



OUTER HOUSE, COURT OF SESSION

[2025] CSOH 102

P247/25

OPINION OF LORD CUBIE

In the petition of

ROSEANNA MCPHEE

Petitioner

for

Judicial Review of a decision by Perth and Kinross Council to grant planning permission for *inter alia* the erection of a brewery at land 50 metres south of Council Cottages, Ferry Road, Pitlochry.

Petitioner: K Springham KC, S McPhee, advocate; Drummond Miller LLP
Respondent: A Burnet KC, D Blair, advocate; Harper Macleod LLP (Edinburgh)

5 November 2025

[1] This is a decision in the judicial review of the decision of the respondent, Perth and Kinross Council, to grant an application for the building of a brewery and tap room and related components at Ferry Road, Pitlochry. It is not an assessment of whether the decision was correct or not, but rather whether in reaching the decision the respondent has reached a decision in accordance with the procedures required by law.

Background

[2] By application of 18 October 2023, Wasted Degrees Holdings Limited applied to Perth and Kinross Council for planning permission for brewery, tap room, storage,

formation of vehicle access, parking and associated components at land south of Council Cottages, Ferry Road, Pitlochry. The cottages described are known as Burnside Cottages. A tap room is a form of public house where alcohol will be served to the public.

[3] The proposed development site includes an area of or at least adjacent to, ancient woodland. The development will involve removal of established trees with compensatory replanting.

[4] The petitioner lives at Bobbin Mill, less than 100 metres from the proposed development site (the precise distance is a matter of dispute but not material to this decision). Bobbin Mill is an area of historic interest to the Gypsy Traveller community. Residents, including the petitioner, are Gypsy Travellers.

Previous application for judicial review

[5] The petitioner objected to the application on grounds including risk of harassment of Gypsy Traveller residents by patrons, and the detrimental impact on ancient woodland (production 6/3). By decision of 5 June 2024, the respondent granted planning permission. The petitioner sought judicial review on the grounds that amongst other things the respondent erred in law in failing to consider whether the proposed development would result in loss of ancient woodland. The respondent conceded that it had acted unlawfully in failing to consider the potential detriment to ancient woodland. The decision of 5 June 2024 was reduced by the court in terms of a joint minute entered into by the parties.

Fresh application

[6] The respondent reconsidered the application. By decision of 12 February 2025, the respondent granted planning permission for the same development following reconsideration (production 6/1). That decision is challenged in this petition.

Petitioner's submissions

First basis of challenge – inadequacy of reasons

[7] The petition as drafted challenged the decision on the basis that there was a failure to follow the development plan which includes the National Planning Framework ("NPF4") in terms of section 24(1)(a) of the Town and County Planning (Scotland) Act 1997.

[8] NPF4 policy 6(b)(i) provides *inter alia*:

- “(b) Development proposals will not be supported where they will result in
 - (i) Any loss of ancient woodland, ancient and veteran trees, or adverse impact on their ecological condition”

[9] The petitioner absorbed that discrete point about the woodlands into her general argument about inadequate reason for departure from the development plan. As I understood the revised argument, it was contended that the reasons given were inadequate and did not deal in terms with the departure from the development plan in terms of NPF4, rendering the decision unlawful. I proceed on the basis that the criticism relates to the failure to give adequate reason for the departure from the development plan so far as it affects the loss of ancient woodland and no broader point is being made. If I am wrong about that, I address the matter in more general terms during the course of this decision.

[10] The petitioner submitted that the respondent's reasons for its decision are inadequate. The reasons should be in the decision notice; there were no reasons given at all. Recourse could not be made to the Report of Handling (production 6/2), because that could

only be used to allow understanding of brief reasons on the decision notice. The absence of reasons in the decision notice was fatal to the procedure. The decision notice gave conclusions but not reasons. Even if reference could properly be made to the Report of Handling, the informed reader is still left unable to determine how the decision was reached.

[11] The reasons given in the decision do not enable the informed reader to understand why the application was decided as it was, and what conclusions were reached in relation to ancient woodland. The reasons do not enable the reader to understand what considerations were taken into account, whether they were material, nor how they were balanced against the duty to apply policy 6(b)(i). The reasons are inadequate, and the decision is consequently unlawful.

[12] Reference was made to *South Buckinghamshire District Council and another v Porter (No 2)* [2004] 1 WLR 1953 at para [36]. The respondent must give reasons, which are adequate proper and intelligible, must deal with the substantive issues which allows an informed reader to know how they were decided, leave the informed reader in no real and substantial doubt as to what the reasons were and what material considerations were taken into account, and must also enable unsuccessful objectors to understand how the policy underlying the grant may apply to future application.

