From:	Angus Murdoch <>
Sent:	30 June 2026 17:13
To:	TeamE1
Cc:	Parminder Sanghera
Subject:	Appellant's Final Comments *URGENT* Plots at Stovolds Hill, Cranleigh APP/R3650/C/25/3366481, APP/R3650/C/25/3366483, APP/R3650/C/25/3366493, APP/R3650/C/25/3367392, APP/R3650/W/25/3366387 & APP/R3650/W/25/3367393
Attachments:	JR Pre-action letter to Waverely Borough Council - FINAL 30.06.26.pdf; Smith _Casey v Crawley BC Approved Judgment.docx.pdf
Importance:	High

Good afternoon, Corrina

This email, that below it and the attachments hereto represent the Appellant's Final Comments on LPA's Ground G Statement of Case [GGSoC]:

At 2.4 of their GGSoC the LPA list the planning applications that have been submitted for this Appeal site and those nearby but they failed to acknowledge that on 4th May 2026, I submitted a planning application for Pitch 1 to the LPA. The LPA gave this application the reference WA/2026/01044 and validated the application on 4 June 2026.

At 4.3 and 4.4 the LPA refer, *inter alia*, to the issues of Landscape Character, Flooding and Ecology as representing harm alleged to be caused by the development which requires enforcement action. Planning application WA/2026/01044 attached all of the Flooding, Landscape and Ecology evidence submitted by the Appellant in his s78 Appeal in February 2026 which addresses all of those concerns. The LPA had objected to those documents being accepted in the s78 Appeal due to their allegation that the *Wheatcroft* principles would be offended as no public consultation had taken place on them at application stage (an allegation that is not accepted by the Appellant). Application WA/2026/01044 provided a reasonable alternative route through which that evidence would then be subject to public consultation.

However, on 26th June 2026, the LPA exercised the power under s70C of the Town and Country Planning Act 1990 to Decline to Determine [DTD] WA/2026/01044. Today the Appellant's Solicitor has issued a Pre-Action Judicial Review Letter Before Action [LBA] (attached) to the LPA in relation to that DTD decision. The Appellant relies on the contents of that LBA and attached judgment in his Ground G Appeal.

4.7 - The LPA's claim in the GGSoC that there are alternative sites available is rejected by the Appellant for the reasons stated in his Ground G Statement.

Many thanks

Angus

Dr Angus Murdoch BA MA MSc PhD MRTPI

Director Murdoch Planning Limited

T 07899908343

From: Parminder Sanghera
Sent: 30 June 2026 16:09
To: Lewis.Jones@waverley.gov.uk; John Bennett
Cc: Angus Murdoch
Subject: (015892/6)URGENT - Judicial Review Pre-action letter
Importance: High

Dear Mr Jones and Mr Bennett

Please find attached above a Judicial Review Pre-action letter on behalf of my client Mr Barney Doherty.

I look forward to hearing from you within 14 days. I would appreciate it if you could confirm safe receipt.

Kind regards

Parminder

Parminder Sanghera (Solicitor and Public Law Supervisor)
parminder@communitylawpartnership.co.uk

The Community Law Partnership
4th Floor, Clarence Chambers
39 Corporation Street
Birmingham B2 4LS

[redacted]

Please note that my working days are Monday to Thursday.

Website: www.communitylawpartnership.co.uk
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GU7 1HR

Our Ref: 015892/6/PS/ Parminder Sanghera
Your Ref: Lewis Jones

30 June 2026

[redacted]

JUDICIAL REVIEW PRE ACTION PROTOCOL LETTER

Dear Sirs

Re: Our Client – Barney Doherty
Planning Application WA/2026/01044
Pitch 1, Land North of Lydia Park, Stovolds Hill, Cranleigh

The Claimant

Barney Doherty

The Defendant

Waverley Borough Council.

Reference Details

See above.

The Details of the matter being challenged

The Defendant's decision of 26 June 2026 to decline to determine the application WA/2026/01044 – by invoking s70c of the Town and Country Planning Act 1990.

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Partners: Nashin Akbar, Samitra Balu, Craig Keenan, Mike McIlvaney, Holly Sherratt

The issue

An application for planning permission was submitted on behalf of the Claimant Mr Doherty. The application was for the Change of use of land to provide 1 gypsy pitch comprising 1 mobile home and 1 touring caravan; erection of 1 day room with associated parking hardstanding. That application (WA/2025/00495) was appealed for non-determination on 10 June 2025.

