Neutral Citation Number: [2024] EWHC 2943 (Admin)

Case No: AC-2023-BHM-000256

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

The Birmingham District Registry

Date: 19th November 2024

Before :

Richard Kimblin KC sitting as a Deputy Judge of the High Court

- -

Between :

The King (On the application of Lifford Gardens and the Sands Residents' Association Ltd)	**Claimant**
- and -	
Wychavon District Council	**Defendant**
- and -	
Full Fibre Ltd	**Interested Party**

- -

Gabriel Nelson (instructed by **SCS Law**) for the **Claimant**
Jack Smyth (instructed by **Legal Services, Wychavon District Council**) for the **Defendant**

Hearing date: 22nd October 2024

- -

RICHARD KIMBLIN KC sitting as a Deputy High Court Judge:

INTRODUCTION

1. The Claimant applies for judicial review of a decision by Wychavon District Council ("the Council"), dated 27th October 2023, concerning the erection by the Interested Party ("FullFibre") of telegraph poles and cabling ("the development") in the village of Broadway, which is in Worcestershire. The decision which is challenged is that the development was "*Within the scope of Part 16 of Schedule 2 of the* [Town and Country Planning (General Permitted Development) Order 2015]" ("GPDO"). This decision was made following a notification from FullFibre to the Council, pursuant to Regulation 5 of the Electronic Communications Code (Conditions and Restrictions) Regulations 2003 ("2003 Regulations").

2. The development was highly contentious in Broadway, as similar developments have been in other locations. Such reaction has been the subject of three Ministerial letters in recent times. In April 2023, Julia Lopez MP, Minister of State for the Department of Science, Innovation & Technology, wrote to local planning authorities to note an increase in complaints about deployment of telecommunications infrastructure. The Minister explained the notification obligation on telecommunications operators ('Operators') and the enforcement powers of OFCOM, the regulator, if it has reasonable grounds to believe that an Operator is not complying with its statutory duties. Planning authorities were encouraged to report any instance of an Operator not complying with statutory obligations so that the statutory framework would operate effectively.

3. In March 2024, the same Minister wrote to fixed-line Operators about the use of telegraph poles for fixed-line broadband deployment which "*is generating public*

concern in some parts of the country". The topic of control over how infrastructure is deployed was raised, and the Minister advised *"new telegraph poles should only be in cases where installing lines underground is not reasonably practicable, and only after ensuring that appropriate community engagement has taken place and that the siting of new infrastructure will not cause obstructions to traffic or unduly impact the visual amenity of the local area."*

4. By August 2024, Sir Chris Bryant MP was Minister of State. He wrote to Operators on the topic of a revised Code of Practice which was expected to result in greater sharing of infrastructure and fewer unnecessary pole deployments, failing which he would consider change to the existing regulations.

5. This same controversy is evident in the facts of this case. However, the role of this court is specific and focused. Paraphrasing the observations of the Senior President of Tribunals in *R (oao) Save Stonehenge World Heritage Site Limited v Secretary of State for Transport* [2024] EWCA Civ 1227 at [7], in cases such as this, the court must be conscious of its proper role and take care not to exceed it. That role is simply to apply the law in reviewing the decision of the Council, and to establish whether or not that decision was lawfully made. It is not to gauge the impacts of the permitted development, nor to review policy judgements which lie behind the statutory scheme. The court is concerned only with the lawfulness of the decision actually made.

6. The procedural position is that permission was refused on the papers by Eyre J on 6th March 2024 in which he gave detailed reasons over 24 paragraphs, explaining why the then pleaded grounds were not arguable. The Claimant renewed its application before His Honour Judge Worster, sitting as a Deputy Judge of the High Court, via renewed grounds settled by different Counsel. HHJ Worster granted permission on what are now

grounds 1a and 2a and he rejected as unarguable ground 3 which was a complaint of failure to take account of relevant considerations, namely two of the conditions to which the permitted development right is subject (A.2(1)(c) and A.2(1)(d)). The Deputy Judge ordered that the skeleton argument which had been produced for that renewal hearing should stand as the Statement of Facts and Grounds for the purposes of the substantive hearing.

7. On 8th July 2024, the Claimant made an application to amend their pleaded grounds which application I adjourned to the substantive hearing by an Order dated 22nd August 2024.

8. Still further, on instructing Mr Nelson, who appeared on behalf of the Claimant at the substantive hearing, application was made on 17th September 2024 to add a further ground of review to the pleaded grounds. The parties addressed their arguments on these applications via their skeleton arguments in the substantive hearing and I heard the parties on both of them.

THE GROUNDS

9. Hence, at the hearing of this application, the Claimant's grounds and proposed grounds were as follows:

Ground 1

a. Insofar as the Defendant was expressing the view in its decision of 27 October 2023 that the development was within the scope of Class A of Part 16 of Schedule 2 to the GPDO, the Defendant was required to consider whether the conditions imposed by paragraph A.2(1)(c) and (d) were fulfilled by reference to the information submitted by the Interested Party.

b. If, and to the extent that, the Defendant claims that these factors were taken into account, the Defendant failed to provide adequate reasons for its decision.

Ground 2

a. In deciding that the development was within the scope of Class A of Part 16, the Defendant misinterpreted paragraph A.2(1)(c) by failing to recognise that it was required to consider whether the visual impact of the development had not been "minimised so far as practicable, taking into account the nature and purposes of the site" because the cabling had not been undergrounded.

b. If, and to the extent that, the Defendant claims that these factors were taken into account, the Defendant failed to provide adequate reasons for its decision.

Ground 3

In finding that a consultation was not required between themselves and the Interested Party pursuant to regulation 3(1)(b) of the 2003 Regulations, the Defendant erred in law.

10. The Claimant had permission to apply for judicial review in respect of Ground 1a. and Ground 2a prior to the substantive hearing and sought permission to amend and permission to apply in respect of the additional reasons challenge which comprise Ground 1b and Ground 2b. Similarly, the Claimant sought permission to amend and permission to apply in respect of Ground 3. The Council resisted both applications to amend and argued that, on the merits, permission should be refused in any event.

11. The decision on the contested applications to add further grounds needs be made on an understanding of the merits of those proposed grounds. I have therefore assessed the merits of those proposed grounds and give my decisions on the applications at the end of this judgment.

THE ISSUES

12. The numerical order of the Grounds as pleaded arises from the procedural history of proposed amendment rather than the natural sequence of events. Given that consultation logically comes first, I shall address Ground 3 first, as an issue, then the 'conditions' issues, which overlap. I will take the reasons points together and last.

13. As a legal challenge to a planning decision, the target is unusual in this case. In the large bulk of Planning Court cases there is an application which has been determined one way or the other by a decision maker, either at first instance or on appeal. The target isa decision which a statutory scheme required to be made. The claimant in such a case contends that the decision was unlawful and should be redetermined on a lawful basis. In contrast, in this case, the essence of the dispute between the parties is whether or not the Council had to make a decision or take some form of action in respect of FullFibre's notification. In overview, the Claimant contends that the Council could and should have used powers which the Claimant says the Council had, to ensure lawful consultation and to control the nature and form of the development. The Council does not accept the Claimant's analysis of any consultation duty or power, nor does it consider that it may control the nature and form of the development, at least not in the way that the Claimant contends. The target in this case is therefore an alleged failure to deploy the powers available to the Council and the Council's alleged errors lay in its misunderstanding of

the legislative regime. The remedy sought by the Claimant is to compel the Council to apply its powers and to control the development.