[13] The decision notice is where reasons must be found; the reasons can be brief but must exist; before other material can be examined, there must be reasons in the decision notice itself. The decision notice did not contain reasons only a conclusion or justification. *Bruce v Moray Council* 2023 SC 197 was authority for the proposition that reasons, however brief, had to be given, and one cannot look beyond the decision letter.

[14] What was provided did not inform the reader especially in a context when the original decision had been subject to review and robustly contested. The introduction of the discrete protection for ancient woodland into NPF4 demonstrated the focus which this issue merited.

[15] The Report of Handling could not be a substitute for the proper provision of reason in the decision notice. There was no authority to support that, but even if the Report of Handling was apt for consideration, it was also inadequate in relation to the paragraphs referred to viz 101, 112-114, 115. An informed reader could not know what the material considerations were that justified a legitimate departure from the development plan; essentially, the petitioner submitted that the Report of Handling could elaborate upon the reasons but not fill a vacuum left by an absence of reasons in the decision letter; in the decision letter there were no reasons at all. The inadequacy of reasons was prejudicial rendering the decision unlawful.

Second basis for challenge – The Public Sector Equality Duty (PSED)

[16] The petitioner submitted that the respondent failed to comply with their PSED in terms of section 149 of the Equality Act 2010. The Act provides, so far as relevant to this petition:

“149 Public sector equality duty

- (1) A public authority must, in the exercise of its functions, have due regard to the need to—
 - (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
 - ...
 - (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.
 - ...

- (5) Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—
 - (a) tackle prejudice, and
 - (b) promote understanding.
- (6) Compliance with the duties in this section may involve treating some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act.
- (7) The relevant protected characteristics are—
race;”

[17] Against that statutory background, it was submitted that the respondent required to have due regard to the need to eliminate discrimination, advance equality, and foster good relations between those who share a protected characteristic and those who do not. As Gypsy Travellers, the petitioner and others resident at Bobbin Mill share the protected characteristic of race. Such communities were marginalised and experienced persistent discrimination which can include violence. It was submitted that the respondent failed to make reasonable enquiries about the impact of the proposed development on Gypsy Traveller residents; the consideration of the PSED has to be in substance, with rigour and an open mind (*R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin) at paragraph 92).

[18] In considering the application the respondent should have taken into account whether the decision eliminated harassment. They had a duty to have due regard to the terms of section 149, which meant a duty to consider if siting a public house next to a Gypsy Traveller site, especially one with cultural significance, would foster good relations.

[19] The petitioner made extensive and detailed reference to the Equality and Human Rights Commission - Technical Guidance on the Public Sector Equality Duty: (Scotland) showing the extent to which due regard should be had. It was submitted that taking into account the guidance provided, the respondent should have undertaken a rigorous

consideration of their duty, leading to a decision informed by that duty. They had failed to do so.

[20] Reference was made to the decision in *R (Bracking) v SSWP* [2013] EWCA Civ 1345 and the approach to be taken; the duty was non delegable; it required a proper and conscientious focus on the statutory criteria; it included a duty of reasonable enquiry, the gathering of relevant information and consultation.

[21] In the present case it was submitted that the respondent had failed to take into account the protected characteristics of the petitioner, where the petitioner lived, her proximity to site, and the concerns that she had raised about harassment (production 6/3 letter of objection). In substance the respondent did nothing, paying lip service to its duty. It was only mentioned once in Report of Handling; there was no material showing that the respondent consciously and properly focused on the statutory duty. Production 6/6 (*Improving the Lives of Scotland's Gypsy/Travellers 2 | Action Plan 2024-2026*) provided ample material to show what should have been done. The cultural significance of Bobbin Mill itself merited a rigorous consideration.

[22] Reference was made to *Gartmore House v Loch Lomond and the Trossachs National Park Authority* [2022] CSIH 56; 2023 SC 105. Any such enquiry in this case could not be described as an “inquisitorial frolic” but rather a proper function in the decision making.

[23] The petitioner made reference to a number of documents to show the proposed structure and whereabouts as well as to the affidavits of the petitioner and others to vouch the concerns, as well as the decision in the Employment Tribunal dated 7 March 2008 in the case of *MacLennan v Gypsy Traveller Education and Information Project* 2008 ETZ4 (WR) (number 8 of the joint list of authorities). The petitioner was concerned that despite the

lapse of time between June 2024 and February 2025 she was not contacted about the impact which the development would have.

[24] The failure to properly consider the PSED rendered the decision-making as a whole unlawful.

[25] For these reasons the remedies sought should be granted.