The Defendant issued an Enforcement Notice (EN) dated 22 April 2025 ref: EN/2025/02 in respect of the development of the land. The EN stated the following:

Without planning permission:

"(i) The material change of use of the Land to a residential caravan site for occupation by Gypsies and Travellers. And all the associated development facilitating the material change of use, which includes:
i) The erection of fencing on the Land;
ii) The erection of an outbuilding;
iii) The installation of services;
(ii) An engineering operation comprising the laying of hardstanding within the area outlined in red on the attached plan."

The requirements of the notice are:

"1) Cease the use of the Land as a residential caravan site
2) Remove from the Land:
(i) All mobile homes/caravans and touring caravans
(ii) All structures
(iii) All domestic paraphernalia
(iv) All services provided for the purposes of residential accommodation
(v) All fencing and gates
3) Remove the hardstanding (including that constructed over and within an ordinary watercourse) in the area outlined in red on the attached plan.
4) Remove from the Land all resultant materials arising from compliance with step (3) above.
5) Restore the land to its condition before the breach took place."

The Claimant to lodged an appeal against the EN at the same time as the s.78 appeal for non-determination (10 June 2026). The EN appeal is proceeding under ground (g) only. The appeals are due to be determined by Inspector Steen in September 2026. The s78 appeal is to be heard by way of a Public Inquiry and the EN appeal by way of Written Representations.

The Planning Inspectorate (PINS) set down a timetable for the submission of documents and Proofs of Evidence for the Inquiry and Proofs were to be lodged with PINS by 10 February 2026. Dr Murdoch, the Claimant's Planning Consultant, submitted Proofs of Evidence in relation to Flooding (Mr Quigg), Ecology (Mr Coe) and Landscape (Mr Crandon).

The Defendant challenged the submission of these proofs. The Defendant states this material should have been submitted when the planning application was made rather than in connection with the s78 appeal. The Defendant's position is that the material should not be accepted as it amounts to a substantial change to the proposal and this is contrary to the principles established in *Bernard Wheatcroft Ltd v SSE [1982] JPL 37.*

Submissions have been provided to the Inspector by both parties, and we await a determination from the Inspector. Without prejudice to the submissions made on behalf of the Claimant in relation to this issue, Dr Murdoch was instructed to submit another application for planning permission for the Claimant. This application included the evidence on Flooding, Ecology and Landscape. The application was received by the Defendant on 6 May 2026 given a reference number - WA/2026/01044 and validated on 4 June 2026. Therefore the 8 week deadline to determine the application would have been 30 July 2026, with consultation comments due by 5 July 2026. On 26 June 2026, the Defendant made a decision to invoke s70c and decline to determine the application.

*"**70C Power to decline to determine retrospective application***

(1) A local planning authority in England may decline to determine an application for planning permission for the development of any land 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.

(2) For the purposes of the operation of this section in relation to any particular application for planning permission, a "pre-existing enforcement notice" is an enforcement notice issued before the application was received by the local planning authority."

The Defendant's decision of 26 June 2026 stated: ***"****The local planning authority* ***DECLINE TO DETERMINE*** *the application under Section 70C of the Town and Country Planning Act 1990 (as amended) for the following reason:*

1. The application relates to development of land to which a pre-existing enforcement notice relates and seeks permission for the retention of matters specified in the enforcement notice as constituting a breach of planning control."

It is clear from the Defendant's decision of 26 June 2026 that it is invoking s70c due to the pre-existing EN. The case officer – John Bennett has also drafted a report with a recommendation to decline to determine and that recommendation was accepted by Joanne Hollingdale.

No consideration has been taken in relation to the evidence put forward by the Claimant on Flooding, Ecology and Landscape, or the purpose behind the provision of such evidence, and it has simply declined to determine the application purely because it has the power to do so.

It should also be noted that Parliament's intention was to provide local planning authorities with extra powers to prevent repeat planning applications being used as a mechanism to delay enforcement action.

s70c is a discretionary power and not something which local planning authorities must invoke when faced with the position this Claimant is in. There is no issue of delay in this matter as the Claimant would wish to appeal any refusal of planning permission and have the s78 appeal joined with the current appeal which is to be heard in September 2026.

By simply invoking s70c the Defendant is foreclosing its mind of the possibility of a planning permission being granted by an Inspector appointed by the Secretary of State. The Defendant has failed to take obvious relevant matters into consideration.

