site. A letter was served on the occupants dated that day, referring to the 2017 enforcement notice and the county court injunction and enclosing those documents and warning that the council would consider what action to take if there was any continuing breach of planning control. On 27 October 2020, the council wrote to the claimant, declining under section 70C to determine his planning application. A letter to the same effect was sent the same day to Mr Golby.

21. Such was the planning history of the site when on 2 November 2020 the claimant purchased and became the owner of Plot C, paying a purchase price of £5,000. Friends and family members of his purchased the other plots at the site at around the same time. The council had, by my reckoning, invoked section 70C five times at this stage. The claimant became the registered freehold proprietor of Plot C on 10 November 2020.

22. The claimant says he was not aware of the 2017 enforcement notice when he bought Plot C and only knew of it later because, at the time, his then adviser did not carry out a local search. The council does not accept that evidence. The enforcement notice was served on, among others, Mr Fred King. The claimant's planning application, nearly simultaneous with Mr King's, was, like Mr King's application, rejected in a letter which expressly referred to the enforcement notice, dated five days before the claimant completed his purchase of Plot C.

23. In May 2021 a yet further planning application was made in respect of the site. The applicant was a Mr Thomas Read. He sought "change of use to residential caravan site to include stationing of 3 … caravans (two static caravans and one touring caravan) laying / refurbishment of hard standing and works to access. Partly retrospective." The application stated (as already noted) that building work had started on 1 April 2020, 13 months earlier.

24. Mr Read also stated (at box 10) that there were already parking spaces on the site for three cars and one light goods or public carrier vehicle. This was the same as the number of parking spaces proposed in the application. The "existing use" of the site was described by Mr Read (at box 14) as "residential caravan site" and the last use, until 2019, as "storage".

25. On 27 May 2021, the council wrote to the occupiers of the site regarding "ongoing breaches of planning control", i.e. of the 2017 enforcement notice. The letter complained that the site was being used for residential purposes, with caravans and mobile homes on the site and stockpiling of hardcore and aggregate. The letter stated that the council had decided to enter the land and take direct action to "carry out the requirements of the Enforcement Notice", unless it was complied with in full by 7 August 2021.

26. On 28 May 2021, the council received Mr Read's application. Its response was to write to Mr Read on 8 June 2021, declining under section 70C of the 1990 Act to determine the application because of the extant enforcement notice issued on 3 May 2017. This was, by my reckoning, the sixth occasion on which the council had exercised its discretion under section 70C in respect of the site. The officer's report recorded that there had been residential use, caravans and hard surfacing at the site on inspections from November 2020 to May 2021.

27. The deadline of 7 August 2021 came and went. The site was not cleared. In February 2022 the council took direct action and cleared the site. According to the claimant's chronology, that took place on 21 February 2022. On 16 March 2022, Mr King submitted an application for planning permission to build a one bedroom house at the site. The application was supported by a detailed design and access statement prepared by a planning agent. By a letter of 6 April 2022, the council declined to determine it, relying on section 70C for a seventh time.

28. The claimant's solicitors then wrote to the council on 17 June 2022 that section 70C would no longer apply in relation to a future application for residential use with caravans at the site; that the enforcement notice "has been complied with"; and asked for an assurance that the council would not seek to exercise its section 70C power when that application was made, as it shortly would be. A refusal would be "open to

challenge in the High Court", the letter stated. On 17 July 2022, the council responded, declining to give the assurance sought.

29. Over a year later, on 8 September 2023, the claimant submitted (through his agent, Smart Planning Limited), a planning application for "change of use of land to residential for the siting of caravans and mobile homes together with construction of four day rooms and a stable building". It was supported by detailed documents: a proposed site plan, a planning support statement, a landscape policy assessment, a landscape visual appraisal and a preliminary ecological appraisal.

30. Mr Beglan submitted that this application made a very strong case. It was, indeed, a most impressive presentation. Among the many cogent points made was that there was an acknowledged need for an additional 34 pitches for gypsies and travellers in the area, in the period from 2017 to 2035. There was a significant shortfall which the present application would ameliorate, it was argued in the planning support statement. There was a detailed rebuttal of any significant harm to the character of the surrounding countryside.

31. Mr Beglan identified the supporting documents and took me to some passages in them to make his point that the case for granting the application was very strong indeed. I am not an expert in the merits of planning applications; they are a matter of planning judgment for an LPA. I do not need to decide exactly how strong was the case made in application because the claimant does not plead an irrationality challenge and therefore stops short of submitting that no reasonable LPA could refuse the application on its merits.

32. The council's chief planning officer, Mr Dave Harris, sought legal advice and prepared (or reviewed and signed) a report advocating exercise of the discretion to decline to determine the application, relying on section 70C of the 1990 Act. His report was dated 9 November 2023. I will take it as Mr Harris' report, as he signed it, though it may have been prepared by other officers. He began by describing the proposal in some detail. He set out the planning history of past applications and explained the content of the enforcement notice in 2017.