Submissions by respondent

Adequacy of reasons

[26] The respondent submitted that the reasons were adequate. The respondent gave careful consideration to the terms of all the relevant policies within the development plan and in particular NPF4 policy 6(b)(i). The terms of the council officer's Report of Handling (RoH (production 6/2)) and the council's tree officer's consultation response dated 21 November 2024 (production 7/6). The council considered the issue of the potential presence of, and loss of, ancient woodland at the site in particular at paragraphs 101 to 118 of the Report of Handling.

[27] The council had concluded at paragraph 115 of the Report of Handling that the proposed development would "result in the loss of ancient woodland", engaging NPF4. However, as highlighted in the tree officer's consultation response, the vegetation on the edges of the planning application hosted non-native invasive species and dead trees the removal of which would not result in an adverse impact on the ancient woodland.

A number of trees were proposed for retention. Within the context of the overall Bobbin Mill woodland, the loss of trees would be minimal, and the removal of dead and invasive species would enhance the woodland habitat.

[28] Compensatory planting of additional trees was also proposed and formed part of the conditions imposed. The respondent noted at paragraph 116 that the proposals did not amount to a significant departure from the development plan. It also noted at paragraph 117 that conditions were recommended by the tree officer to ensure a pre-site meeting takes place to examine tree works and protection measures; a method statement was submitted for written approval of the respondent, to include details of how the removal of diseased trees and soil would be handled; and for a post-development tree report to be submitted. Those conditions were imposed on the planning permission granted as conditions 5, 6 and 7.

[29] Having regard to the Report of Handling as a whole, it is plain that the council concluded that the application proposed a development which would bring economic benefit to the area. Those were clear justifications in favour of the development, notwithstanding the minor effect in relation to woodland. The non-compliance with NPF4 policy 6(b)(i) was relatively minor and did not prevent the respondent concluding that any minor non-compliance with the development plan was outweighed by other material considerations concerning the economic and other benefits brought; in exercise of its planning judgement that was the overall conclusion that the council reached and in the circumstances, it was entitled to do so.

[30] Read as a whole the decision and the Report of Handling whose recommendations were adopted in the decision provide proper, adequate and intelligible reasons for the decision. An informed reader is not left in any real or substantial doubt as to what the reasons for the respondent's decision are, or what matters they did or did not take into account. The consideration given to the issue is set out in detail at paragraphs 101 to 118 of the Report of Handling. It was legitimate to take account of that material. In that context

reference was made to *Moray Council v the Scottish Ministers* [2006] CSIH 41; 2006 SC 691 (at paragraphs 28 - 30) and *R (Siraj) v Kirklees Metropolitan Council* [2010] EWCA Civ 1286 (at paragraphs 14 - 16). The reasons were adequate. The challenge should fail.

Submissions in relation to the Public Sector Equality Duty

[31] The respondent accepted that the petitioner and other residents of Bobbin Mill are Gypsy Travellers and that they share the protected characteristic of race. The obligation incumbent upon the respondent under section 149(1) of the 2010 Act was to have “due regard” to the matters mentioned. The respondent had had due regard to those matters throughout and by way of the processing of the planning application leading to the decision.

[32] The actions complained of were not acts of the respondent to which the PSED applies. In any event, the Report of Handling made reference to the concerns raised in respect of the effect on the traveller community from paragraph 123 et seq further considering the potential impact of noise pollution and air pollution, which the petitioner contended was an equalities issue. The petitioner had an opportunity to make full representations at the meeting of the Planning and Placemaking Committee of 5 June 2024, where the proposal was discussed. She had been asked various questions by the attending councillors as regards her equality concerns. The respondent did not fail to consider the matters covered by the PSED. The Report on Handling had regard to the petitioner’s concerns that the development could lead to increased levels of harassment. Having had due regard to the matters set out in section 149 of the 2010 Act, the weight to apply to any such consideration, and the conclusions to draw from those considerations were matters for the respondent, in the exercise of its discretion and planning judgement; see *R (Brown) v*

Secretary of State for Work and Pensions [2008] EWHC 3158 (Admin) at paragraph 82. The respondent had complied with its duty. This challenge should also fail.

Basis for decision

Adequacy of reasons

[33] The law is well settled, the precise application depending on the circumstances. The nature and extent of the reason(s) required will vary from case to case. The test for what is required for reasons is well established. It originates in *Wordie Property Co Ltd v Secretary of State for Scotland* 1984 SLT 345. Reasons need not be provided in relation to every possible part of the case. What is required is that they “deal with the substantial questions in issue in an intelligible way” (*Wordie*, page 348). The reasons should be read as a whole: *City of Edinburgh Council v MDN* 2011 SC 513. The court need not exercise a needlessly exacting standard by some detailed textual analysis and criticism. The decision maker is entitled to confine themselves to the determining issue. Concision of reasoning should seldom be subject of criticism. Reasons which are intelligible and adequate can be expressed concisely. That is especially appropriate where those affected by the decision are aware of the issues involved and the arguments which have been advanced (*Moray Council*).