There are also Article 6 factors to be taken into consideration. Article 6 provides:

"*(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law …"*

On the facts of this case, the use of the power to decline to determine is insufficiently justified and disproportionate. This is, we submit, a matter that the court can decide for itself. A relevant Article 8 consideration which the Defendant has not addressed is the impact on the Claimant's Article 8 rights of shutting him out from having his application determined when the matters relied on by the Claimant could support a different outcome.

This case is to be distinguished from ***R (Wingrove) V Startford-on-Avon DC*** **[2015] EWHC 287 (Admin)** given that the Court held that the planning application submitted by Mrs Wingrove was designed to delay further enforcement proceedings that were then pending, that Claimant having been prosecuted repeatedly for breaching extant Enforcement and other Notices:

> *"4. The claimant is no stranger to enforcement action in relation to her occupation of Fox Farm. In 2005 an issue arose as to the stationing of caravans on the land and the sub-division of a dwelling to create two separate dwellings. Ultimately, an enforcement notice was issued in relation to the dwellings. It was complied with some time later. In 2006 the Council referred the claimant's tipping of work materials on the land to the Environment Agency, which prosecuted her and, on her pleading guilty she was fined £1250 at Rugby Magistrates Court. In April 2010, the Council prosecuted her at Leamington Magistrates Court for non-compliance with a planning contravention notice and in 2010 she was fined £250. Later in 2010 the Council became concerned about the change of use of the land and later issued an enforcement notice, with which the claimant complied.*
> …
>
> *14. The third application for retrospective planning permission, on 21 March 2014, was in the same terms as that quoted for the second application. In submitting it on the claimant's behalf, Framptons said in the covering letter that it was to be hoped that in consequence of its receipt,*
>
> > *"a decision to prosecute against non-compliance with the enforcement notice will be held over."*

…

16. The decision letter was accompanied by an officer's report, which contained further reasoning. The report reiterated that if the claimant had wanted the planning merits to be considered it should have appealed the enforcement notice. It added:

> *"There has been no pre-application discussion on the merits of the development ahead of submitting the planning application. It is therefore hard to judge the applicant's motivation for making it;* ***however, given that the notice now needs to be complied with in order to avoid criminal proceedings, it is likely that a strong motivation will be the applicant's desire to maintain occupation of the units, whilst avoiding further proceedings.*** *The applicant may believe that* ***submitting a planning application is likely to persuade the Council to put any further proceedings on hold whilst the planning merits are considered.****"*

The Claimant's situation is to be distinguished from Mrs Wingrove's. This Claimant has never had a determination on the site in question. His personal circumstances have never been taken into consideration.

At paragraph 30 in *Wingrove*, the Court identified the mischief against which s70C was directed:

> "*Section 70C confers a wide discretionary power on local planning authorities to decline to determine a retrospective planning application for a development, subject to an enforcement notice.* ***The legislative history of section 70C demonstrates that Parliament's intention was to provide a tool to local planning authorities to prevent retrospective planning applications being used to delay enforcement action being taken against a development.*** *It seems to me that there is a legislative steer in favour of exercising the discretion, especially since an enforcement notice can be appealed and the planning merits thereby canvassed. Since* ***delay is the bugbear against which the section is directed****,* ***a claimant's actual motives to use a retrospective planning application to delay matters*** *is clearly a consideration in favour of a decision to invoke section 70C."*

In contrast to the position in *Wingrove*, in this case, the Claimant's planning application was not submitted to avoid or delay enforcement proceedings. It has been submitted due to the stance taken by the Defendant in relation to the evidence on Flooding Ecology and Landscape. It is a pragmatic resolution to an unnecessary dispute.

At paragraph 31 of *Wingrove*, the Court held:

> *"There may be* ***factors pointing against exercising the discretion in section 70C to decline to determine an application which for a local planning authority to ignore would open their decision to a public law challenge.****"*

The Defendant has failed to take these matters into consideration and therefore its decision is open to a public law challenge.

We now move on to consider what factors may support such a public law challenge. The case of ***R (O'Brien) v South Cambridgeshire DC*** **[2016] EWHC 36 (Admin)** is relevant here.