14. The Council agrees that the decision letter of 27th October 2023 is a decision which is amenable to judicial review. I have therefore not enquired further into that question. I also asked both Mr Nelson and Mr Smyth whether there was any part of the case which focussed on the Council's decision that there is no breach of planning control and therefore that there would be no enforcement action. Each confirmed that the Claim is not concerned with any enforcement decision and there is no challenge in that regard.

15. Therefore, from the Grounds, I have identified the following issues:

    (i) As a matter of law, is consultation required between an Operator and the local planning authority? If so, did the Council err in law in making its decision? (**'The Consultation Issue'**);

    (ii) When notified by FullFibre of its development proposals, was the Council required to consider whether FullFibre had fulfilled the conditions imposed on the deemed consent by paragraph A.2(1)(c) and (d)? (**'Notification Issue'**);

    (iii) Does the condition imposed on the deemed consent by paragraph A.2(1)(c) (visual impact minimised so far as practicable, taking into account the nature and purposes of the site) give the Council power to require that cables be installed underground? (**'Council's Control Issue**');

    (iv) Were the Council's reasons adequate in respect of the second and third issues? (**'The Reasons Issue'**).

16. Evidently, for the third and fourth issues, the outcome is dependent to a substantial extent on the answer to the questions raised in the preceding issues. The overlap

between the second and third issue is clear from the commonality of focus on paragraph (or condition) A.2(1)(c). The analysis and conclusions on the third issue are therefore to be read in the light of the analysis and conclusions on the second issue.

PERMITTED DEVELOPMENT FOR TELECOMMUNICATIONS

Permitted Development Rights

17. The Secretary of State shall provide for the granting of planning permission by development order: s59(1) Town and Country Planning Act 1990 ('the 1990 Act'), thus providing for the GPDO. The power to grant permission in this way is twofold, namely for the GPDO to grant permission itself, or to provide for application to the local planning authority in accordance with the provisions in the order: s59(2). Planning permission may be subject to conditions and limitations: s60(1).

18. By Article 3(1) of the GPDO, planning permission is granted for the classes of development described as permitted development in Schedule 2. Article 3(2) provides that "any permission granted by paragraph (1) is subject to any relevant exception, limitation or condition specified in Schedule 2".

19. Class A of Part 16 of Schedule 2 provides, so far as relevant to this claim, the following description of development:

"*Development by or on behalf of an electronic communications code operator for the purpose of the operator's electronic communications network in, on, over or under land controlled by that operator or in accordance with the electronic communications code, consisting of—*

(a) *the installation, alteration or replacement of any electronic communications apparatus …*"

20. Therefore, this case is concerned with development which is termed 'Class A(a)' development. The remaining types of development which are permitted, and which are not relevant in this case, are in respect of emergency development and radio equipment housing.

21. Conditions on the grant of permission by development order must be specified in the order: s60(1). The permitted development right is subject to conditions, which are set out in Paragraph A.2. In its amended form, the GPDO has seven conditions which define and control the scope of the permitted development right. The Claimant's Grounds 1 and 2 and its skeleton argument emphasised the first condition. In particular, the Claimant drew attention sub-paragraphs (1)(c) and (1)(d). However, given the needto construe this provision in order resolve the issues in this case, I prefer to set out the whole of the condition because it is essential to see and understand it as a whole, including the different requirements which apply in the particular circumstances of a development which is notified to a local planning authority:

"*(1) Class A(a) and A(c) development is permitted subject to the condition that—*

(a) the siting and appearance of any—

(i) mast;

(ii) electronic communications apparatus installed, altered or replaced on a mast;

(iii) antenna or supporting apparatus;

(iv) radio equipment housing; or

(v) development ancillary to radio equipment housing,

constructed, installed, altered or replaced on a building (other than a building which is a mast) are such that the effect of the development on the external appearance of that building is minimised, so far as practicable;

(b) the siting and appearance of any—

(i) mast;

(ii) electronic communications apparatus installed, altered or replaced on a mast;

(iii) antenna or supporting apparatus;

(iv) radio equipment housing; or

(v) development ancillary to radio equipment housing,

which has been constructed, installed, altered or replaced in a manner which does not require prior approval under paragraph A.2(3) are such that the visual impact of the development on the surrounding area is minimised, so far as practicable;

(c) the siting and appearance of any development which is visible from a site which is—

(i) article 2(3) land;

(ii) a scheduled monument or a listed building;

(iii) the curtilage of a schedule monument or a listed building;

(iv) a World Heritage Site;

(v) a site designated by the Secretary of State under section 1 of the Protection of Wrecks Act 1973; or

(vi) land registered by Historic England in a register described in section 8C of the Historic Buildings and Ancient Monuments Act 1953,

are such that the visual impact of the development on the site is minimised so far as practicable, taking into account the nature and purposes of the site;

(d) the siting of any development is such that it—

(i) does not prevent pedestrians from passing along a footway;

(ii) does not prevent access to premises adjoining a footway; and

(iii) is determined having regard to—

(aa) the needs of disabled people; and

(bb) the guidance document "Inclusive Mobility" issued by the Department for Transport in December 2021"

22. In my judgment, the four parts to this condition have different but clearly related functions and application. Parts (a) and (b) of the condition are each concerned with

siting and appearance and relate expressly to the particular development set out at (i) to (v). Both of them serve the purpose of controlling the effects of the development in visual terms, so far as practicable. The first, i.e. (a), is concerned with buildings and the second, i.e.(b), is concerned with the area surrounding the development. One or other of these parts of the condition, or both, will apply to any development, dependingon whether the development is on a building or not.

23. Part (c) of the condition is of more limited and specific application but to the same end. It is concerned with visual impact of the development on categories of site which require particular protection by reason of their value or characteristics, particularly in heritage terms. The reference to Article 2(3) land is to *"The land referred to elsewhere in this Order as article 2(3) land is the land described in Part 1 of Schedule 1 to this Order (National Parks, areas of outstanding natural beauty and conservation areas etc)."* This is of relevance because the Claimant's interests are within the Cotswold Area of Outstanding Natural Beauty ("AONB").

24. Where development is visible from a site such as an AONB then both of Parts (b) and (c) will apply in that the visual impact of a development on the surrounding area is to be minimised and also the visual impact on the site is to be minimised, so far as practicable, i.e. the 'site' is the AONB.

25. The parties agree that the development in this case did not require "*prior approval*". However, in order to understand the purpose and rationale behind the Permitted Development Order in Part 16, it is necessary to say something about those circumstances in which prior approval is required. Condition A(2)(3) lists five types of land for which prior approval by the Local Planning Authority is required. This includes Article 2(3) land. It also includes land which is a Site of Special Scientific

Interest, for example. However, the extent to which prior approval is required is limited to particular types of development. In respect of masts and telegraph poles, the condition contains detailed criteria as to dimensions, in particular. These provisions were referred to at the hearing as questions of scope. In essence, the scheme of Part 16specifies communications equipment, the nature and characteristics of which will require prior notification to the planning authority, and those which will not.

26. 'Prior approval' is a detailed set of provisions. Condition A.3. of Part 16, comprises 13 provisions which prescribe the method of application for prior approval, the serving of notice of the fact of the prior approval application, consultation requirements in accordance with the table in Schedule 4 of the Procedure Order, advertising and notice as to whether or not prior approval is required. If prior approval is required, such approval must not be given contrary to the advice of statutory consultees. There is a right of appeal against refusal.