33. He noted that the reasons for issuing the enforcement notice were that the development and use of the land were contrary to certain policies in the local plan, which he named as policies BNE1, BNE25, BNE33, BNE35, BNE36 and CF13; and to paragraph 55 of the National Planning Policy Framework (2012) (**NPPF**). He then set out section 70C of the 1990 Act, before proceeding to his assessment of the position. Mr Harris reasoned that the enforcement notice was still in force and the current proposals overlap with the breaches identified in it.

34. The supporting statement, he noted, argued that the requirements of the notice were discharged by the LPA taking direct action; it had effectively been complied with. The application would be for the settled occupation of gypsies. Their assumed status as such did not affect the planning harm or breach of policy caused by residential use; "the status of any applicant goes to whether there are material considerations which would outweigh the harm". The local plan remained applicable. The NPPF had been amended in 2023 but not materially.

35. Mr Harris then stated that the criteria for exercise of the discretion under section 70C of the 1990 Act were met: the current proposals overlapped with the breaches in the prior enforcement notice. Section 70C "was introduced to ensure that the time taken to determine a planning application (including appeals) should not prevent effective enforcement". Whether to exercise the discretion was "a matter of judgement".

36. He then identified various considerations, which he discussed. He started by referring to the content of the most recent application, namely Mr King's, made in March 2022, supported by a design and access statement. While disavowing any full consideration of the planning merits, he identified as a "key consideration … whether there is any realistic chance that permission would be granted". Officers thought that unlikely, he said.

37. Mr Harris then set out his reasons for that view. The site was unallocated and wholly unsuitable for residential accommodation, he said. The benefits to use of the site for additional residential accommodation for gypsy and traveller communities, did not outweigh the harm to the character and appearance of the site and surrounding area. There would be a detrimental impact on the rural character of the area and adjacent areas which were protected under various polices which he mentioned.

38. Mr Harris went on to say that the site was in "flood zone 3, an area with a high probability of flooding" on the Environment Agency flood map. He referred to certain government guidance on flood risk. Even if the site were "limited to flood zone 2", he said, an "exception test" would have to be met and there was no evidence that would be impossible to locate the development elsewhere at lower flood risk.

39. He then discussed the relevance of the local plan policies that seek to enhance the character of the countryside, marshes and wetlands, mentioning also the Medway Landscape Character Assessment 2011. This "character area" formed "an important buffer to the urban edge of Gillingham and protects Natura 2000/Ramsar[1] sites" and is "a valuable recreational and biodiversity resource". The proposal "would introduce development within an area that was previously open … in appearance and is … in close proximity to the North Kent Marshes Special Landscape Area" and other protected areas."

40. Mr Harris did not consider that the submissions made in the various documents supporting the application would overcome these difficulties. Assuming the applicants had the status of gypsies and travellers, he recognised that the latest assessments in 2017, 2018 and an ongoing one started in 2022 show there is "a shortfall in the provision of sites for Gypsy and Traveller families." The lack of sites was "a consideration to be weighed in the balance" but in this case the site "is wholly contrary to policy and … lack of sites is not expected to be sufficient to outweigh the harm … ."

41. The chief planning officer then referred to the personal circumstances of the applicants; they were on a site in Essex but an enforcement notice required them to leave by February 2024. The applicants were clearly aware of the enforcement notice at the current site. The applicants' son, aged seven, wanted to return to the local school, which he loved. Mr Harris reasoned that the applicants' personal circumstances had

[1] Ramsar is the Iranian city on the Caspian Sea where the Ramsar Convention on Wetlands took place in 1971. An intergovernmental treaty was made with the aim of conserving wetlands and biodiversity.

previously been considered when deciding to exercise the section 70C discretion on previous occasions.

42. Mr Harris then observed that the planning merits had not been tested before an inspector, i.e. on appeal. The current applicants were not the owners of the site when the enforcement notice was served. They could not appeal and the person who did was "judged … by the Planning Inspectorate to be an unauthorised occupier … . who did not have standing to appeal."

43. A "factor in the decision is therefore whether there is a need to allow the application in order that the merits can be considered, either by the council or, on appeal, by an inspector". The site owners in 2017 could have appealed but did not. They were not the current owners, who could not then have appealed. However, the history of breaches of planning control, multiple applications and the need to take direct action to clear the site was such that the council could "give little weight" to that consideration.

44. Overall, Mr Harris' recommendation was that the council should exercise its discretion to decline to determine the application. The decision letter challenged in these proceedings was sent the same day, 9 November 2023. It conveyed the council's decision, for the eighth time by my reckoning, to exercise the section 70C discretion and decline to determine the claimant's application on its merits. The decision letter was brief; the more detailed reasons are found in Mr Harris' report.

45. After that, correspondence followed by litigation ensued. The claim was issued in December 2023. The acknowledgement of service and summary grounds of defence were served in January 2024. In a witness statement, the claimant said he was unaware a planning application had been made in his name in October 2018. The only reason he could think of for that was that it was because the previous owner wanted to sell Plot C to him.

