Neutral Citation Number: [2021] EWHC 336 Admin

Case No: CO/4745/2019

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

The Civil Justice Centre Manchester

Date: 19 February 2021

Before :

His Honour Judge Bird sitting as a Judge of this Court

- -

Between :

The Queen
(on the application of GEMMA CAMERON) **Claimant**

- and –

MANCHESTER CITY COUNCIL **Defendant**

- -
- -

Mr John Hunter and Mr Piers Riley-Smith (instructed by **Nexa Law**) for the **Claimant**
Mr Christopher Katkowski QC and Miss Kate Olley (instructed by the **City Solicitor)** for the **Defendant**

Hearing dates: 8 January 2021

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

HIS HONOUR JUDGE BIRD SITTING AS A JUDGE OF THE COURT

His Honour Judge Bird :

1. This is an application for judicial review of the Defendant's grant of planning permission for the use of land adjoining Great Ancoats Street in Manchester as a 24-hour public pay-and-display 440-space car park for 2 years ("the Car Park"). Permission was granted in October 2019 and will expire on 17 October 2021.

The Site

2. The relevant site is in Manchester, adjacent to New Islington and Ancoats. These areas have seen high levels of development activity in recent years as part of the delivery of the Ancoats and New Islington Neighbourhood Development Framework (NDF).

3. The site comprises 1.5 hectares and was the former car park of the "Central Retail Park". The retail park outlets have been demolished and the land they occupied hoarded off. The totality of the site is identified as strategically important in planning terms and it is anticipated that permanent development plans will be submitted in due course.

4. In terms of layout, the site forms an "L" with the longest element fronting Great Ancoats Street wrapping round to form the shortest element along the Rochdale Canal. It is bounded by Old Mill Street, Great Ancoats Street, the Rochdale Canal, New Islington Free School and New Islington Marina. The New Islington medical practice is also close by.

5. The site is within an Air Quality Management Area ("AQMA"). As paragraph 12.80 of the Core Strategy (see below) makes plain, the AQMA is in place by reason of high NO_2 concentrations:

> "*in terms of Lead, Particulate Matter, Sulphur Dioxide, 1,3 Butadiene, Benzene and Carbon Monoxide, Manchester meets both current and future air quality targets. In Manchester, therefore, the AQMA is for NO_2 only*"

The planning process.

6. Following consultation some 320 objections were received. The common thread running through each is, broadly, environmental harm and in particular the risk of air pollution. The Free School registered objections which included "*the detrimental impact on ..... pupils experiencing respiratory problems*". The Defendant adopted a screening opinion and determined that the development was not likely to give rise to significant environmental effects. No Environmental Statement was therefore prepared.

7. The Development Plan insofar as relevant to this application consists of the Manchester Core Strategy (2012). The relevant policies within the Core Strategy include ***S06*** Environment and ***EN16*** air quality which requires the Defendant to:

> "*seek to improve the air quality within Manchester, and particularly within Air Quality Management Areas*"

8. The NPPF (2019) at paragraphs 170(e), 180 and 181 provide that:

> "*Development should, wherever possible, help to improve local environmental conditions such as air .... quality*".
>
> "[planning decisions should] *ensure that new development is appropriate for its location taking into account the likely effects (including cumulative effects) of pollution on health, living conditions and the natural environment, as well as the potential sensitivity of the site or the wider area to impacts that could arise from the development*"
> "[planning decisions should] *sustain and contribute towards compliance with relevant limit values or national objectives for pollutants, taking into account the presence of Air Quality Management Areas and Clean Air Zones.... Opportunities to improve air quality or mitigate impacts should be identified*".

9. Every AQMA must have an Air Quality Action Plan (see para.2.3.1 of the Redmore assessment) the aim of which is to "*develop a clear, robust and meaningful set of actions which will deliver real changes in terms of air quality*" and which allows councils within Greater Manchester to carry out their statutory duties under Part IV of the Environment Act 1995. The defendant has adopted, as best practice, IAQM Development and Planning Control Guidance to deal with those obligations.