27. The GPDO is a scheme for the grant of planning permission which is deemed to be granted and as such it contains many planning and policy judgements. These policy judgements are expressed through and in the types of development permitted, their extent or size, and the degree to which the local planning authority is required to be involved, amongst other controls and limits. The matters which have been judged to be important in defining the limits of telecommunications permitted development can be seen in the scheme of Part 16 in that some scales of development require a decision from the local planning authority, as do those which might affect sites of particular sensitivity or value.

28. I will return to the various approaches, limits, criteria and conditions in the GPDO when I come to the second and third issues on notification and the extent of the Council's

control. For now, it is necessary to understand something of the interaction with 2003 Regulations.

THE ELECTRONIC COMMUNICATIONS CODE

29. The 2003 Regulations were made pursuant to s.109(1) and (3) and s.402(3)(a), (b) and (c) of the Communications Act 2003 ("the 2003 Act"). S.109 of the 2003 Act is entitled "Restrictions and conditions subject to which code applies."

"*(1) Where the electronic communications code is applied in any person's case by a direction given by OFCOM, that code is to have effect in that person's case subject to such restrictions and conditions as may be contained in regulations made by the Secretary of State*.
(2) In exercising his power to make regulations under this section it shall be the duty of the Secretary of State to have regard to each of the following—
(a) the duties imposed on OFCOM by sections 3 and 4;
(b) the need to protect the environment and, in particular, to conserve the natural beauty and amenity of the countryside;
(ba) the need to promote economic growth in the United Kingdom;
(c) the need to ensure that highways are not damaged or obstructed, and traffic not interfered with, to any greater extent than is reasonably necessary;
(d) the need to encourage the sharing of the use of electronic communications apparatus;
(da) the need to ensure that restrictions and conditions are objectively justifiable and proportionate to what they are intended to achieve;
(e) the need to secure that a person in whose case the code is applied will be able to meet liabilities arising as a consequence of—
(i) the application of the code in his case; and
(ii) any conduct of his in relation to the matters with which the code deals."

30. The Electronic Communications Code ("the Code") is set out in Schedule 3A to the 2003 Act. It deals with electronic communications apparatus as an infrastructure system

and addresses rights, agreements and obligations as between Code Operators, and those with an interest in land which hosts the electronic infrastructure. It is a detailed statutory scheme which is set out in 17 Parts in 108 paragraphs. I was not addressed on any of them, nor was it included in the agreed authorities bundle. I therefore say little more about it, save to observe that its function is to address interests in land in, over and on which an Operator installs electronic apparatus. That is a function which is mirrored in other statutory schemes for the installation of other types of infrastructure such as water supply, wastewater, pipelines etc and in particular categories of land such as highways. However, the Code does not confer planning permission. In a post-hearing exchange, the parties agreed this description of the Code.

31. S110 of the 2003 Act provides for enforcement of the s109 obligations. Where OFCOM determines that there are reasonable grounds for believing that a Code Operator is contravening, or has contravened, a requirement imposed by virtue of any restrictions or conditions under section 109, they may give him a notification under this section. The notification may include steps to be taken and/or a penalty. It will be noted that the s109(2) obligations include protection of the environment and the amenity of the countryside.

32. The Code applies to FullFibre as a Code Operator, pursuant to a direction made under s106(3)(a) of the 2003 Act. It is also the Code which is referred to in the permitted development right which I have set out above at paragraph 19: Class A of Part 16 of Schedule 2 to the GPDO.

33. Regulation 3 of the 2003 Regulations is entitled "General conditions" and, so far as relevant, states:

"*(1) A code operator shall consult-*

…

(b) planning authorities in relation to the installation of electronic communications apparatus, including installation in a local nature reserve; and ….

(3)A code operator, when installing any electronic communications apparatus, shall, so far as reasonably practicable, minimise—

(a) the impact on the visual amenity of properties, in particular buildings on the statutory list of buildings;

(b) any potential hazards posed by work carried out in installing the apparatus or by apparatus once installed; and

(c) interference with traffic"

34. Regulation 3 echoes the requirement s109(2) of the 2003 Act, to have regard to the effects on the environment and countryside when drafting the regulations.

35. Regulation 5 is entitled "*Installation of electronic communications apparatus*" and, so far as relevant, states:

"(1) A code operator must give 28 days notice, in writing, to the planning authority for the area in question where–

(a) the code operator has not previously installed electronic communications apparatus in the area and (subject to paragraph (1A)) is intending to install such apparatus in that area;

[…]

*(ba) in relation to England, the code operator intends to carry out a matter specified in paragraph (**1BA**) for which—*

(i) the code operator is not required to obtain planning permission under the Planning Acts; or

(ii) planning permission is granted under a development order and is not subject to the prior approval process; or

[…]

*(**1ZA**) the matters referred to in paragraphs (1)(b) and (1)(ba) are—*

(i) the installation of a cabinet, box, pillar, pedestal or similar apparatus; and

(ii) the installation, alteration or replacement of a mast.

[…]

(2) The notice to be given under paragraph (1) must state the code operator's intention to install electronic communications apparatus and must describe that apparatus and identify the location where it is proposed to install it.

(2A) The description required in paragraph (2) shall include whether or not the apparatus is fixed-line broadband electronic communications apparatus.

(3) Where a code operator has given notice under paragraph (1), the planning authority may, within 28 days of the receipt of that notice, give the code operator written notice of conditions with which the planning authority wishes him to comply in respect of the installation, alteration or replacement of the apparatus, but he is not obliged to comply with those conditions to the extent that they are unreasonable in all the circumstances."

36. The references to paragraph 1BA and 1ZA are a typographical error in the Regulations. They should cross-refer to each other. '1ZA' should read '1BA'. Nothing turns on the error.

37. Regulations 3(1) and 5(1) and (2) are the parts of the 2003 Regulations which are the particular focus of the Grounds. However, it is necessary to record that the 2003 Regulations address the same matters which are set out in the conditions to permitted development right in the GPDO, Part 16. It is clear that the two statutory instruments were drafted to be consistent in approach and with a common and coherent purpose.

THE CODE OF PRACTICE

38. The Department for Digital, Culture, Media and Sport ('DCMS') has produced the Code of Practice for Wireless Network Development in England which provides guidance to Code Operators, Local Planning Authorities and all other relevant stakeholders in England on how to carry out their roles and responsibilities. The document appears to be primarily directed to the siting and design of mobile infrastructure but expressly

refers to the 2003 Act and the 2003 Regulations and so does appear to be intended to also cover telecommunications network infrastructure as in this case. The following paragraphs are concerned with consultation:

"*73. Consultation and engagement are vital for ensuring the installation of electronic communications infrastructure is carried out in a transparent and appropriate way. The type and level of consultation and engagement required will depend on a number of factors, and should therefore be decided on a case by case basis. In general, it is expected that there will be a greater level of consultation for a new site as opposed to upgrades to an existing site. 40 In all instances, it is important for all parties involved in the process to take a positive approach to consultation and engagement.*

74. High-quality applications are essential and this includes ensuring the information provided in the application is of a good standard. The application information should be complete and straightforward. This allows stakeholders with an interest in the development to understand what is being proposed and its likely impact. It will also benefit applicants by avoiding unnecessary time and effort spent explaining the proposals, and can help allay concerns caused by ambiguous and incomplete information. In addition, good quality submissions are likely to result in more timely and better informed decisions by local authorities.