46. In February 2024, Lang J refused permission on the papers. However, following an oral hearing before Mould J, he granted permission and gave directions in an order made on 19 April 2024. The application was then prepared for trial and heard before me on 22 January 2025. I am grateful to counsel for their cogent written and oral submissions, to which I come next.

Submissions

47. There are now two grounds of challenge. The first is failure to take into account mandatory considerations. Eight considerations which the council is said to have disregarded are set out at in the statement of facts and grounds (paragraph 39). The second ground was failure to provide any adequate reasons for the decision. That was pleaded before the claimant's lawyers had seen Mr Harris' report and is not now pursued. The third ground is that the council "failed to apply section 70C … consistent with its statutory purpose" (paragraph 44).

48. I will take the *Padfield* ground (ground 3) first because I accept Mr Neill's point that to decide what considerations are mandatory when considering whether to exercise a statutory power, you have to ascertain first what is or are the statutory purpose or purposes of the power. It is, at the very least, useful to have the purpose or purposes in

mind when considering an allegation that mandatory considerations were left out of account.

49. The claimant's main arguments were as follows. The legislative purpose is to give LPAs "a tool … to prevent retrospective planning applications being used to delay enforcement action being taken against a development" (*Wingrove v Stratford-on-Avon District Council* [2015] PTSR 708, per Cranston J at [30]); or, as Lewis J (as he then was) put it in *R. (O'Brien) v. South Cambridgeshire District Council* [2016] EWHC 36 (Admin), at [72]: "that an applicant for permission for an unauthorised development cannot insist on more than one determination of the underlying planning merits of that development."

50. A developer may fail to appeal against an enforcement action notice and has a fair opportunity to do so. But the purpose does not extend as far as preventing a subsequent, current owner, not in breach of planning control, from having any opportunity to have the planning merits determined. One should take "the statutory purpose as … to ensure that effective enforcement cannot be avoided or delayed by those in breach of planning control having multiple bites of the cherry …" per Natalie Lieven QC (as she then was) in *R. (Banghard) v. Bedford Borough Council* [2018] PTSR 1050.

51. Mr Beglan formulated the statutory purpose emerging from *Wingrove* as "to prevent unmeritorious efforts to delay enforcement processes by applicants taking repeated bites of the cherry". Here, while the previous owner had failed to appeal against the enforcement notice, the claimant had no opportunity to do so. He did not know of the enforcement notice when he bought Plot C. Since February 2022, the requirements of the enforcement notice had been met "against an updated matrix". The site had been clear since then.

52. There was, therefore, no continuing breach of planning control when the claimant's application was made; and it was supported by what Mr Beglan called "a substantial swathe of documentation". In the particular circumstances here, the council's decision to invoke section 70C did frustrate the statutory purpose. There has never been an assessment of the planning merits of the site becoming a residential one for use by gypsy or traveller families. It should be an exceptional case where there is never consideration of the planning merits.

53. The facts in *O'Brien* were very different, he submitted. There, the land was being occupied in continuing breach of the relevant enforcement notice and two planning appeals had been pursued and failed. Here, the statutory purpose was frustrated because the breach of planning control was a thing of the past; the planning merits had changed for all the reasons set out in the detailed supporting documents; the claimant had no bites of the cherry at all; and the claimant had no intention to delay or avoid enforcement action by retrospective applications.

54. In support of his argument that the claimant's planning application in 2023 was different from previous applications, Mr Beglan took me to the policy H13 in the local plan, concerning provision of gypsy caravan sites and travelling showpeople's quarters. The officer's report from Mr Harris referred to harm to the character of the landscape but failed to mention this policy, Mr Beglan complained. Nor did the report refer to national policy on the same subject.

55. The report of Mr Harris also referred to the site being outside settlement boundaries and contrary to countryside protection policies; but, said Mr Beglan, Mr Harris' comments were at odds with the landscape visual appraisal submitted with the planning application, in which the expert author opined in detailed reasoning that the development would not cause any harm to the character of the landscape.

56. On the issue of flood risk, Mr Beglan submitted that Mr Harris had erroneously relied on out of date materials and had proceeded on the basis of out of date flood risk criteria contained in the local plan dating back to 2003; The up to date flood risk maps from the Environment Agency showed the site as located within zone 1, with the lowest level of flood risk; while Mr Harris had placed the site, wrongly, within zone 3, i.e. at the highest level of risk of flooding.

57. Mr Neill, for the council, submitted that the purpose of section 70C is not just to prevent unmeritorious efforts to delay or prevent enforcement action by making multiple applications. More widely, it is to remove from applicants and their successor in title the opportunity to have the planning merits determined more than once. Further, the narrower purpose includes prevention of efforts to delay or prevent enforcement action of any kind, including direct action; not only enforcement action in the sense of serving an enforcement notice.

58. Mr Neill took me to the provision in the Localism Act 2011 (section 123) introducing section 70C into the 1990 Act, along with amendments to section 174 of the 1990 Act, removing the right of appeal against an enforcement notice on the ground that planning permission should be granted, where the enforcement notice predates an application for planning permission "related to the enforcement notice". The amendment to section 174, said Mr Neill, mirrors the purpose in the then new section 70C.