10. The relevant IAQM Guidance was published in January 2017. It notes at para.3.4 that NO_2 can play:

> *"an adverse role in exacerbating asthma, bronchial symptoms (even in healthy individuals), lung inflammation and reduced lung function. .... [there] is also an increasing awareness of evidence, as summarised in the HRAPIE review by the WHO, that chronic exposure to NO_2 may be important for premature mortality effects.... when applied on a national basis, use of these functions suggests that the national premature mortality burden for long term exposure to NO2 is equivalent to 23,000 deaths annually".*

11. Section 4 of the IAQM Guidance deals with planning matters. Paragraph 4.3 sets out a reminder that planning authorities need to pay particular attention to a number of matters when considering the grant of planning permission including whether the development will "*materially affect any air quality action plan or strategy*" and the overall "*degradation (or improvement) in local air quality*". Section 6 deals with the mechanics of undertaking an air quality assessment.

12. At para.6.8, the Guidance notes that it would be reasonable to have an air quality assessment where the development brings with it "*a risk of a significant air quality effect*". Where an assessment is required (see para.6.9, 6.13 and 6.14) it may be either a simple assessment (relying on already published information and without quantification of impacts) or a detailed assessment (completed with the aid of a predictive technique, such as a dispersion model). A simple assessment "*may be*

appropriate, where it will clearly suffice for the purposes of reaching a conclusion on the significance of effects on local air quality."

13. Paras.6.13 and 6.14 deal with a screening process. There are 2 stages: the first screens out developments if certain criteria relating to size are not met. The second helps to identify the likelihood that an air quality impact assessment should be carried out. The present development was not screened out at stage 1. Stage 2 suggests (bearing in mind the nature of the proposed development) that if it would not result in an AADT (annual average daily traffic flow) increase in the number of cars of more than 100 an assessment is unlikely to be required (in the sense that positive indicative factors are lacking).

14. At paragraphs 6.16 and 6.18 the following guidance appears:

> "*The principle underlying this guidance is that any assessment should provide enough evidence that will lead to a sound conclusion on the presence, or otherwise, of a significant effect on local air quality. A Simple Assessment will be appropriate, if it can provide this evidence*"
>
> "*The intent of an air quality assessment is to demonstrate the likely changes in air quality or exposure to air pollution, as a result of a proposed development.... Ultimately, the planning authority has to use this information to form its own view on the "significance" of the effects of air quality impacts, and thereby the priority given to air quality concerns in determining the application. The assessment therefore needs to provide sufficient information to allow this decision to be made.*"

15. It is clear from para.6.20 that the key point for an air quality assessment to address ("the basis of the assessment") is a comparison of air quality if the development takes place (described as "with development" and generally considered – see para.6.23 – for the first year of use) and if it does not take place (described as the "future baseline"). That exercise is comparative and necessarily involves a degree of informed speculation. The Guide suggests that "*Comparison with existing conditions will also be required, as current conditions are those with which people are familiar*" (this is the "existing baseline").

Mott McDonald - Traffic

16. Mott McDonald have prepared an amended "Technical Note" on traffic (or a "summary Transport Note") dated 26 September 2019. It is a short note set out like an office memo rather than a report. It is not signed. The aim of the note is to provide: "*estimated peak hour traffic movements to and from the car park and commentary on the integration with the surrounding highway network*". The methodology adopted is this:

    i) first, it considers the traffic flow generated by the site when it was "fully operational" (effectively serving the car parking needs of 15,143 m^2 of retail space).

    ii) Then it considers traffic flows post completion of the proposed development.

17. The conclusion is that traffic flows arising from the new development are likely to be lower than traffic flows experienced when the retail park was operating.