…

76. Pre-application discussions are important in helping to identify the most appropriate solution for any proposed individual development. Consultation is important for ensuring the appropriate design and siting for wireless infrastructure and should take place as part of the pre-application process, where appropriate. Effective consultation also enables local planning authorities to give feedback on the planned installation of wireless infrastructure in a timely manner and provides transparency for the public."

39. The guidance also addresses those forms of permitted development for which there is a prior notification requirement:

"*94. Not all telecommunications development that benefits from permitted development rights will require the prior approval of the local planning authority. In these cases, the operator must provide the local planning authority with written notice of its intention to install and a description of the apparatus and location it proposes to install it. It can then exercise the permitted development right after 28 days' notice. This is sometimes referred to as a 'regulation 5 notification' or 'code notification'. The local planning authority may within this period give written notice of conditions with which they wish the operator to comply in respect of the installation of the equipment. Operators should respond positively and promptly to any requests for engagement from local planning authorities and work towards solutions where reasonable concerns are raised about the proposed development.*"

THE EVIDENCE

40. The pivotal events and dates are the notification by FullFibre to the Council of its intention to install the apparatus on 4th September 2023 and the Council's decision of 27th October 2023 which is the subject of the challenge. There are therefore three distinct periods: (i) The evidence of what happened prior to the 4th September notification is relevant to understanding any consultation prior to notification; (ii) the period of 4thSeptember to 27th October is relevant to understanding the Council's approach to the permitted development right and the effect of notification and/or consultation in that period, and; (iii) the post decision correspondence is of some assistance in understanding the parties' thinking but is of less relevance than the pre-decision material.

Prior to Notification

41. Lord Christopher Harrison explains in his witness statement that in June 2023, FullFibre Limited wrote to all the residents in Lifford Gardens explaining that they intended to erect six poles in Lifford Gardens to provide ultra-fast broadband and that they would be 11 metres high.

42. Lifford Gardens had been built in 1963 subject to a condition which restrains the building of structures in the curtilages of the dwellings and on the highway boundaries such that what is created is "*an open plan estate*". The 30 detached houses are all within the Cotswold AONB. There was immediate and strong opposition to FullFibre's proposal. Lord Harrison also provided evidence as to the diameter of ducts on the estate, with a view to demonstrating that capacity existed to put cable underground in existing infrastructure.

43. The Cotswold National Landscape Board also had some early notice of FullFibre's intentions in that on 4th May 2023 the Board's planning officer, Simon Joyce, was invited to attend an introductory meeting with representatives of FullFibre. He does not recollect discussion of any specific project or location, merely mention of upcoming projects, including in Broadway. However, on 23rd May 2023, the Board received a "*Notice to Relevant Authorities*" of proposals including those in Broadway. At that stage, the Board responded in standard format, referring to relevant landscape policies for the AONB and to the Code of Practice. The Board also responded in September, and I shall come to that response below.

44. On 26th June 2023, there was a meeting which was attended by FullFibre and residents, a County Councillor (Elizabeth Eyre), District Councillors, the Clerk to the Parish Council and the Council's Director of Economy and Environment at which the intention of FullFibre to erect poles at Lifford Gardens and The Sands estate were discussed. At that stage, it was on the basis that notice had already been given, in May:

"*FullFibre has given 28 days' notice of their intention to erect poles and worked* [sic] *using criteria to minimise and mask the poles. In your areas, existing blocked,*

overcrowded ducts or lack of ducts are an issue, a significant amount of the network has been "direct buried", not originally put in a conduit."

45. On 4th August 2023 the Head of Public Procurement and Engagement at FullFibre wrote to Mr Vic Allison, Deputy Chief Executive at the Council to express the view that "*If the legislation wasn't as explicit as it is vis a vis permitted development and the limitation on 'consultation' to providing notice, the national fibre upgrade would be at significant risk."*

Notification

46. After notification, there was extensive correspondence between affected residents, FullFibre and officers of the Council and elected members. The officers of the Council ranged from the planning case officer, to the Assistant Chief Executive, Mr Allison, along with the solicitor advising the Council. It would make this judgment unduly long to set out the exchanges which took place and it would not assist in the analysis of the legal merit of the claim. I have found that the material as a whole demonstrates the following.

47. The "*Notice to Relevant Authorities*" was given on 4th September 2023 and specified the locations and heights of poles in the affected streets, which included Lifford Gardens. The pole height is either 10 or 11 metres and its grade is described as "*medium*" which is an indication of the diameter of the pole. The Notification is accompanied by street plans which show that the locations of each pole and a degree of explanation of the rationale for the approach. The Notice stated that FullFibre had identified all existing duct and pole assets and that they intended only to install new poles where no opportunities to use existing infrastructure currently exist, either

underground or overhead. It was stated that much of the relevant area is served by existing copper telecoms networks which is buried directly in the ground and there is no underground infrastructure through which to pass fibreoptic cables.

48. It is further indicated in the Notice that in some areas there is partial ducting available which would be used where possible to reduce the number of poles required.

49. The Notice concludes with a subheading "*Community Awareness*" which states:

"*FullFibre Limited are engaged in the following processes to raise awareness about the plans.*

Every property visually affected by the proposals have [sic] *been sent a letter. This letter explains the reasons for the new poles and offers an opportunity to suggest someminor amendments to the plan. As such, the exact locations may change marginally before the installation dates as a consequence of residents* [sic] *feedback.*

FullFibre have also discussed the plans with the Parish Council, District and County Ward Members and the MPs [sic] *office.*"

50. The Council's Development Manager corresponded with interested councillors and Amanda Gray (the Development Manager being an officer of both Wychavon and Malvern Hills District Councils). By 12th September, a petition had been generated by the many local residents who objected to the proposals. The Development Manager responded to the receipt of the petition to explain that he would be meeting with senior management to discuss how to respond to the Notification. He stated that "*it is important to note from the outset that the proposed telegraph poles are permitted development and as such there is very little that the Planning Authority can do to influence their roll out. I will respond as soon as I can*".

51. The correspondence ensued at pace and between many parties and individuals on the topic of the respective duties of the Council and FullFibre.

52. Those objecting made their views clear as to the requirement for consultation, one example of which was the email from Rebecca Fowler of 22nd September, stating and explaining that there is a clear requirement for FullFibre to **consult** not just notify the local planning authority (emphasis in the original). Mr Allison, Assistant Chief Executive, responded on 25th September to say that that there was no duty to consult, a point which I shall particularly address under the consultation issue.

53. The Council wrote to FullFibre on two occasions during this period. On 19th September 2023, the Council sought further information on the potential for sharing of apparatus, to minimise the visual impact of the proposed infrastructure. This was followed up on 29th September 2023 by letter. The Council found that the proposals fell within the scope of the GPDO in the sense that the dimensions of the poles complied with the GPDO and that the notification was sufficient in that regard. However, the Council took the opportunity to remind FullFibre of the conditions requiring minimisation of visual impact of the new development on the surrounding areas as far as practicable, particularly considering potential impacts on Article 2(3) land. The Council further emphasised the need to ensure that impacts on accessible footways and access to properties were also minimised. The Council repeated its request for detailed assessment, including any relevant surveys, of available infrastructure within the search areas associated with the Notification. In that context, the Council imposed a condition that:

"*No later than four weeks prior to the commencement of any works, your detailed assessment, including any relevant surveys, of available infrastructure within the*

search areas associated with the above notification shall be made available to Wychavon District Council and Broadway Parish Council to allow for any further engagement and clarification to be provided from the operator prior to works commencing."