59. He also pointed out that "enforcement action" under the 1990 Act includes not just issuing an enforcement notice but also issuing an "enforcement warning notice" or a "breach of condition notice". Section 178 creates the LPA's power to take direct action on expiry of the deadline for compliance with the steps required under an enforcement notice, by the LPA entering the land, taking those steps itself and recovering reasonable costs of doing so from the owner.

60. Section 181(1) of the 1990 Act, Mr Neill reminded me, provides that compliance with an enforcement notice "shall not discharge the notice". By section 181(2), if the notice requires a use of the land to be discontinued, that requirement continues permanently and does not lapse once the prohibited use has ceased. Therefore, an enforcement notice that has been "complied with" remains extant and relevant once the required steps have been taken, whether by the owner or by the LPA exercising its right to enter the land.

61. Mr Neill referred to the authorities also cited by Mr Beglan: *Wingrove*, *Banghard* and *O'Brien*. He submitted that the latter in particular supported a broader purpose than merely deterring repeat applications intended to frustrate or delay enforcement action. The wider purpose emerged, he said, from Lewis J's judgment at [41], referring to the purpose of preventing the applicant from insisting on "two separate considerations of the underlying planning merits"; and at [48] confirming that:

> "The legislation is not limited to cases where the application for planning permission is triggered by the service of an enforcement notice and can be characterised as an attempt to delay the enforcement process."

62. The statutory purpose is, as contended in the council's skeleton, "to remove from applicants (or their successors in title) the opportunity to have the planning merits of the development in question determined more than once"; or, at any rate, the purpose is "not limited to prevention of delay to the issue and upholding of enforcement notices" but "is concerned about the delay to enforcement more generally, including taking direct action and the removal of unlawful development."

63. There is nothing in the text of section 70C, said Mr Neill, that limits its purpose to preventing delay to enforcement. It does not say it applies only to prevention of retrospective applications under section 73A of the 1990 Act. The word "retrospective" in the title to section 70C denotes that the "applications" for planning permission referred to in the section overlap with matters already specified in a pre-existing enforcement notice.

64. It does not matter if ownership of the land changes after the enforcement notice, Mr Neill said. Planning restrictions run with the land, just as (subject to any express condition) planning permissions do; see Gilbart J's judgment (at permission stage) in *R. (Smith) v. Basildon Borough Council* [2017] EWHC 2696 (Admin) at [10]-[11], treating *Banghard* as confined to its facts. *Smith* was approved in the substantive stage by UTJ Rodger QC (sitting as a judge of the High Court) in *Chesterton Commercial (Bucks) Ltd v. Wokingham District Council* [2018] EWHC 1795 (Admin), at [69].

65. The authorities, Mr Neill submitted, are consistent with the statutory purpose being prevention of delay to enforcement action of any kind, including direct action. In *Wingrove* and *Banghard*, no direct action was taken and the point did not arise. The mischief at which section 70C is directed includes preventing a developer from thwarting direct action to stop unlawful development, as well as from thwarting other kinds of enforcement such as an injunction (under section 187B of the 1990 Act) or criminal proceedings (under section 179).

66. Mr Neill submitted that the report signed by Mr Harris acknowledged that the opportunity for the planning merits to be examined had fallen to the previous owner, who had not taken that opportunity. The enforcement notice remained in force and unlawful development had only been prevented by direct action. There had been repeated attempts to undo the prohibitions in the enforcement notice by making planning applications. The likelihood of the application succeeding had been considered in the report, albeit in a summary way.

67. On ground 1, Mr Beglan said compulsory considerations were disregarded. He cited the judgment of Lords Sales and Hodge JJSC in *R. (Friends of the Earth Ltd.) v Secretary of State for Transport* [2021] P.T.S.R 190, at [116]-[121]. The "third category" of considerations includes those so obviously material that they must, on pain of irrationality, be considered. Further, Mr Beglan submitted, the "cumulative effect" of considerations may render "each of them a mandatory consideration even if (which is not accepted) they otherwise would not be".

68. There was some debate about the scope and formulation of the mandatory considerations relied on. In the statement of facts and grounds, there were eight. In the renewal notice (after refusal of permission), there were six. The skeleton argument referred to "the considerations identified in the Grounds for Renewal". I doubt whether anything turns on this possible pleading point. I am content to proceed mainly from the account given in Mr Beglan's skeleton argument, which appears to cover, and I would expect to cover, his points.

69. It was mandatory to consider the following matters, he submitted. The first was the claimant's motive; or, more objectively, whether entertaining the merits of his planning application would or might delay effective enforcement against a current breach of planning control. Secondly, that there had been sustained compliance with the enforcement notice in recent years, unlike in 2017 when there was an injunction and then committal proceedings for breaching it.

70. Third, it was mandatory to consider whether the need had changed. A bare reference to national policy on sites for gypsies and travellers, which was evolving, was not sufficient. The definition of travellers had changed in 2015 in a manner recognised as indirectly discriminatory in *Lisa Smith v. Secretary of State for Housing Communities and Local Government* [2023] PTSR 312, CA. In the pleaded grounds the claimant submitted that the council had not assessed whether the position on need had been "significantly worsened as a consequence of the recent judgment in *Lisa Smith* …. ".