Firstly, at paragraph 23 of *O'Brien,* the Court made clear the extremely limited ground (singular) of challenge in that case:

> *"The Claimant sought judicial review of the Defendant's decision of the 10 April 2015 declining to determine the Claimant's application for planning permission dated 28 March 2015.* ***The Claimant did not seek to challenge the decision on the grounds that it involved an unlawful exercise of discretion, applying usual public law or "Wednesbury" principles.*** *Rather, the sole ground of challenge in the claim form was that, on a proper interpretation of Article 13(1)(b) of the Order, the power conferred by section 70C of the 1990 Act (as introduced into that Act by the 2011 Act) did not apply where the enforcement notice relied upon was issued before the 6 April 2012.*

At paragraph 33 of *O'Brien,* the Court held:

> *"…Circumstances where it may be appropriate to exercise the discretion and determine the application for planning permission include situations* ***where there has been a relevant change in the development plan, or where there has been a change in other material planning considerations, such that the unauthorised development might now be granted planning permission.*** *The exercise of that discretion will be subject to judicial review on the usual principles of public law.* ***If there were circumstances where a local planning authority exercised the discretion and refused to determine an application for planning permission in circumstances that were unlawful, an individual would be able to seek judicial review of that decision."***

The failure to consider changed material considerations supports a public law challenge to a s70C decision is discussed again at paragraph 44 of *O'Brien* :

> *"The planning authority has a discretion to do so (for example, where the development plan has changed,* ***or other material planning considerations have changed****, so that the underlying planning merits may be different and it may be appropriate to grant planning permission for the unauthorised development)."*

Thus, grounds for a public law challenge based on a Defendant's failure to consider whether material considerations have changed is thus supported by both *Wingrove* and *O'Brien*. Clearly, the Court accepts that considering whether material considerations have changed involves a different exercise than considering the determining the *"full planning merits"* of a proposal per paragraph 31 *Wingrove*.

Moving on chronologically, the case of *Banghard* (handed down in September 2017), we can see that the issue of delay is again raised: *"Cranston J* [in O'Brien] *refused the judicial review. The following two passages are the most important for present purposes:*

> *"21. In an illuminating article on the history of the relevant legal provisions, Professor Michael Purdue suggests that although an application for retrospective planning permission might appear unnecessary when the enforcement notice can be appealed, it might still be made for tactical reasons: Professor Michael Purdue, "Reform of the Enforcement of Planning Control: Where Are We Now?" [2012] J.P.L. 795.* ***Section 70C, he states, was directed at the problem of delay under the existing provisions.*** *Of the situation where an application for retrospective planning permission is made where enforcement action has already been taken, Professor Purdue writes:*
>
> *"****The purpose must be to prevent a retrospective applications being made just to delay enforcement…"***

In terms of *Wednesbury* principles, *Banghard* is clear that LPAs:

> ***"must still exercise that discretion rationally and to achieve the purposes of the statute.*** *It cannot simply use s.70C because it is quicker and cheaper than determining the application and thus risking a further appeal."*

The statutory purpose of avoiding delay is again raised at paragraphs 28 and 33 in *Banghard*:

> *"…it is important to have closely in mind the purpose of s.70C and ensure that it is not used in a way that is clearly unfair to an applicant for permission and is outside* ***the statutory purpose….to ensure that effective enforcement action cannot be avoided or delayed*** *by those in breach of planning control…"*

The next case to consider s70C - *Chesterton,* where once again the use of that power to avoid delay in enforcement proceedings is discussed:

> *"The decision letter informing the claimant of the defendant's refusal to consider the application recited the text of section 70C, and continued:*
>
> *"****The purpose of s70C is to prevent retrospective applications being used to delay enforcement action****…"*

This continues at paragraph 33 in the section entitled *"The Statutory Provisions"*:

> *"Sections 70C, and 174(2A)-(2B) are both concerned with* ***curbing opportunities for delay in enforcement****."*

Paragraphs 41- 42 also discuss the issue of delay:

"The object of the provision is not to prevent the merits of an unauthorised development from being considered at all, but ***to avoid delay in enforcement****…*

Where section 70C is engaged, Cranston J explained in Wingrove (at para 30) that it conferred "a wide discretionary power" but added:

"The legislative history of section 70C demonstrates that Parliament's intention was to provide a tool to local planning authorities to prevent retrospective planning applications being used to delay enforcement action being taken against a development. It seems to me that there is a legislative steer in favour of exercising the discretion, especially since an enforcement notice can be appealed and the planning merits thereby canvassed. Since ***delay is the bugbear against which the section is directed****, a claimant's actual motives to use a retrospective planning application to delay matters is clearly a consideration in favour of a decision to invoke section 70C."*

Paragraph 69 of *Chesterton* also deals with delay:

"Secondly, the statutory objective of stopping applicants who have undertaken development in breach of planning control from gaming the system by tactical appeals and retrospective applications is not achieved by asking only whether the planning merits of a proposal have already been determined."