[34] In *Siraj* the court of appeal stressed:

“15 When considering the adequacy of summary reasons for a grant of planning permission, it is necessary to have regard to the surrounding circumstances, precisely because the reasons are an attempt to summarise the outcome of what has been a more extensive decision making process. For example, a fuller summary of the reasons for granting planning permission may well be necessary where the members have granted planning permission contrary to an officer's recommendation. In those circumstances, a member of the public with an interest in challenging the lawfulness of planning permission will not necessarily be able to ascertain from the officer's report whether, in granting planning permission, the members correctly interpreted the local policies and took all relevant matters into account and disregarded irrelevant matters.

16. Where on the other hand the members have followed their officers' recommendation, and there is no indication that they have disagreed with the reasoning in the report which lead to that recommendation, then a relatively brief summary of reasons for the grant of planning permission may well be adequate. Mr Roe referred us to the observations of Collins J in paragraph 28 of his judgment in *R (on the application of Midcounties Co-operative Ltd) v Forest of Dean DC* [2007] EWHC 1714 (Admin). For my part, I would respectfully endorse the observations of Sir Michael Harrison in paragraphs 47 to 50 of *R(Ling)(Bridlington) Limited v East Riding of Yorkshire County Council* [2006] EWHC 1604 (Admin)."

In *South Buckinghamshire District Council v Porter (No.2)* [2004] 1 WLR 1953, Lord Brown of Eaton-Under Heywood observed at paragraph 36 that:

"The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issues of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced."

[35] In *R (on the application of Trashorfield Ltd) v Bristol City Council*, 2014 WL 979032

Mr Justice Hickinbottom made the following observations relevant to consideration of this petition:

"13. The legal principles relevant to this ground are well-trodden. They are as follows

- i) Section 70(2) of the Town and Country Planning Act 1990 requires that planning authorities, in dealing with an application for planning permission, must have regard to all 'material considerations'. What amounts to a material consideration is a question of law. Statements of central government policy are material considerations. Since March 2012,

such statements are set out mainly in the National Planning Policy Framework ('the NPPF').

- ii) Whereas what amounts to a material consideration is a matter of law the weight to be given to such considerations – the part any particular material consideration should play in the decision-making process, if any – is a question of planning judgment, and is a matter entirely for those to whom Parliament has assigned the task of planning decision making. They are democratically elected bodies (e.g. a committee of councillors), or persons accountable such a body; and it is an important principle that planning decisions, which inevitably involve the public interest, are made by those who are ultimately democratically accountable (see, e.g. *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295 at [69], per Lord Hoffmann; and *R (Morge) v Hampshire County Council* [2011] UKSC 2 at [36], per Baroness Hale). Thus, an application for judicial review does not provide an open opportunity for a disappointed party to contest the planning merits of a decision. The court will intervene, and will only intervene, on conventional public law grounds, which focus on process; and, if a challenge is successful, the court will usually quash the decision and send the matter back to the planning decision-maker to redetermine the planning application lawfully.
- iii) A local planning authority usually delegates its planning functions to a planning committee of councillors, who act on the basis of information provided by case officers in the form of a report. Such a report usually also includes a recommendation as to how the application should be dealt with. In the absence of contrary evidence, it is a reasonable inference that, where a recommendation is adopted, members of the planning committee follow the reasoning of the report. The officers' report is therefore often a crucial document. It has to be sufficiently clear and full to enable councillors to understand the important issues and the material considerations that bear upon them; and decide those issues within the limits of planning judgment that the law allows them. Whilst the report must be sufficient for those purposes, the courts have stressed the need for reports to be concise and focused, and the dangers of reports being too long, elaborate or defensive:

'... [T]he courts should not impose too high a standard upon such reports, for otherwise their whole purpose will be defeated: the councillors either will not read them or will not have a clear enough grasp of the issues to make a decision for themselves.' (*Morge* at [36], per Baroness Hale).

'The court should focus on the substance of a report by officers given in the present sort of context, to see whether it has sufficiently drawn councillors' attention to the proper approach required by the law and

material considerations, rather than to insist upon an elaborate citation of underlying background materials. Otherwise, there will be a danger that officers will draft reports with excessive defensiveness, lengthening them and over-burdening them with quotation of materials, which may have a tendency to undermine the willingness and ability of busy council members to read and digest them effectively.’ (R (Maxwell) v Wiltshire Council [2011] EWHC 1840 (Admin) at [43], per Sales J).