54. The Council further drew attention to FullFibre's duties under the Code, particularly as to impact on the AONB and inviting liaison with the Cotswold National Landscape Board.

55. The Board did respond by letter of 26th September 2023 to express its view that the proposed installation of poles and wires, several of which were to be in prominent locations, would neither conserve nor enhance the landscape and scenic beauty of the national landscape. The Board considered that the proposal would not accord with the Landscape Strategies and Guidelines in its Management Plan. It drew attention to the potential to use underground infrastructure. It acknowledged the limitations of Part 16 of Schedule 2 to the GPDO and that the LPA has limited powers in respect of permitted development notification of this nature. Without actually specifying any particular power, the Board asked that the LPA use all powers available to restrict the permitted development to the use of underground infrastructure.

56. In response to these requests, FullFibre responded on 9th October 2023 to explain that there was some infrastructure present, which I understand to mean underground infrastructure, and that FullFibre would use that for its main trunk fibres. However, FullFibre said that their surveys proved beyond doubt that there were no ducts presently feeding premises directly and therefore poles would be required. It was said that there had been detailed communication with people in the local area and all changes which were structurally possible had been made and that the design minimised impact.

57. Erroneously, the response stated that in relation to the AONB the Board had been consulted in May and had raised no concerns. Evidently, FullFibre was not aware of the Board's objection by its letter of 26th September 2023.

58. FullFibre indicated that it was unable to use any ducts which had been installed by another operator, Gigaclear.

Decision

59. The letter of 27th October 2023, to which I have added paragraph numbers, states:

> "[1] I write further to our letter of the 29th September 2023 in response to your notification under Electronic Communications Code and the Electronic Communications Code (Conditions and Restrictions) Regulations 2003 and Part 16 of Schedule 2 to the Town and Country (General Permitted Development) (England) Order 2015 (GPDO) received on 4 September 2023.
>
> [2] In response to our requested condition requiring your detailed assessment, including any relevant surveys, of available infrastructure within the search areas associated with the notification, we received these details via email on 16th October 2023.
>
> [3] Having reviewed the information provided it appears that there are limitations on the infrastructure surveyed which would prohibit your ability to connect households to your network. In the surveys provided and your covering email you explain that there is some infrastructure present that you will utilise for your main trunk fibres, however, due to a lack of ducts presently feeding the premises directly, poles will be required.
>
> [4] You have also confirmed that you have approached Gigaclear who have begun to provide services into the village. We are aware that in some areas of Broadway their infrastructure has been laid underground however we understand, from your

email, that there is no space for a secondary fibre within their ducts and that the sharing of their trenchwork is not possible.

[5] It therefore remains the Council's view that, from the information available to us, the proposals fall within the scope of Part 16 of Schedule 2 of the GDPO. Please note that the above observations are offered in respect of surveys provided within Wychavon District and exclude the 15 poles, within Cotswolds District Council's administration area, for which we offer no observations.

[6] Notwithstanding the above, the Council, would like to take this opportunity to highlight a number of matters which should be given careful consideration under the Electronic Communications Code and the Electronic Communications Code (Conditions and Restrictions) Regulations 2003 which include:

[7] Firstly, as you are aware, the area in which the poles are to be located sit within an Area of Outstanding Natural Beauty (AONB) and the Council considers that the poles will have a negative visual impact. There are also a number of areas within the scope of the notification, where no poles currently exist and, in these areas, the level of resultant visual harm is increased. We have received comments in relation to the visual impact from the Cotswolds National Landscape and the Parish Council who also refer to their Neighbourhood Development Plan which seeks the provision of underground infrastructure as opposed to overground. It remains open to you to offer underground ducting direct to properties whether that be funded by yourself or the occupiers and we would encourage you to engage positively with communities and provide this option where feasible.

[8] Secondly, the Council are also aware of the new Code rights which were inserted by s57 of the Product Security and Telecommunications infrastructure Act 2022 earlier this year. Section 57(2) inserts into para 3 of the Code provisions to make the right to share electronic communications apparatus a specific code right. Whilst it is accepted that the amendment only provides the first operator with permission to share that apparatus with others and does not give other operators the right to require the first operator to share that apparatus, we would encourage the continual

review of this situation, and should opportunities evolve these should be utilised and overground infrastructure should be avoided.

[9] Thirdly, guidance within Cabinet Siting and Pole siting Code of Practice Para 5.8 states, "All new poles should be sited, so far as is practicable, so as to minimise their impact on their setting, including the landscape and any buildings. To minimise the visual impact, poles should not be sited in a prominent position at a junction or on a bend in the road. Other prominent locations on grass verges or grassed amenity areas should be avoided unless there is a technical justification. Poles must not obstruct any existing means of entering or leaving land. " Whilst the Council acknowledge that the code of practice is a voluntary document the advice provided should be carefully considered and help inform operators of appropriate siting."

Post-decision

60. After the decision had been taken, further correspondence ensued, including from the Head of Legal Services to Amanda Gray, and others, which included this observation:

"*So just to be clear, those conditions automatically apply under the GDPO to operators. They are not something that the Council must satisfy itself of when they receive the 28 day notice or decide upon before work starts. Permitted development rights have already been granted by the government subject to those conditions. If operators do not comply with these conditions when installing the apparatus then enforcement can be considered.*"

61. Installation of poles commenced on The Sands Estate on 31st October 2023, despite mass demonstrations by the residents, as explained by Rebecca Fowler in her first witness statement. By 6th November, an application for judicial review had been intimated.

62. On 18th June 2024, the Council's Senior Planning Enforcement Officer prepared a report which concluded that no enforcement action should be taken in respect of the

development because the conditions under the legislation had been satisfied. In other words, the Council concluded that the development benefitted from planning permission. So much is confirmed in the evidence of Samuel Mather who undertook a site inspection on 15th May 2024. He reached the view that the poles were, in most part, reflective of the positioning of the poles as indicated in the Notification. So far as there were discrepancies and that there was divergence from the notified positions, Mr Mather was content with the location of the poles and he considered that they did not breach any condition and did not constitute a breach of planning control.

THE CONSULTATION ISSUE

63. As a matter of law, is consultation required between an operator and the local planning authority? If so, did the Council err in law?

64. It was common ground between the parties that there was no requirement for the Council to consult those who may be affected by the proposal. There are many instances in respect of other forms of development and other application procedures where there are such requirements, but the parties to the alleged consultation requirement in this case are limited to the Operator and the planning authority.

65. Mr Nelson submitted that Ian Edwards's view, expressed on 22 September 2023, was wrong. Mr Edwards had said that there is no requirement for consultation, whereas regulation 3(1)(b) of the 2003 Regulations does require consultation with the planning authority. Similarly, Mr Allison was wrong to hold that Regulation 8 disapplied the requirement to consult, per his email dated 25th September 2023. Although Regulation 8 does apply to AONBs, it does not apply to the proposals at issue in this case;

Regulation 8(6). There is also nothing in regulation 8 which disapplies the requirement to consult.

66. The result, Mr Nelson submitted, was that no such consultation was carried out and therefore there was an error of law by the Council. What was required by Regulation 3 of the 2003 Regulations was a legally adequate consultation before the notification. The onus to do so was on FullFibre, and the Council may require consultation because the Code is incorporated into the permitted development right. Moreover, this position is supported by the guidance issued by DCMS, particularly paragraph 73 of the Code of Practice (set out at paragraph 38 above). The Operator may only benefit from the permitted development right if it has complied with the Code.