Chesterton also addresses situations where the discretion to use s70C may be unlawful:

"43. ***Cranston J recognised that in some cases there may be factors pointing against the use of the discretion conferred by section 70C, such as*** *"where for legitimate reasons there has been a failure to appeal an enforcement notice and the development is plainly compliant with planning provisions"; if such considerations were ignored an authority's decision would be open to a public law challenge (Wingrove, para. 31). Other examples of circumstances in which a proper exercise of the discretion might require that the application for planning permission be determined were suggested by Hickinbottom J in R (Seventeen de Vere Gardens Management Ltd) v London Borough of Kensington v Chelsea [2016] EWHC 2869 (Admin), at paragraph 44: "where the development plan has changed,* ***or some other material planning considerations have changed, so that the underlying planning merits may be different."***

There is no issue of delay in this matter. Had the Defendant refused the application, an appeal could have been lodged with PINS and a request made to have the 2 s.78 appeals formally joined and heard at the same Inquiry in September 2026. Even now the Claimant is willing to undertake to appeal any non-determination/refusal within 7 days of the relevant deadline. The date for a non-determination appeal would therefore be 7 August 2026.

The case law in relation to s70C repeatedly stresses the need to consider whether planning considerations have changed. The Defendant has manifestly failed to consider that matter, and it is plain that the Defendant has failed to take into account relevant considerations in a *Wednesbury* sense. On the one hand the

Defendant is objecting to the evidence as new evidence and relying on the principles established in *Wheatcroft* and on the other hand declining to determine the planning application as …"*the application relates to development of land to which a pre-existing enforcement notice relates and seeks permission for the retention of matters specified in the enforcement notice as constituting a breach of planning control."*

The officer's report states: "*The planning merits of the enforced development have already been considered by the local planning authority when issuing the Notice. The appellant also has a live and imminent opportunity for the planning merits of the development to be tested through the s78 appeal relating to the WA/2025/00495 application. That appeal will be determined by the same Inspector who is dealing with the enforcement appeal. The Inspector will therefore have the opportunity to consider the planning merits of the development in a comprehensive and coordinated manner."*

The Defendant did not have the evidence on Flooding, Ecology and Landscape when the EN was issued and are objecting to this evidence being relied upon in the current s78 appeal. If the Inspector accepts the submissions made by the Defendant, then this evidence may be excluded from the current appeals. If this occurs, the Inspector would not have the opportunity to consider the planning merits of the development in a comprehensive and coordinated manner as alleged by the Defendant as vital Flooding, Ecology and Landscape evidence would be excluded. The insidious approach of the Defendant in seeking to exclude consideration of relevant evidence in the extant appeals, whilst at the same time refusing to consider that obviously relevant evidence as part of a pragmatic and focused planning application is irrational and unreasonable.

This renders the decision open to legal challenge. For this reason alone, it is clear that the decision is legally flawed.

Consideration has been given to the Court of appeal's judgment in Moran v Medway Council [2026] EWCA Civ 484 and it is submitted that the circumstances surrounding this planning application can be distinguished from the circumstances in the *Moran* case. There has been no determination by an Inspector appointed by the Secretary of State of the planning merits in relation to the Claimant's pitch. Evidence submitted in relation to that appeal is being challenged by the Defendant under the *Wheatcroft* principles.

Consideration should also be given to the High Court's permission judgment in the case of Casey and Smith v Crawley Borough Council [2025] EWHC 887 (Admin) (attached herewith). At paragraph 27, Karen Ridge sitting as a Deputy High Court Judge stated: *"The Defendant's decision to decline to determine the second planning application did directly affect the question of the rights of the Claimants to a fair hearing/determination. I have concluded that it is arguable that the discretion was unfairly/irrationally exercised and I therefore conclude that it is also arguable that the decision unlawfully affected the Claimants' article 8 rights."*

The Defendant's decision to decline to determine does affect the rights of the Claimant to a fair hearing/determination. This decision is therefore legally flawed and unfairly/irrationally exercised which has a resultant unlaw affect of the Claimant's Article 6 and 8 rights.

It is submitted that the application WA/2026/01044 should be determined without further delay and then if refused, for the opportunity of appealing that to the Secretary of State who may well form a different view as compared to the Defendant in this matter. It is therefore requested that the decision to decline to determine under s70c of the Town and Country Planning Act 1990 should be withdrawn and the application should be determined to allow time to appeal any refusal and make a request for it to be joined and heard with the current s.78 appeal. Even now the Claimant is willing to undertake to appeal any non-determination/refusal within 7 days of the relevant deadline. The date for a non-determination appeal would therefore be 7 August 2026.