The assessment of how much and what information should go into a report to enable it to perform its function is itself a matter for the officers, exercising their own expert judgment (R v Mendip District Council ex parte Fabre (2000) 80 P&CR 500 at page 509)

- iv) Of course, if the material included is insufficient to enable the Planning Committee to perform its function, or if it is misleading, the decision taken by the Committee on the basis of a report may be challengeable. However:

‘[A]n application for judicial review based on criticisms of the planning officers’ report will not normally begin to merit consideration unless the overall effect of the report significantly misleads the committee about material matters which thereafter are left uncorrected at the meeting of the planning committee before the relevant decision is taken’ (Oxton Farms, Samuel Smiths Old Brewery (Tadcaster) v Selby District Council (18 April 1997) 1997 WL 1106106, per Judge LJ).

- v) Furthermore, when challenged, officers’ reports are not to be subjected to the same exegesis that might be appropriate for the interpretation of a statute: what is required is a fair reading of the report as a whole (R (Zurich Assurance Limited trading as Threadneedle Property Investments) v North Lincolnshire Council [2012] EWHC 3708 (Admin) at [15]).
- vi) In construing reports, it also has to be borne in mind that they are addressed to a ‘knowledgeable readership’, including council members ‘who, by virtue of that membership, may be expected to have a substantial local and background knowledge’ (Fabre at page 509, per Sullivan J as he then was). That background knowledge includes ‘a working knowledge of the statutory test’ for determination of a planning application (Oxton Farms, per Pill LJ). Furthermore, in deciding whether they have got sufficient information to make a properly informed decision or request further information or analysis, again that involves the exercise of judgment on their part. Given the experience and expertise of Planning Committee members is coupled with the fact that they are democratically elected, the judicial approach to challenges to their decisions should be marked by particular prudence and caution (see Bishops Stortford Civic Federation v East Hertfordshire District Council [2014] EWHC 348 (Admin) at [40]-[41] per Cranston J).”

[36] The courts have made it clear that there are a range of acceptable adequate decisions and that the court should not easily criticise reasons which were imperfect if the dissatisfied but informed observer could understand what the reasons were. The approach apparently contended for by the petitioner, that the observer is restricted to only the decision letter, is an over puristic or legalistic approach; I cannot accept that the interested observer is confined, as a matter of law, to a passive or even inert state; knowing or suspecting where the answer may lie, but unable for want of a precise trigger in the stated reason, or justification, to look at other material. That undermines the role of the decision maker and overstates the role of the court in this supervisory jurisdiction. I consider that reference to the Report of Handling is legitimate.

[37] I acknowledge that the reason given in the decision letter might be seen as brief, generic and formulaic saying:

“Justification

There are material considerations to justify a departure from the Development Plan otherwise, the proposal is generally in accordance with the Development Plan.
There are no material reasons which justify refusal,”

[38] However, for the reasons explained above, I am satisfied that reference can be made to the Report of Handling which makes it clear in the executive summary that the rationale was as follows:

“This report reconsiders this application as the previously issued permission was quashed and the case returned to the Council for reconsideration, following a judicial review. That previous decision to approve was taken at the Planning and Placemaking Committee on 5 June 2024.

This report recommends approval of the application as, whilst the development is contrary to NPF4 Policy 6 b) i) due to the loss of ancient woodland, it is considered that the loss of trees would be limited and acceptable due to other material considerations, and the removal of dead and invasive species will enhance and improve the woodland and woodland habitat. Further, looking at the Development

Plan in the round the development is considered to comply with its wider relevant provisions and there are no material considerations which are considered to justify refusal of the application.”

[39] In the decision letter, the respondent discusses in terms the provisions of the NPF4 policy, concluding that the central core of the development did not contain trees and was not considered ancient woodland, although at the eastern periphery the respondent accepted that for the purposes of the application to include ancient woodland, engaging NPF4 6(b)(i). The decision is clear; the effect if any on the woodland was *de minimis*; it is not a contradiction in terms to say that a *de minimis* departure from the policy was a material consideration in determining that the policy could be departed from, standing the views about the economic benefits of the development identified in the recommendation.

[40] I also reject the notion from the petitioner that because the application was hard or robustly fought that there is some heightened obligation to give detailed (or more detailed) reasons. As was observed in *Siraj*, there may be a heightened obligation to expand on reasons if a committee ignores the recommendation of its officers, but the existence of opinions “resolutely held and forcefully voiced” (as put in *Trashorfield* paragraph 5) does not of itself impose a heightened responsibility to give more detailed reasons.