71. This requires explanation. The judgment of the court in *Lisa Smith* was given on 31 October 2022. She succeeded in the Court of Appeal in a statutory review claim under section 288 of the 1990 Act. Until 2015, the definition of gypsies and travellers included those who had permanently ceased travelling due to, *inter alia*, disability or old age. An amendment in a national policy document excluded that group from the definition. That indirectly discriminated against those in the excluded group, as the Secretary of State accepted. The judge at first instance found that the discrimination was justified.

72. The Court of Appeal (Sir Keith Lindblom, Holroyde and Coulson LJJ) disagreed. They quashed the inspector's decision dismissing Ms Smith's appeal against refusal of planning permission for a permanent site for gypsies and travellers in Leicestershire; and they remitted the appeal back to the inspector for redetermination. At [139] in the judgment of the court, they stated:

> "… the consequences for future decision-making on applications for planning permission and appeals in which the relevant exclusion is engaged will inevitably depend on the particular circumstances of the case in hand. In every such case it will be for the decision-maker – whether a local planning authority or an inspector – to assess when striking the planning balance what weight should be given, as material considerations, to the relevant exclusion and to such justification for its discriminatory effect as obtains at the time, and also to undertake such assessment as may be required under Article 8 of the Convention. As is always so, the result of that process of decision-making will emerge from the facts and circumstances of the individual case."

73. In his skeleton argument, Mr Beglan also included within his third mandatory consideration the submission that there was no consideration of housing supply over five years; nor of temporary planning permission; and that the claimant's detailed new analysis contesting harm to character and appearance of the countryside and contesting

the extent of flood risk, was not engaged with. The 2023 planning application was of a different order and calibre to previous ones and merited more than the cursory consideration it received.

74. In the pleaded grounds, Mr Beglan submitted that the detailed supporting documents submitted with the planning application showed that the application was "policy compliant". In the pleaded grounds and in the account of the facts in his skeleton argument, he also made the point that there had been public consultation on the application and not one consultee, statutory or non-statutory had objected to it.

75. Fourth, Mr Beglan complained that there was no mention in the report of policy H13 in the local plan, dealing with gypsy caravan sites and travelling showpeople's quarters. That was a striking and material omission, especially when contrasted with the express mention of policies which were said to point against grant of planning permission for a caravan site, namely policies BNE25, 33, 34, 35 and 45 and CF13. In its detailed grounds, the council had rightly not denied that policy H13 was a compulsory consideration.

76. Fifth, Mr Beglan submitted, the council "put the bar for s.70C far too high, and applied or took into account an inapposite test" because it asked itself in the officer's report whether there had been "any changes such that planning permission would now be granted for the proposed development". However, he clarified in oral argument that he did not rely on any misinterpretation of section 70C by the council and did not allege perversity independently of his assertion that mandatory considerations were left out of account.

77. For the council, Mr Neill in his skeleton addressed the six considerations relied on in the grounds of renewal. He submitted that all the considerations there set out were either voluntary or were taken into account. There had been no "extended period of compliance" with the enforcement notice. The had been no further breaches since the clearance of the site by direct action in 2022. That was known to officers who remarked that the council had twice cleared the site.

78. There was no failure to have regard to the point that the claimant had said he was unaware of the enforcement notice when he bought Plot C; nor to the point that he had been unable to appeal against the enforcement notice. Both points were expressly mentioned in the report signed by Mr Harris. As for the changing profile of the need for caravan sites for gypsies and travellers, that was considered in the context of the likelihood of success on the merits, which was considered. The authors of the report were well aware of and considered the GTAA and an update to the assessment of need in it having been commissioned.

79. As for Policy H13 in the local plan (on provision of sites for gypsies and travellers), the officer's report included clear references to the planning context, including whether there had been significant changes in planning policy since the enforcement notice was served. The planning support statement referred to Policy H13 and the report referred to the planning support statement. The conclusion was that the application would probably fail as the proposed uses were clearly contrary to policy; which necessarily included consideration in fact of Policy H13. There was no need for a detailed analysis of each policy.

80. It was not necessary, said Mr Neill, for the officer's report to refer expressly to whether or not any statutory or non-statutory consultee had objected to the application. This is not a matter so obviously material that it had to be taken into account. The claimant does not suggest, he pointed out, that there had been a shift in opinion on the part of consultees since the enforcement notice was issued in 2017.

81. There was no obligation, he said, for the council to consider what the subjective motive of the claimant was in making the application. The premise of the assertion was not accepted: that the motive could not be to delay enforcement because the site was clear and had been for over a year. The enforcement notice remained in force and the application was inconsistent with its requirement that there be no residential use.

82. Mr Neill objected that the claimant had not pleaded any error of fact relating to the degree of flood risk according to the latest updated version of the Environment Agency's flood risk map. The council had not answered that point in its evidence because it had not been put on notice of the point. Had the council been alerted to the point, it would probably have argued that any error, if one was made, would have made no difference to the council's decision.