The details of the action that the Defendant is expected to take

The Defendant is expected to withdraw its decision to decline to determine the application and proceed to determining the application without further delay.

The details of the legal advisers, if any, dealing with this claim

See above.

The details of any interested parties

None known of at this stage.

The details of any information sought

Copies of all files, memos, notes relating to the decision to decline to determine.

The details of any documents that are considered relevant and necessary

Please see above.

The address for reply and service of Court documents

See above.

Proposed reply date

Within 14 days of the date of this letter.

We look forward to hearing from you.

Yours faithfully,

The Community Law Partnership.

Case No: AC-2024-LON-002214
Neutral Citation Number: [2025] EWHC 887 (Admin)

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10 April 2025

Before :

KAREN RIDGE SITTING AS A DEPUTY HIGH COURT JUDGE

- -

Between :

The King (on the application of Teresa Casey (1) And Stacey Jane Marie Smith (2))	**Claimants**
- and -	
Crawley Borough Council	**Defendant**

- -
- -

Stephen Cottle (instructed by **Public Interest Law Centre**) for the **Claimants**
Scott Stemp (instructed by **Crawley Borough Council Legal Services**) for the **Defendant**

Hearing date: 28 November 2024

- -

APPROVED JUDGMENT

Deputy High Court Judge Karen Ridge :

1. The Claimants are Irish Travellers residing on a site in Crawley which has been the subject of enforcement proceedings and separate applications for planning permission. The Defendant is the local planning authority for the administrative area in which the Claimant's land is situated. The planning application was made in respect of land to the north of Brookside and the east of Radfords Farm, Radfords Road, Crawley, West Sussex (the Land). This is the Claimant's renewed application for permission to judicially review the decision of the Defendant dated 16 May 2024 to decline to determine an application for planning permission (reference CR/2024/0103/FUL).

Background

2. By an enforcement notice (EN) dated 29 April 2021, the local authority alleged an unauthorised change of use of the Land to a residential caravan site with associated unauthorised operational development. That EN was subsequently appealed on grounds (e) and (g) of section 174(2) of the Town and Country Planning Act 1990 (the Act). Ground (e) alleged improper service of the EN and ground (g) requested additional time to comply with the requirements of the EN. The Claimants were professionally represented during the course of that appeal. Ground (e) was withdrawn before final determination and by decision letter dated 28 February 2022 the ground (g) appeal was dismissed. As a result of the appeal outcome the EN took effect on 28 August 2022 and the time for compliance expired on 28 August 2022.

3. Running alongside the EN procedures was a separate application for planning permission[1]. That application was made on 6 August 2021 and it sought planning permission for the material change of use of land to a Gypsy and Traveller site with association operational development. It was refused and it went to appeal and, by decision letter dated 9 December 2022, the appeal was allowed to the extent that a temporary planning permission (personal to the applicants) was granted for a period of 3 years. That decision was subsequently quashed by consent as a result of an error in the Inspector's approach to local planning policies in relation to noise.

4. The planning appeal was then re-heard on the 23 January 2024 and was dismissed by letter dated 14 February 2024 for reasons to do with flood risk. That appeal decision was then subject to judicial review proceedings which are ongoing and that claim has been granted permission on some grounds (the s288 proceedings).

5. In the meantime, on the 26 January 2024, a further application[2] for planning permission was submitted for a Gypsy and Traveller site with associated development. The local planning authority then exercised its discretionary powers, under section 70C(1) of the Act, to decline to determine the application. It is the challenge to that decision which is the subject of this claim.

6. Section 70C(1) provides as follows:

> "70C Power to decline to determine retrospective application

[1] Reference CR/2021/0243/FUL
[2] CR/2024/0103/FUL.

> (1) A local planning authority may decline to determine an application for planning permission or permission in principle for the development of any land 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.
>
> (2) For the purposes of the operation of this section in relation to any particular application for planning permission or permission in principle, a "pre-existing enforcement notice" is an enforcement notice issued before the application was received by the local planning authority."