[41] And the reasons must be read in context, which context includes the conditions attached to the grant of the application arising from the ancient woodlands issue.

[42] The petitioner having raised the issue of ancient woodland must be regarded as informed; there is a detailed analysis of the woodland. Although the reference to material considerations could have been more detailed, the *de minimis* affect upon the ancient woodland, the condition of the relevant trees and the steps taken to preserve are sufficient for the purposes of providing a lawful decision. The reasons given while brief and making reference to the Report of Handling are adequate. The decision makers proceeded on the

basis of the recommendation of the officers. The petitioner will know from the reasons and the report the basis for the decision. There is no ambiguity or uncertainty.

[43] If I am wrong about the extent of the challenge (in that the challenge to the reasoning is wider than the woodland issue), then it is clear again by reference to the Report of Handling that the material consideration in relation to the application included the objections, as well as the relevant parts of NPF4 and the respondent's own Local Development Plan. The Report of Handling concluded at paragraph 136 that the positive aspects of the application were material considerations which justified a departure from the NPF4 policy 6(b)(i), given that the proposal was otherwise considered to comply with NPF4. The nature and extent of the conditions imposed are consistent with the consideration given.

As was said in *Trashorfield*:

"13...ii) Whereas what amounts to a material consideration is a matter of law the weight to be given to such considerations – the part any particular material consideration should play in the decision-making process, if any – is a question of planning judgment, and is a matter entirely for those to whom Parliament has assigned the task of planning decision-making."

[44] The decision letter read along with the Report of Handling provide sufficient information for the informed reader to understand why the respondent did what it did. The challenge to the legality of the decision in relation to the adequacy of reasoning fails.

Second issue - PSED

[45] The petitioner (and her brother, who provided affidavit evidence with others) are to be commended for their work in keeping the rights and protected characteristics of the Gypsy Traveller community in the public consciousness; the material provided was

interesting, important and even chastening¹, but the concern of the court is with its relevance to the judicial review of an application for planning permission. The issue of PSED cannot eclipse what is a routine application for planning permission which happened to be close to a Gypsy Traveller site.

[46] I have recorded that significant reference was made to the Equality and Human Rights Commission Technical Guidance on the Public Sector Equality Duty: Scotland.

I observe that in the context of judicial review it is generally inappropriate for a party to seek to rely upon documents (or to advance arguments based on those documents) which were not available to the decision maker: see Lord Reed at para [65] in *Chief Constable of Lothian and Borders v Lothian and Borders Police Board* [2005] CSOH 32; 2005 SLT 315. The detailed look at the material were not part of the assessment process undertaken by the respondent. I proceed on the basis that the document was being referred to in order to frame the criticism of the respondent's approach.

[47] The modern accepted exposition of the principles to be applied relating to consultation and the PSED is from *R (Bracking) v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345 where McCombe LJ said:

"25.(1) As stated by Arden LJ in *R (Elias) v Secretary of State for Defence* [2006] 1 WLR 3213; [2006] EWCA Civ 1293 at [274], equality duties are an integral and important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation.

(2) An important evidential element in the demonstration of the discharge of the duty is the recording of the steps taken by the decision maker in seeking to meet the statutory requirements: *R (BAPIO Action Ltd) v Secretary of State for*

¹ During the week in which this petition was heard, the First Minister John Swinney apologised for a state-sanctioned social experiment on Scotland's Gypsy Travellers. In what was known as the "Tinker Experiments", which ran from the 1940s to 1980s, authorities aimed to "settle" travellers by forcing them to leave their lives on the road for permanent settlements. The first minister told MSPs: "The Tinker Experiments should not have happened. Those policies were wrong and we recognise it is still hurting so many today. On behalf of Scotland, we are sorry."

the Home Department [2007] EWHC 199 (QB) (Stanley Burnton J (as he then was)).