67. Mr Smyth submitted that there was a requirement for FullFibre to consult the Council, but the law does not require consultation prior to notification. It was not correct to say that the only lawful approach was sequential, with lawful consultation only being possible in advance of notification. The consultation could overlap with notification. In any event, submitted Mr Smyth, there had in fact been consultation by FullFibre with the Council and there was therefore compliance with Regulation 3 of the 2003 Regulations. In this regard, care had to be taken in interpreting the correspondence on the topic of consultation because some people used the term consultation in the context of what was actually notification. Mr Smyth gave the example of the exchange which Mr Allison had on 21 September 2023 as an example in which he was responding to a point about *"a 28 day Consultation and that the Councillors would have to consult with local residents and the AONB"*.

68. In my judgment, there is plainly a statutory duty under Regulation 3(1)(b) of the 2003 Regulations for an Operator to consult a local planning authority in relation to the installation of communications apparatus. In order to understand that duty, it is necessary to read Regulation 3(1)(b) with Regulation 3(3) which sets out three matters which the Operator is obliged to minimise, so far as reasonably practicable. These are impact on visual amenity of properties, in particular buildings on the statutory list of buildings, potential hazards posed by the work or the apparatus once installed and interference with traffic. The consultation with the planning authority is on the topic of visual amenity of properties, heritage effects and the minimisation of those impacts, so far as practicable.

69. It is also necessary to understand the duty to consult to include those matters which arise from the particular deemed consent which is to be relied upon. In other words, the consultation between the Operator and the planning authority cannot sensibly be limited to matters set out in Regulation 3(3)(a) of the 2003 Regulations but ignore the conditions which apply to the particular development which is notified to the local planning authority. Those conditions are location-specific. Their requirements vary according to the presence or absence of sites which are to be afforded protection, such as listed buildings, scheduled monuments, or, as in this case, AONBs. The consultation is, therefore, not generic but is to take account of the particular surroundings of the development, visual amenity and also visual impact on any site which is within the scope of a condition within Part 16 of Schedule 2 of the GPDO.

70. What will be legally adequate consultation to satisfy Regulation 3(1)(b) for development comprising electronic communications apparatus will, therefore, be

highly case-specific. I have not found the distinction between consultation in advance of notification and consultation which happens after notification to be especially helpful as a means of deciding whether consultation is legally adequate. In my judgment, it is too absolutist to say that discussions and amendments which happen after notification cannot comprise or contribute to a lawful consultation. In any event, I am not concerned with facts in which the only consultation relied upon happened after notification. If there were such a case, then it would need to be assessed on its own merits.

71. In this case, the evidence discloses that:

(i) In May 2023, there was some form of notification of statutory consultees (see paragraphs 43 and 44 above)

(ii) In June 2023, residents received written notice of FullFibre's plans

(iii) On 26th June 2023 there was a meeting with a high level of representation from the Council, including Councillors who were active on this topic area, and senior officers of the Council

(iv) There was correspondence between FullFibre and the Council on the proposals during August 2023

(v) The Notification document itself records that discussion of plans had taken place with Parish, District and County Council's and their elected representatives

(vi) Post notification, the local planning authority sought and obtained further information. That information was focussed on the objectives which are set out in the conditions, namely visual effects and the scope to minimise the use of poles.

72. In my judgment, the engagement with those affected amounted to a lawful consultation, without taking account of the post-notification requests and exchanges of information which I set out at (vi) in the list above. It was undertaken at a stage which was several months in advance of the notification. It was undertaken with the Council in person and in writing in advance of notification (particularly points (iii) and (iv) above). It went beyond simple contact with the local planning authority, which would have satisfied the letter of Regulation 3(1)(b), in that it included residents directly, along with their elected representatives. It plainly allowed for intelligent responses: *R v NE Devon Health Authority ex p Coughlan* [2001] QB 213 at [112], which were in fact made clearly and cogently. Further, I find that the request for further information which was made by the Council after notification and its provision by FullFibre were part of the consultation and may properly be taken into account in deciding whether there was compliance with Regulation 3(b). The dialogue remains open at that stage, and it would be contrary to good sense and the obligations of the Code Operator to hold otherwise. These post-notification exchanges strengthen, but are not essential to, my conclusion that the consultation was legally adequate.

73. Correspondence from FullFibre shows that at least some of its staff did not have a sufficient understanding of the consultation requirements. It was not correct to say that there was a *limitation on 'consultation' to providing notice.* This error is compounded by the Council's Assistant Chief Executive making the same error in response to Rebecca Fowler, who had correctly stated the position. If that had been the totality of the evidence at the point of decision, then it would be a matter of concern.

74. However, as a matter of fact, it is clear that the available options were the subject of survey, iterative design and with regard to the need to minimise visual impacts. Both

before and after these erroneous exchanges, there were substantive enquiries and exchanges of information between FullFibre and the Council. Further, the Defendant in these proceedings is the Council, not FullFibre. The Council expressed itself to be satisfied with the proposals and the information with which it had been provided. In circumstances where the consultee has been corresponding with the developer and has indicated its assent, that is a very strong indicator that Regulation 3(b) has been satisfied.

75. I do not accept that the description of the deemed consent incorporates the Code such that there is a duty on the Council to reach a conclusion on compliance with the Code before it can be said that proposed development is within the scope of Part 16. The reference to the Code is a reference to the legal basis on which the installation is to be carried out on the land. There are two options: either the Operator owns the land, or it uses the Code. That is why the deemed consent is expressed as "*…in, on, over or under land controlled by that operator* ***or*** *in accordance with the electronic communications code…"* (see paragraph 19 above; emphasis added). As I have described it briefly at paragraph 30 above, the Code is concerned with conferring property rights in respect of the land and is an extensive and comprehensive statutory scheme in that regard. Mr Nelson's submission that description of the deemed consent incorporates the Code as a requirement fails to read the text as a whole. I accept that development which does not comply with the Code, in that it fails to minimise impacts, would not be permitted development, but that takes matters little further than is established by the conditions to which the permitted development is subject. If Mr Nelson were correct, an installation on land controlled by the Operator would not be caught by the same provisions as an installation which is present on land by reason of the property rights under the Code.

Such an interpretation would be flat contrary to the purpose of the scheme of the legislation.

76. Drawing the above together, having regard to the issue which arises from the proposed Ground 3, there is certainly a duty on an Operator to consult a local planning authority for development of this type, which must go beyond mere notification. In this case, there was ample and lawful consultation. I would give permission to add Ground 3 to the Claim for the reasons given below, and permission to apply for judicial review which just crosses the threshold of arguability. However, the ground has not been made out for the reasons given above. Thus, Ground 3 fails.

THE NOTIFICATION ISSUE

77. When notified by FullFibre of its development proposals, was the Council required to consider whether FullFibre had fulfilled the conditions imposed on the deemed consent by paragraph A.2(1)(c) and (d)?

78. Mr Nelson submitted that the Council did not purport to consider these conditions, i.e. the conditions to which the deemed consent is subject, which was irrational. The Council was obliged to do so notwithstanding the absence of any explicit statutory requirement to do so. There was an implied obligation arising from Regulation 5(1)(ba) of the 2003 Regulations. Mr Nelson emphasised the cases which establish that a planning permission is to be construed as a whole, along with its conditions: *Barton Park Estates Ltd v Secretary of State for Housing, Communities and Local Government* [2022] PTSR 1699 at [21(2)]; *R. (on the application of Dennis) v Southwark LBC* [2024] EWHC 57 (Admin) at [35]; *F.G. Whitley & Sons Limited v Secretary of State for Wales* (1992) 64 P&C.R. 296, 302: *New World Payphones Ltd v Westminster City Council*

[2020] P.T.S.R. 888 at [48(i)] per Hickinbottom LJ who emphasised that it is necessary for the development to not only comply with the class description but also the conditions and limitations in order to fall with the class of permitted development right.