7. In declining to determine the application the local authority had regard to whether there were good and proper reasons to determine the new planning application, notwithstanding the extant EN. It decided that there were no such good reasons, observing:

> "In coming to this conclusion, the matters the Council took into account included:
>
> • There was an unsuccessful appeal against the Enforcement Notice during which a ground (A) appeal under s174(2)(a) of the Act was not progressed.
>
> • You subsequently filed an application for retrospective planning permission (application CR/2021/0243/FUL), which was refused. Your appeal before the Inspector was refused on 14.02.2024 (although I note there is an extant s.288 appeal before the Planning Court against this decision).
>
> • You were professionally represented in your appeal before the Inspector, and were able to submit whatever information you thought appropriate and proper to overcome the objections to permission.
>
> • The New Application would only serve to further delay effective enforcement at the Site through the Enforcement Notice"

8. By pre-action protocol letter the Claimants asked the Defendant to review its decision. That request was refused and a judicial review claim was duly issued. The application for permission to apply for judicial review was refused on the papers by the Honourable Mr Justice Eyre on 9 August 2024.

9. The Claimants contend that the discretion under section 70C has been unfairly exercised on three grounds and they seek to renew their application for permission on all grounds. I have been helpfully referred to the case of *R (on the application of*

Chesterton Commercial (Bucks) Ltd) v. Wokingham Borough Council [2018] EWHC 1795 (Admin); [2019] PTSR 220 which draws together previous decisions on the exercise of a local authority's discretion (at §32 – 47).

> "69 Secondly, the statutory objective of stopping applicants who have undertaken development in breach of planning control from gaming the system by tactical appeals and retrospective applications is not achieved by asking only whether the planning merits of a proposal have already been determined. The applicant cannot 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. As was recognised in Banghard's case [2018] PTSR 1050, para 30, the statutory purpose requires that the unexploited opportunity to have the planning merits considered should also count against the applicant, because "in such cases the developer had a full opportunity to a fair process and did not avail himself of it". In Smith's case [2017] EWHC 2696 Gilbart J considered that it was sufficient that the opportunity to pursue an appeal against an enforcement notice had been available to the applicant's predecessor in title, even though it had not been taken and was no longer available to the applicant himself."

Ground 1

10. The Claimants assert that the Defendant erred in deciding to rely on the April 2021 EN without having regard to the purported deficiencies in the evidence base which the new planning application sought to remedy. On behalf of the Claimants Mr Cottle says that the EN and its appeal were determined on the basis that some of the caravans would be located in Flood Zone 2, whereas the layout in the new planning application depicted them in Flood Zone 1.

11. Mr Stemp, on behalf of the Defendant, submits that the redetermined appeal decision had regard to the revised caravan layout; that the Claimants have had ample opportunities to present their case on the planning merits and that the exercise of the discretion was reasonable. The Claimants, he says, could have presented their evidence on flood risk at the EN appeal, the first planning application and the two subsequent planning appeals, as well as the second planning application.

12. The language of section 70C is discretionary. The purpose of section 70C is to prevent the forestalling of an EN taking effect by the submission of multiple applications and appeals in circumstances where the applicants have already had sufficient opportunity to address the planning merits at the centre of an EN. In this case, the EN was served to address breaches of planning control aimed at protecting landscape character; safeguarding protected land for the expansion of Gatwick airport; providing acceptable living conditions for occupiers (in terms of noise); protecting archaeological interests; addressing flood risk.

13. The Claimants fairly accept that, at the EN appeal, they did not take the opportunity to seek planning permission and address those planning objections. That was on the advice of a former professional advisor and I accept the Claimants' statement that this

was bad advice from a professional advisor on whom they had relied to serve their interests.

14. It is important thereafter to examine the chronology and the basis on which various decisions were made. Applicants and appellants will apply for planning permission after an initial adverse determination by a local planning authority or following an unsuccessful appeal and in doing so, will seek to address the issues on which the application/appeal was lost. In planning applications it is notable that following a refusal, subject to certain criteria, applicants have a 'free go' at a second application to enable them to address the reasons for refusal.

15. In this case, whilst the appeal against the EN did not seek planning permission for the reasons above, the first application for planning permission was submitted on 6 August 2021, only two months after the EN appeal was submitted and notably several months before the EN appeal was determined on the 28 February 2022. That does not point to applicants who were seeking to game the system, it is more indicative of applicants who were seeking to address the five planning reasons listed on the EN as being the reason for issuing the notice after having recognised that an opportunity had been missed in the EN appeal.