Reasoning and Conclusions

83. The scheme of section 70C is clear. If there is an unauthorised development of land, that is a breach of planning control. That may lead the LPA to issue an enforcement notice. If the owner appeals against the enforcement notice, the owner may argue on appeal that the development should be authorised. The inspector will then have to consider the planning merits of the development. If the owner does not appeal, she or he will still have had an opportunity to have the planning merits considered.

84. A subsequent owner can be expected to know the planning history of the land they have acquired. Planning restrictions, like planning permissions do (subject to any express condition about change of ownership) run with the land, as Gilbart J correctly said in *R (Smith) v. Basildon Borough Council*. So the subsequent owner should know about the enforcement notice and any appeal against it; and, therefore, should know that either the planning merits of the development have been considered or, if they have not, the opportunity to have them considered has been passed up and may not recur.

85. A subsequent owner who is unaware of the planning history cannot assume the LPA will rescue him from the consequences. That is not controversial or contrary to any of the case law or, indeed, disputed here. The claimant does not say the council misinterpreted the section. However, the question then arises how the LPA should approach the exercise of its discretion in a case within section 70C, i.e. where the planning permission sought would be in respect of some or all the matters specified in a pre-existing enforcement notice.

86. First, to state the obvious, no considerations in the statute are expressly mandatory. Nor, equally obviously, are there any which by express provision must be disregarded. Nor, in my judgment, are there any considerations which are impliedly mandated or, indeed, impliedly ruled out, by the terms of section 70C read in its statutory context. The section is what some lawyers call open textured. The discretion is, on the face of it, at large. Provided the statutory purpose is respected, no considerations are on or off the table.

87. The class of considerations at issue here is therefore those that fall into the "third category", namely "those which the decision-maker may have regard if in his judgment and discretion he thinks it right to do so" (in the words of Simon Brown LJ (as he then was) in *R. v Somerset County Council, ex p. Fewings* [1995] 1 WLR 1037, at p.1049, cited with approval by Lords Hodge and Sales JJSC in *Friends of the Earth Ltd.* at [116]). Some considerations in that category were taken into account here and discussed in submissions.

88. The question then becomes whether there were considerations not considered here which, though within the third category, were also within the sub-category of considerations that are "so obviously material to a decision …. that anything short of direct consideration of them … would not be in accordance with the intention of the Act" (per Cooke J in *CREEDNZ Inc v Governor General* [1981] NZLR 172, at p.183, approved by Lords Hodge and Sales JJSC in *Friends of the Earth Ltd*, at [116]-[120]).

89. Whether a consideration within the third category is so obviously material that it must be directly considered is measured against the standard of "the familiar *Wednesbury* irrationality test" (*Friends of the Earth Ltd.*, at [119]). Whether the council disregarded considerations in that sub-category is the issue raised in ground 1 of the challenge. But since the statutory purpose must be respected and there is a *Padfield* challenge in ground 3 asserting that it was not, the wider question first arises what that purpose is.

90. I agree with Mr Neill that this question should be addressed first, before it can be ascertained whether the considerations said by the claimant to be compulsory are so obviously material that they must as a matter of rational decision making be entertained and taken into account. In *Wingrove* the purpose was expressed in an academic text adopted by the judge at [21]: "to prevent retrospective applications being made just to delay enforcement". *Wingrove* was a classic case of the claimant attempting to have "multiple 'bites at the cherry'" (*ibid.*).

91. In *O'Brien*, there had been several applications and appeals relating to the site and an injunction, as well as a prior enforcement notice which had been appealed but the appeal was withdrawn. Lewis J (as he then was) gave an account at [10]-[22] of the statutory provisions, placing section 70C in its proper legislative context as part of the scheme of the 1990 Act; and in its temporal context as a major part of the amendments in the Localism Act 2011.

92. Much of the argument was about a retrospectivity point not relevant here. But the purpose of section 70C was discussed. The judge rejected the proposition that the purpose was confined to preventing attempts to frustrate or delay enforcement: see the judgment at [38]-[44] and [48]. He held that "[t]he purpose underlying the legislative provisions is that an applicant for permission for an unauthorised development cannot insist on more than one determination of the underlying planning merits of that development" ([72]).

93. The facts in *Banghard* were unusual and generated a broader conception of the statutory purpose than Lewis J's in *O'Brien*. A planning permission in 2010 permitted use of a building for storage of vehicles. The claimant developer then used it as residential accommodation. An enforcement notice against residential use was issued. The developer appealed but lost; the building must be demolished. The developer, instead

of demolishing it, applied for permission to use it for storage as had been permitted in the 2010 planning permission.

94. The LPA invoked section 70C of the 1990 Act and declined to determine the application. Ms Natalie Lieven QC, as she then was, held that the LPA could not lawfully do so. There were two issues: whether the LPA had power under section 70C to decline to determine the application; and if so, whether they exercised the power rationally (see the judgment at [2], [18] and [21]). The judge upheld both grounds, though the second did not arise ([35]-[38]).