79. I accept Mr Nelson's submission that in order to reach a conclusion on whether FullFibre's proposal benefited from the deemed planning under Part 16 it is necessary to assess compliance with the relevant conditions. I do not accept that the Council failed to have regard to the conditions nor that it acted irrationally in reaching its 27th October 2023 decision, nor do I accept that there was an implied obligation arising from Regulation 5(1)(ba) of the 2003 Regulations.

80. Firstly, the decision was preceded by exchanges of information between June and October 2023 which exchanges were concerned with the options for installation with a view to minimising visual impacts both in the immediate locality and in respect of the AONB, as I have found in respect of the consultation issue.

81. Secondly, the GPDO deems consent to be granted, subject to the relevant conditions. There is no prior approval step, as there is in respect of some other types of telecommunications apparatus and also for other classes of development, such as the erection of agricultural buildings under Part 6, Class A. It is a grant of consent in the first category in s61(2) of the 1990 Act, i.e. permission is granted without any application to the local planning authority. In this case, the GPDO does not require a determination to be made by the Council. The narrow scope of the Council's role is to be acknowledged.

82. Thirdly, the conditions are qualified as to reasonable practicability, or practicability. Mr Nelson points out, correctly, that the 2003 Regulations use the term 'reasonably practicable' whereas the GPDO uses 'practicable', which is narrower and more demanding. What is practicable is matter of assessment on the basis of matters such as the nature and scale of effects, engineering or technical feasibility, and costs. Costs may well be relevant, support for which is to be found by analogy with the same term in the health and safety context of ALARP (as low as reasonably practicable) which involves weighing a risk against the trouble, time and money needed to control it. The conditions serve an obvious purpose and objective in seeking the lowest level of impact within the bounds of what is practicable. Reasonable people may disagree about what is practicable. It was plainly open to the Council to decide that the facts presented to it justified the proposal on the basis of practicability. That conclusion was not irrational.

83. Fourthly, Regulation 5 of the 2003 Regulations requires no more than 28 days notice, in writing, to the planning authority where planning permission is deemed to be granted by the GPDO and not the subject of the prior approval process: Regulation 5(1)(ba). It is a bare requirement to give notice.

84. Fifthly, the letter of 27th October (set out in full at paragraph 59 above) plainly does address the conditions by:

(i) Finding that underground ducts are not adequate and so poles are required (paragraph [3]);

(ii) Finding that there is no space for secondary fibre in Gigaclear's ducts (paragraph [4]);

(iii) Noting the fact of the AONB and the resultant visual harm (paragraph [7]);

(iv) Seeking continued co-operation in sharing infrastructure (paragraph [8]);

(v) Highlighting relevant guidance (paragraph [9]).

85. The letter accepts the information provided by FullFibre. There was contrary evidence, including on the important issue of whether there was space in existing ducting. Residents had supplied photographs which they contended showed that there was sufficient space for a second operator to install is cable. It is not this court's function to resolve those competing evidential questions. It is clear that the Council sought and considered information which satisfied it as to what was practicable and that its conclusion was reasonably and properly open to it.

86. In my judgment, the Council did consider conditions A.2(1)(c) and (d) to the extent that was open to it. The content of the letter making findings as to what is practicable and agreeing that the FullFibre scheme is an appropriate response to the circumstances, but nevertheless noting the effects and the good reasons to do whatever else proves to be possible. The letter is all about the minimization of visual effects. In my judgment, the Council plainly had all of the relevant criteria in mind when it came to draft its letter of 27th October 2023.

87. The implied obligation submission (Regulation 5(1)(ba)) does not take matters any further because I have found that the Council did have the relevant conditions in mind and were the focus of its questions and interrogation of FullFibre and its intentions. However, the submission that there is an implied obligation on the Council is contrary to the well settled approach to statutory construction as summarised in *CG Fry Limited v Secretary of State for Levelling Up, Housing and Communities* [2024] EWCA Civ 730, per The Senior President of Tribunals, Singh and Arnold LLJ. It is to be construed

having regard to context and in light of its purpose, consistent with the approach taken in GPDO cases: see the summary in *R(Mawbey) v Lewisham Council* [2020] PTSR 164 at [20].

88. When that is done, I do not find the provisions of Part 16 of the GPDO to be complicated, so far as a local planning authority's role is concerned. It is quite straightforward to work out whether there is a determination to be made, or not. In this case, the clear terms of the GPDO are that there is no determination for the Council to make. The context and purpose of the development order is to choose which types of development will be permitted under the Order and then to set limits and criteria within which it is necessary to fall in order to be permitted development.

89. In this case the conditions incorporate a range of matters which are to be assessed, in order to decide whether the conditions have been complied with. The subjectivity of some elements of the assessment does not imply a role for the Council. Rather, the developer needs to be confident of compliance with those conditions, or make an application for planning permission. The Council will, if necessary, make its own assessment in an enforcement context, and will follow the usual enforcements steps if there appears to be breach of planning control. None of this imports a requirement into the GPDO, by implication or otherwise.

90. However, the 2003 Regulations are part of the legislative context. Do those Regulations displace the ordinary meaning of the GPDO? I do not think that they do. The local planning authority is given a power under the 2003 Regulations to impose conditions. It is not obliged to do so, but it may do so: Regulation 5(3) (paragraph 35 above). A

Code Operator may be given written notice of conditions with which the planning authority wishes him to comply. But he is not obliged to comply with those conditions to the extent that they are unreasonable in all the circumstances. Paragraph 94 of the guidance in the Code of Practice (which is not to be confused with the Code under the 2003 Act) explains that operators should respond positively and promptly to any requests for engagement from local planning authorities and work towards solutions where reasonable concerns are raised about the proposed development.

91. Mr Nelson made no submissions about the manner of operation of Regulation 5(3). Correctly, he did not submit that use of a Regulation 5(3) condition could prevent telecommunications development of a type which complies with the conditions in the GPDO. That would require a direction under Article 4, and such a direction would specifically address the form of development which is limited: Art 4(2)(c). Moreover, I have had regard to s60(1) of the 1990 Act which gives power to the Secretary of State to include conditions and limitations on the grant of planning permission by development order. This contrasts to the position in respect of the grant of permission by a local planning authority: *I'm Your Man v Secretary of State for the Environment* [1999] 77 P&CR 251 – in those circumstances, there is only a power to impose conditions, not limitations. Any limitation on the grant of permission by the GPDO would, by reason of s60(1), have to be contained within the Order. For these further reasons, the scheme of the GPDO as a whole, read with the 2003 Regulations, does not imply that a Council may amend that which is compliant with the terms of the permitted development right. I do however accept Mr Smyth's example of the potential scope of a condition which controls matters such as colour or finish in an appropriate case.