- (3) The relevant duty is upon the Minister or other decision maker personally. What matters is what he or she took into account and what he or she knew. Thus, the Minister or decision maker cannot be taken to know what his or her officials know or what may have been in the minds of officials in proffering their advice: *R (National Association of Health Stores) v Department of Health* [2005] EWCA Civ 154 at [26 – 27] per Sedley LJ.
- (4) A Minister must assess the risk and extent of any adverse impact and the ways in which such risk may be eliminated before the adoption of a proposed policy and not merely as a ‘rearguard action’, following a concluded decision: per Moses LJ, sitting as a Judge of the Administrative Court, in *Kaur & Shah v LB Ealing* [2008] EWHC 2062 (Admin) at [23 – 24].
- (5) These and other points were reviewed by Aikens LJ, giving the judgment of the Divisional Court, in *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin), as follows:
 - i) The public authority decision maker must be aware of the duty to have ‘due regard’ to the relevant matters;
 - ii) The duty must be fulfilled before and at the time when a particular policy is being considered;
 - iii) The duty must be ‘exercised in substance, with rigour, and with an open mind’. It is not a question of ‘ticking boxes’; while there is no duty to make express reference to the regard paid to the relevant duty, reference to it and to the relevant criteria reduces the scope for argument;
 - iv) The duty is non-delegable; and
 - v) Is a continuing one.
 - vi) It is good practice for a decision maker to keep records demonstrating consideration of the duty.’
- (6) ‘[G]eneral regard to issues of equality is not the same as having specific regard, by way of conscious approach to the statutory criteria.’ (per Davis J (as he then was) in *R (Meany) v Harlow DC* [2009] EWHC 559 (Admin) at [84], approved in this court in *R (Bailey) v Brent LBC* [2011] EWCA Civ 1586 at [74-75].)
- (7) Officials reporting to or advising Ministers/other public authority decision makers, on matters material to the discharge of the duty, must not merely tell the Minister/decision maker what he/she wants to hear but they have to be ‘rigorous in both enquiring and reporting to them’: *R (Domb) v Hammersmith & Fulham LBC* [2009] EWCA Civ 941 at [79] per Sedley LJ.
- (8) Finally, and with respect, it is I think, helpful to recall passages from the judgment of my Lord, Elias LJ, in *R (Hurley & Moore) v Secretary of State for*

Business, Innovation and Skills [2012] EWHC 201 (Admin) (Divisional Court) as follows:

(i) At paragraphs [77-78]

[77] Contrary to a submission advanced by Ms Mountfield, I do not accept that this means that it is for the court to determine whether appropriate weight has been given to the duty. Provided the court is satisfied that there has been a rigorous consideration of the duty, so that there is a proper appreciation of the potential impact of the decision on equality objectives and the desirability of promoting them, then as Dyson LJ in *Baker* (para [34]) made clear, it is for the decision maker to decide how much weight should be given to the various factors informing the decision.

[78] The concept of 'due regard' requires the court to ensure that there has been a proper and conscientious focus on the statutory criteria, but if that is done, the court cannot interfere with the decision simply because it would have given greater weight to the equality implications of the decision than did the decision maker. In short, the decision maker must be clear precisely what the equality implications are when he puts them in the balance, and he must recognise the desirability of achieving them, but ultimately it is for him to decide what weight they should be given in the light of all relevant factors. If Ms Mountfield's submissions on this point were correct, it would allow unelected judges to review on substantive merits grounds almost all aspects of public decision making.'

(ii) At paragraphs [89-90]

[89] It is also alleged that the PSED in this case involves a duty of inquiry. The submission is that the combination of the principles in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 and the duty of due regard under the statute requires public authorities to be properly informed before taking a decision. If the relevant material is not available, there will be a duty to acquire it and this will frequently mean that some further consultation with appropriate groups is required. Ms Mountfield referred to the following passage from the judgment of Aikens LJ in *Brown* (para [85]):

'... the public authority concerned will, in our view, have to have due regard to the *need* to take steps to gather relevant information in order that it can properly take steps to take into account disabled persons' disabilities in the context of the particular function under consideration.'

[90] I respectfully agree....."

[48] The PSED was addressed in *R (Jewish Rights Watch) v Leicester City Council*

(CA) [2019] PTSR 488 where Sales LJ, as he then was, said:

“32 ... Given the enormous range of functions to which the PSED applies, it may be justified in some contexts for a decision-maker not to advert to the matters in section 149(1) if, at the time of acting, they appear to have nothing to do with the action in question or if it appears positively that they can have no bearing on the decision under consideration (as in *R (Lewisham London Borough Council) v Assessment and Qualifications Alliance* [2013] EWHC 211 (Admin); [2013] PTSR D18, paras 145–148).”

[49] In *Hotak v Southwark LBC and others* [2016] AC 811 the Supreme Court considered the approach to be taken as follows:

“74 ... Wilson LJ explained that the Parliamentary intention behind section 149 was that there should ‘be a culture of greater awareness of the existence and legal consequences of disability’: *Pieretti v Enfield London Borough Council* [2011] PTSR 565, para 28. He went on to say in para 33 that the extent of the ‘regard’ which must be had to the six aspects of the duty (now in subsections (1) and (3) of section 149 of the 2010 Act) must be what is ‘appropriate in all the circumstances’. Lord Clarke of Stone-cum-Ebony JSC suggested in argument that this was not a particularly helpful guide and I agree with him. However, in the light of the word ‘due’ in section 149(1), I do not think it is possible to be more precise or prescriptive, given that the weight and extent of the duty are highly fact-sensitive and dependent on individual judgment.”