95. The judge referred to the statutory purpose of section 70C (especially at [28]-[30]) and said at [29] that it included the point that "the Parliamentary intention was to ensure fairness in all cases …". A planning judgment that there was an overlap between the prior enforcement notice and a later planning application must not be used to cloak unfairness by depriving the developer of having even one bite of the cherry, she reasoned.

96. I think the decision in *Banghard* is best understood as turning on the proposition that the operative planning permission application (i.e. the one for storage as under the 2010 permission) plainly did not overlap with "the matters specified in the enforcement notice"; and that any so-called planning judgment that it did would be wrong, perverse and unfair. The judge clearly thought that no reasonable LPA could decide that there was an overlap between the two because "storage use was not part of the matters being enforced against" ([33]).

97. If that is right, it is difficult to see why it was necessary to consider the statutory purpose of section 70C at all. If the section straightforwardly did not apply, the LPA had no discretion to decline to determine the planning application at issue; or, as the judge put it at [36], the LPA "had no jurisdiction to decline to determine the application under section 70C". She also upheld the *Wednesbury* challenge (see at [39]), while recognising that it "does not arise" ([36]).

98. Gilbart J's decision in *R. (Smith) v. Basildon Borough Council* was to refuse permission to bring a judicial review claim. He did not give permission to cite it though it is arguable that since he published it with a neutral citation number, he probably would not object to it being cited. There would not be much point in publishing it if it could not be cited. Hence, I have already mentioned it above and both counsel alluded to it.

99. Caravans and hardstanding had been placed on the relevant Green Belt land by the former owner, in breach of planning control, leading to service of two enforcement notices against which the then owner of the land appealed, arguing that the residential use and hardstanding should be authorised. He then sold the land to the claimant and withdrew his appeals before they were determined. The new owner, Mr Smith, then applied for planning permission for residential use.

100. The LPA declined under section 70C to determine the application. The judge rejected as unarguable the submission that, applying the reasoning in *Banghard*, Mr Smith was being unlawfully deprived even of a single bite of the cherry. The 1990 Act does not limit the application of section 70C "to applications for planning permission by the same applicant" ([10]). Planning control run with the land. There was no other basis for impugning the LPA's decision.

101. In *Chesterton Commercial (Bucks) Ltd*, UTJ Martin Rodger QC reiterated that, as the parties agreed, whether there was an overlap between what an enforcement notice required and what a subsequent planning application sought, "involved an element of planning judgment"; but qualified that by observing that the exercise involved considering "objective matters requiring a comparison between two documents" which was "a relatively limited exercise … likely in most cases to be capable of only a single outcome" ([62]).

102. The judge also reiterated the point derived from Gilbart J's judgment in *R. (Smith) v. Basildon Borough Council* that it does not matter if ownership of the land changes between issue of the enforcement notice and the application for planning permission. The predecessor in title had had an opportunity to have the planning merits determined. An applicant may not have multiple bites at the cherry; but "nor can he decline the cherry when it is available to be bitten, and insist on biting it on a later occasion" ([69]).

103. That brief survey of the cases shows that the applicability of section 70C should not be confused with it purpose; and that the court should not be drawn into entertaining arguments based on a general sense of unfairness to the claimant unless the high threshold of irrationality or some other recognised public law flaw is made out. Where an argument is founded on disregard of relevant considerations, a rigorous examination, not always found in the cases, is needed to determine whether they are mandatory considerations or not.

104. For my part, I accept that the statutory purpose of section 70C is as formulated by Lewis J, as he then was, in *O'Brien* at [72]: "an applicant for permission for an unauthorised development cannot insist on more than one determination of the underlying planning merits of that development". That is a sufficient formulation of the purpose and one that enables LPAs to see off those intent on "gaming the system", in Mr Rodger QC's phrase (in *Chesterton Commercial (Bucks) Ltd* at [69]).

105. As for relevant considerations, Hickinbottom J (as he then was) in *R. (Seventeen de Vere Gardens Management Ltd.) v. London Borough of Kensington and Chelsea* [2016] EWHC 2869 suggested at [44] (cited by Mr Rodger QC at [43]) that it might be necessary to grant the planning application, for example, "where the development plan has changed, or some other material planning considerations have changed, so that the underlying merits may be different".

106. In *Wingrove* at [31], Cranston J suggested that an LPA might act unlawfully in invoking section 70C if "for legitimate reasons there has been a failure to appeal an enforcement notice and the development is plainly compliant with planning provisions … or the development can readily be made acceptable by the correct planning conditions". Or the claimant might have been "badly advised at the time, or unaware of the opportunity to appeal the enforcement notice".

107. In my judgment, statements such as these are not always helpful because they do not differentiate adequately between mandatory considerations and those that are merely relevant. They also risk straying into the very planning merits which section 70C, where it applies, permits the LPA not to determine. I prefer Lewis J's observation that the only requirement for section 70C to apply is a temporal one (in *O'Brien* at [40]).