92. In my judgment, the scheme of control for this particular type of development is one which requires a dialogue between the Code Operator and the planning authority, which scheme anticipates that such dialogue will be undertaken conscientiously and openly, consistent with the Code of Practice. This is a lesser degree of intervention by the planning authority than is to be seen in respect of other types of telecommunications development for which prior approval is required. On the other hand, it is a greater degree of intervention than is required for those permitted development rights which require no contact with the planning authority. The Secretary of State has made a judgement about what is a proportionate response for the planning regime to make in particular circumstances. The Code Operator is from a limited class of developers and is separately regulated, outside the planning system, and is expected to comply with the conditions in the GPDO, failing which enforcement steps are available to both OFCOM (s110(1) of the 2003 Act) and the planning authority (Part VII of the 1990 Act).

93. For those reasons, the answer to the question posed by Ground 1 is 'no', and Ground 1 is not made out.

COUNCIL'S CONTROL ISSUE

94. Does the condition imposed on the deemed consent by paragraph A.2(1)(c) (visual impact minimised so far as practicable) give the Council power to require that cables be installed underground?

95. Mr Nelson submitted that, properly interpreted, paragraph A.2(1)(c) required the Council to consider whether the visual impact of the development could be avoided by laying the cables underground. He submitted that there was a failure of investigation

and in his skeleton argument took a Tameside point; *R (Plantagenet Alliance Ltd) v Secretary of State for Justice* [2014] EWHC 1662 (Admin), [99]-[100], but this was not pressed in argument. To the extent that it remains in issue, I reject it for the reasons summarised at paragraph 71 above: the Council took the trouble to inform itself.

96. I incorporate here my reasons at paragraphs 80 to 86 and 92 above, which are also relevant to the question under this issue (Ground 2a). Moreover, this submission pays insufficient regard to the fact that the Council was not required to make a determination. As Eyre J said in refusing permission on the papers "*The claim is premised on a mistaken contention as to the nature of permitted development rights and in particular of the effects of the Defendant's notification to the Interested Party that the works were within the scope of the GPDO….. The works proposed by the Interested Party would be permitted development if they were within the scope of the GPDO and were carried out in accordance with the requirements laid down by the GPDO. Those requirements included, for example, those at article A2(1)(c) that the siting and appearance of any development be "such that the visible impact of the development on the site minimised so far as practicable"."* Similarly, the Head of Legal Services for the Council was essentially correct in her response to Amanda Gray – the government has granted permission subject to conditions with which FullFibre must comply (paragraph 60 above), failing which the Council may take enforcement steps.

97. The Claimant's concern was to have the broadband cable installed underground. That would minimise visual impact. The GPDO, read with the 2003 Regulations, requires consultation with the local planning authority, notification and compliance with the conditions on the GPDO and any reasonable condition imposed under the 2003

Regulations. For this form of telecommunications development, paragraph A.2(1)(c) (visual impact minimised so far as practicable) places an obligation on the Operator in the planning context which is also found in similar for in the regulatory context under the supervision of OFCOM, which I note has enforcement powers. Part 16 of the GDPO mirrors the purposes of the 2003 Act and its regulations. Code Operators have to comply with both the GPDO and their obligations under the regulations. Both the GPDO and the 2003 Act and its regulations are supported by enforcement powers, the former by the local planning authority and the later by OFCOM. Those enforcement powers are different but are complementary. That, in my judgment, is the statutory and regulatory regime which is in place to ensure compliance with paragraph A.2(1)(c).

98. The Council had no further or additional role and so Ground 2 fails.

THE REASONS ISSUE

99. The final substantive issue is whether the Council's reasons were adequate in respect of the second and third issues?

100. There is no statutory basis on which the Council is obliged to give reasons in this case. Indeed, there is no requirement to make a determination. However, once reasons have been given, those reasons must be legally adequate, whether those reasons wererequired to be given or not. The Council chose to give reasons in this case, so their adequacy may be challenged: *R v Criminal Injuries Compensation Board, ex p Moore* [1999] 2 All ER 90.

101. I have found (paragraph 85 above) that the Council did consider the relevant conditions. The reasons given explain the Council's thinking and the conclusion which it reached.

The Council concluded that FullFibre had done what was practicable to minimise visual impacts. This would, therefore, involve the erection of above ground telecommunications apparatus. The Council explained that it considered the proposed poles to be within the scope of the permitted development right and that the poles were required. Those reasons are adequate for the Claimant to understand why the Council took the steps which it did, and did not intervene in the manner which the Claimant sought. The Claimant has not been prejudiced by inadequate reasoning, and certainly not substantially so: *South Buckinghamshire DC v Porter (No2)* [2004] 1 WLR 1953 at [36]. On the contrary, the Council has provided clear reasons to explain why it accepted FullFibre's surveys and assessments. The reasons grounds are not arguable and, if I had given permission to add these grounds, I would have refused permission to apply for judicial review for the proposed grounds 1(b) and 2(b).

THE APPLICATIONS

102. The first issue arose late. By an application dated 17th September 2024, the Claimant sought to add the consultation ground as Ground 3. The Council, understandably, objected on the basis that the application was nine months after the claim was issued and only five weeks before the final hearing. Mr Smyth drew attention to *R (oao) Kigen v Home Secretary* [2015] EWCA Civ 1286 at [14] in which Moore-Bick LJ took an approach to public law proceedings which was the same as private law civil proceedings, particularly as to a robust approach to compliance with the CPR and promptness. There are, however, some features of public law cases which need to be taken into account, and particularly the public interest in the issue which arises: *R(Talpada) v Secretary of State for the Home Department* [2018] EWCA Civ 841 at [67-69]. This is not a case in which the Claimant has sought to introduce a new point via its skeleton argument. It has made a well-argued application, supported by evidence.

In that sense, there has been appropriate procedural rigour. However, the application is very late.

103. In this case, the consultation issue was prominent in the correspondence between interested persons and the Council. That point cuts both ways. It was a point which was there to be taken, if so advised, from the outset, but it was not. On the other hand, the Council has also known of this legal issue throughout and in that sense is not prejudiced, nor was the hearing date affected. Moreover, I have found that at some stages during the process there was evidence of misunderstanding by a Council officer. While I have found that is not a matter which vitiated the decision nor the consultation which in fact occurred, it is a matter which required consideration and so I give permission for the amendment.

104. I asked the parties whether the fact of the protected costs order should weigh in my consideration of the application to add either, or both, of Ground 3 or the reasons grounds. My concern was the potential for a claimant to apply to amend its claim without any real prospect of the defendant recovering its costs if the application was unsuccessful or if the claim failed, because the costs ceiling had been reached. In my judgment, there is potential for unfairness in that regard. However, on the basis of the costs information which was provided to me, I have concluded that it is not a significant factor in this case and I have not taken it into account.

105. The application to add the reasons grounds was made earlier than that in respect of consultation, on 9th July 2024. Nevertheless, it too was very late. In contrast to the consultation issue, it is not arguable, there is no particular public interest in those

grounds and there is no good explanation for not pleading those grounds at the latest by the oral hearing to renew the application for permission. Accordingly, I refuse permission to add Grounds 1b and 2b.

SECTION 31 SENIOR COURTS ACT 1981

106. S31(2A) Senior Courts Act 1981 provides that I must not grant relief if it appears to be highly likely that the outcome would not have been substantially different if the conduct complained of had not occurred. The evidence and conclusion of Mr Mather that the apparatus is not in breach of planning control is not challenged (paragraph 14 above). The Council would not and could not take any action in respect of the installation. It is therefore highly likely that any future decision by the Council would be the same, and so I would not have granted relief in any event. There is no exceptional public interest feature of the case which would justify a departure from that position.

CONCLUSION

107. The claim is dismissed.

108. I am grateful to Counsel for their focussed submissions and able assistance.