16. The EN appeal proceedings were ongoing between 2 June 2021 until determination on 28 February 2022. Alongside that, the planning appeal in relation to the first planning application was running between 6 August 2021 until determination on 9 December 2022. On the 9 December 2022 the appeal was allowed, the Inspector having determined that a temporary permission would overcome objections relating to noise issues and the safeguarding issues. The issues relating to landscape harm and archaeological issues were either not determinative or could be overcome by condition. The Inspector further concluded (DL59) that

> "' In applying the Framework's exceptions test concerning flood risk7 and Local Plan Policy ENV8, I am of the view that the reasons weighing in favour of granting permission amount to sustainability benefits that outweigh the flood risks in this case. To reiterate, the sustainability benefits are the immediate resolution, albeit temporarily, of an unmet need for two traveller pitches in the context of an absence of available alternatives, and the prioritisation of the best interests of a number of affected children. As this concludes the outstanding element of the test, and given that conditions can make the development safe for its temporary duration, the exceptions test is passed."

17. That temporary planning permission, which addressed the five reasons on the EN, was granted on 9 December 2022 and it remained in force until quashed on 30 May 2022. The decision was quashed[3] on the basis that the Inspector had misunderstood policy H5a when coming to his conclusions about noise. The policy set out noise levels for various types of sites.

18. The appeal went to the a re-hearing. Whilst the Defendant maintained its objections in relation to flood risk at the rehearing, the Claimants would no doubt have been aware

[3] Schedule of Reasons appended to Consent Order dated 14 February 2023 attached to SGD

that the previous Inspector's decision had found that those matters did not militate against the grant of a temporary permission. The revised site layout, moving the caravans into flood zone 1, was an attempt to reinforce the argument (and previous Inspector's view) that the site could be made **safe** during the operation of a temporary permission with the imposition of a condition requiring alerts. The Defendant accepted that the site could be made **safer** with the imposition of such a condition.

19. When one looks at the chronology of events and the five original reasons for serving the EN, it is apparent that the planning merits of the proposal have shifted as proceedings have progressed. It is against this background that the Defendant had to determine whether there were good and proper reasons not to entertain another application for planning permission. Local authorities of course must guard against abuses of the planning system by multiple applications in circumstances where the opportunity to address the planning merits have not been taken or have been taken and found wanting. In the unusual circumstances of this case there is an argument as to whether that discretion was fairly or rationally exercised given the chronology events and the changing landscape of the planning merits. Ground 1 is arguable.

Ground 2

20. Secondly it is alleged that the Defendant should have looked at the nature of the challenge to the EN appeal decision. The Defendant confirms that they had regard to the nature of the section 288 challenge but did not agree with the merits of that challenge and proceeded to exercise its discretion accordingly.

21. Whilst is was not for the Defendant to second guess the outcome of the section 288 challenge, it was important for the Defendant to examine the basis for that challenge and to see if there was any merit in it or change of circumstances to justify looking at the planning merits again. That was part and parcel of the exercise in looking at the chronology of events and all other factors. The challenge to the section 288 decision will be dealt with separately and this aspect of the present claim cannot be contingent on determination of that ground of challenge elsewhere.

22. For the above reasons I conclude that this ground is not arguable on its own merits.

Ground 3

23. Mr Stemp took a preliminary point in relation to the renewal of ground 3. The Claimants had not indicated that on their renewal form that they wished to pursue this ground. Paragraph 4.40 of Practice Direction 54D provides that where a claimant intends to apply to rely on additional grounds at the hearing of the planning statutory review, the claimant must give notice to the court and to any other person served with the claim form no later than 7 clear days before the hearing. The Claimants' skeleton argument dealt with ground 3, as did the Defendants.

24. Mr Stemp was on notice of ground 3, it was part of the claim already pleaded and he had already dealt with it previously. Having regard to the overriding objective I am

satisfied that it is proportionate and appropriate to deal with ground 3. There is no prejudice to the Defendant in doing so and it is expedient to deal with such arguments on this occasion.

25. The Claimants contend that the decision to decline to determine the planning application affected the article 8 rights of the site residents and their article 6 rights or alternatively, that the decision by the Defendant that the section 6 duty was not breached was unlawful.

26. The proportionality of any interference with the article 8 rights of the Claimants was at the heart of the planning merits within the EN and planning applications. The decision not to determine the application was not a direct interference with the Claimants' article 8 rights and I conclude that this part of ground 3 is not arguable.

27. The Defendant's decision to decline to determine the second planning application did directly affect the question of the rights of the Claimants to a fair hearing/determination. I have concluded that it is arguable that the discretion was unfairly/irrationally exercised and I therefore conclude that it is also arguable that the decision unlawfully affected the Claimants' article 8 rights. Ground 3 is arguable to this extent.

28. I would ask Counsel to draw up an appropriate order to reflect the terms of this judgment.