108. Drawing the threads together, the cases lead me to apply the following propositions to determine the legality of this decision under section 70C:

(1) The section 70C discretion is available where a pre-existing enforcement notice overlaps in subject matter with a subsequent planning application.

(2) Whether it does or not involves an element of planning judgment, but requires only a simple comparison often with only one possible outcome.

(3) The section may apply whether or not the enforcement notice was appealed by the applicant or by a previous owner.

(4) Its purpose is to limit the current or a previous owner to one opportunity to have a determination of the planning merits of the matters enforced against.

(5) The considerations to which the LPA will have regard are a matter for the LPA; if a consideration is relevant, it may be taken into account.

(6) However, some considerations may be so obviously material that it would be irrational not to have regard to them.

(7) Identifying any considerations of the latter type (see (6) above) is a question of fact in each case.

(8) Subject to the overarching requirement of rationality, the weight to be given to any particular consideration is a matter for the LPA.

109. In the present case, the first three of those propositions is not in issue. It is agreed that section 70C is applicable; the predecessor owner did not appeal against the 2017 enforcement notice, but that does not prevent the section from applying. As for the *Padfield* challenge, I do not accept Mr Beglan's submission that the statutory purpose was thwarted here because the claimant did not know about the enforcement notice and has not himself had an opportunity to have the planning merits of residential use determined.

110. If it is true that the claimant did not know about the enforcement notice – which is difficult to accept – the statutory purpose is respected because his predecessor in title had that opportunity and it was the claimant's responsibility to acquaint himself with the planning history of the site he was buying. The fact that his 2023 planning application was polished and professional, while some previous applications were more amateurishly presented, does not assist the claimant.

111. I do not agree with Mr Beglan that it should only be in exceptional cases that no determination of the planning merits occurs at all. It is worth remembering that a section 70C case starts with issue of an enforcement notice, i.e. with an allegation of breach of planning control which, if admitted and not appealed, or not successfully appealed, means the then owner has broken the law, not just the planning laws but the criminal law as well.

112. Nor do I accept from Mr Beglan that the statutory purpose was frustrated because the breach of planning control had ceased and lay in the past. As Mr Neill rightly pointed out, the enforcement notice remained in force; it was not spent. The past breaches were

many and persistent up to February 2022, when the council cleared the site for the second time. I do not agree that, viewed from February 2022 onwards, the enforcement notice had been "complied with" and the slate must be treated as wiped clean.

113. Mr Beglan also submitted that the planning merits had changed; there was no intention to delay or avoid enforcement action; and the site ought to have been considered as potentially suitable to be a caravan site for gypsies and travellers as it was "policy compliant" for all the reasons given in the detailed expert supporting statement accompanying the claimant's 2023 planning application. Unjustified discrimination against some gypsies and travellers had been recognised in the *Lisa Smith* case.

114. Those points might be better deployed in an irrationality challenge, but none is made. They are of possible relevance to the ground 1 challenge (disregard of mandatory relevant considerations), to which I am coming next. They do not, in my judgment, say anything about the statutory purpose of section 70C and whether it was frustrated here. In my judgment, it was not and the third ground of challenge fails.

115. For completeness, I should add that I do not think the word "retrospective" in the heading above section 70C leads to a different conclusion. It is not a well chosen word but I do not think it indicates more than that any planning application which overlaps with a *prior* enforcement notice must by definition have a retrospective element to it, since it seeks retrospectively to have authorised development that was in the past unauthorised.

116. Turning to the first ground of challenge, I start from the premise that all the matters considered in the report signed by Mr Harris are accepted as relevant considerations. It is not said that any irrelevant matter was wrongly taken into account. In my brief summary, the considerations were:

(i) the local plan policies to protect the countryside and rural character of the land

(ii) the enforcement history including past applications and direct action;

(iii) changes to national and local policies since the local plan;

(iv) whether there was a realistic chance the application would succeed on its merits, if entertained;

(v) flood risk;

(vi) an acknowledged shortfall in sites for gypsies and travellers;

(vii) the personal circumstances of the claimant's son and his schooling (given no weight because it previously been taken into account); and

(viii) that the planning merits had not been tested (given little weight because of the enforcement history).

117. I can find nothing in Mr Beglan's submissions to persuade me that any compulsory consideration – i.e. one so obviously material that it was irrational not to have regard to it – was left out of account. The following were not mandatory considerations: the claimant's subjective motive; the changed definition of travellers in 2015; the

discrimination recognised in the *Lisa Smith* case; the supply of housing over five years; the possibility of temporary planning permission; the changed incidence of flood risk (the subject of a possible error in the report); the absence of objection from those consulted. Nor was it mandatory to mention and comment on policy H13 in the local plan.

118. I find no legal flaw in the council's reasoning, set out in the report. Officers considered the materials supporting the application. The planning merits were addressed, albeit on a summary basis. The council took into account that the merits had not been tested. The enforcement history was relevant and properly taken into account. I regard the claimant's arguments as akin to a perversity challenge, albeit not pleaded as such, and not one that would come close to succeeding. The first ground of challenge likewise fails.

Disposal

119. For all those reasons, the claim fails and is dismissed.