[50] In looking at the duty in the Scottish context and in relation to the circumstances of this petition, I take into account the observations in *Gartmore* at paras [36] and [37]:

“[36] It is no doubt correct to state, at a high-level of generality that, whatever might have been submitted to the reporter, he remained under a duty to have due regard to the various factors specified in sec 149 of the 2010 Act. The court agrees with *R (Baker) v Secretary of State for Communities and Local Government* (Dyson LJ, para 36). However, the context in which the reporter was operating was a local inquiry for which measures had been taken to ensure equality in participation. The reporter heard submissions about those with a protected characteristic. It was then his function to reach a recommendation based on the submissions made to him by the respondents and the objectors, including the petitioners, rather than engaging in any inquisitorial frolic (*Taylor v Scottish Ministers* (No 2), Lord President (Carloway), delivering the opinion of the court, paras 34, 35).

[37] The reporter addressed the matters which were raised before him in relation to the public sector equality duty. These concerned the interruption, or disruption, of the activities of children, vulnerable persons and religious groups. The reporter

reasoned that the limited scope of any interference, and the ability to temper the effects of such interference by taking temporary measures, was not such as justified a refusal to incorporate new paths which would enhance the access rights of all. The exercise was one of balancing the different weights to be attached to the matters raised and reaching a planning judgement on where the scales came to rest. The reporter reached a view on the relative weights; a matter which is not susceptible to review. There was no need for the reporter to make a specific reference to the 2010 Act when he had done what was important; addressed the specific problems raised by the petitioners and Green Routes in relation to those with protected characteristics (*R (Baker) v Secretary of State for Communities and Local Government*, Dyson LJ, para 37). Once more, there is no difficulty in understanding the reporter's reasoning and the material considerations which were taken into account. The challenge on that basis also fails."

[51] The decision makers were aware in this case of the petitioner's views and that those reflected the wider Gypsy Traveller community; the report and the decision makers addressed the particular concerns, balancing the different weights to be attached and reaching a view on the relative weights. The respondent addressed the specific concerns raised by the petitioner and in relation to those with protected characteristics. The decision is not vitiated by any failure to consider the PSED in terms.

[52] I am fortified in my view by the recent pertinent observations of the Inner House in *McLean v Aberdeen City Council* 2025 CSIH 13 as follows:

"[9] Various authorities on the subject from England and Wales were cited, however there was nothing between the parties as to the law. We do not consider it necessary to rehearse the well-established legal principles relating to the section 149 obligations on the Council; they can be found in *Bracking v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345 at paragraph 25. It is plain that not every decision by a public body requires an equality impact assessment; were it otherwise public administration would grind to a halt. In *Sheakh v Lambeth LBC* [2022] EWCA Civ 457 it was noted that section 149 does not mandate the production of an assessment at any particular moment in a process of decision-making (paragraph 10). In *Shrewsbury and Atcham BC v Secretary of State for Communities and Local Government* [2008] EWCA Civ 148 it was observed that, generally, judicial review is concerned with actions or other events which have, or will have, substantive legal consequences (paragraph 32)."

[53] The extent of the regard to be had will depend on the circumstances of the case.

"Due regard" means giving appropriate weight attention and consideration to the terms of

the PSED depending on the context; one size does not fit all. There is a range of regard to which the decision maker is expected to have from high (*R (Hajrula) v London Councils* [2011] EWHC 448 (Admin)) to low (*R (Lewisham London borough Council) v Assessment and Qualifications Alliance* [2013] EWHC 211 (Admin)).

[54] Important as the matters raised are to the petitioner and her family, what the court is dealing with is a planning application for the development of a brewery and tap room. The concerns expressed are not core to the consideration of a planning application. The perceived increase in risk was not as the respondent points out said to be as a result of any actions by the respondent. The issues raised so far as relevant to the application have been addressed and considered to be satisfactorily addressed in line with national and local planning policy (Report of Handling paragraphs 122 - 127). There was no need to make specific reference to the 2010 Act beyond that in paragraph 42 of the Report of Handling, which reflected that the matter was part of the overall consideration.

[55] The second challenge also fails.

[56] I therefore sustain pleas in law numbers 3, 4.5 and 6 for the respondent, and refuse to grant the remedies sought in the petition. I will reserve expenses at the request of parties who can enrol for disposal of the expenses if agreement cannot be reached.