18. The conclusion is: "*The proposed car park is a 'meanwhile' use for the former Central Retail Park site as masterplans are developed for the site. The extant use is for 15,000 sqm of retail warehousing which, it is estimated, generated up to 600 two-way trips in the PM peak hour. The new car park turnover rates are likely to be much lower than a typical retail car park, as commuters will park on site for up to 10 hours per day. This will result in less movement throughout the day and lower impacts in the PM network peak hour. However, AM peaks are likely to be marginally more traffic intensive than the previous use.*"

19. The parties agree that this reference to "extant use" is in error. The note ends with this conclusion: "*The proposed development will therefore not have a significant impact on the local highway network, during the short period it will be operational. Therefore, it is respectfully concluded that the application should not be refused on highway or traffic grounds*"

Redmore - Air Quality

20. On 26 September 2019 Redmore provided an air quality assessment. Section 3 of the report identifies the "existing baseline" by considering the annual mean for NO_2 concentrations in 2018. At Great Ancoats Street (immediately at the site) the levels were given as 46.1. That is above the relevant limit, as would be expected in an AQMA. The report notes that although the number of retail units at the retail park decreased between 2016 and 2017 (there were 4 units in 2015 and 2016 and 2 units in 2017 and 2018) there was no real reduction in levels of NO_2 at Great Ancoats Street (see para.4.3.2). This leads to the conclusion that "*vehicle movements from the site were not significantly affecting local air quality, possibly as the number of trips was relatively low when compared to overall flows on Great Ancoats Street*".

21. In other words, the flow of traffic into and away from the site when it was operating as a car park and the retail site was open, had no real effect on NO_2 levels in the area because there was so much traffic using Great Ancoats Street that any flow attributable to the site was not material. The conclusion then is that: "*vehicle trips associated with the historical retail use of the site did not have a significant effect on local air quality. As the proposals are predicted to produce only a marginal increase in movements from those during 2017 and 2018, and a reduction in trips compared to 2015 and 2016, it is concluded that these are also unlikely to have a significant impact on air quality*" (emphasis added).

22. There is no information in the 2019 report about NO_2 levels beyond 2018 and therefore (because there were 2 open units in 2018) no indication of levels when the retail park was closed.

23. At para.4.2.1 Redmore calculate that the new use will result in a net change in traffic flow when compared to the usage of the site in 2018 (when there were 2 occupied units until April or May 2018) of +269 based on approximately 1600 projected daily vehicle movements (taken from the Mott Macdonald report). To arrive at that figure the authors of the report have calculated the equivalent vehicle movements "based on historical occupancy rates". The report goes on to conclude that "*the number of additional daily*

vehicle movements on any individual link with associated receptors is not anticipated to exceed 100".

24. The report then at para.4.4.1 looks at the criteria set out in the IAQM Guidance for when an air quality impact assessment might be needed. It concludes (because there will be no increase in the flow of cars of greater than 100) that there is no need for an air quality assessment and that the air quality impacts will be "not significant". The report concludes: "*Potential air quality impacts associated with vehicles travelling to and from the site were considered through comparison of historical and future trip generation, review of local monitoring results and use of the IAQM screening criteria. This indicated that impacts were predicted to be not significant.*" Thus, a comparison of the "historical" use of the site and the "future" use of the site if development were to be permitted leads to the conclusion that the development will have little impact.

The Officer's Report

25. The report refers to a "trip generation exercise" and the conclusion that no highways remodelling, or upgrade works will be required to accommodate the development. That appears to a reference to the Mott Mcdonald note.

26. Reference is made to relevant planning policies and in particular to ***S06*** and ***EN16*** within the core strategy. The conclusion in each case, based on the Redmore report, is that the development would have a neutral impact on air quality.

27. The officer's report deals with traffic and access by reference to the Mott Mcdonald report and concludes in this way: "*Given the previous use of the site as a 440-space car park, which was accommodated into the local highway network, it is not considered that the proposal would have a significant impact on the local highways during the temporary two-year period the site is operational*".

28. The air quality section of the report notes the site is in an AQMA and refers to the Redmore air quality report conclusion that the proposal would not have a "significant material impact on local air quality conditions". The report also notes:

> "*Although the retail use had been in decline, air quality monitoring saw no reduction in real terms in pollution around the site. This would indicate that vehicle movements from the site were not significantly affecting local air quality. More recent figures show that there has been a marginal reduction in air quality conditions which was mirrored in other nearby locations .... and therefore, this reduction could not be directly attributed to the low number of trips visiting the retail park.*
>
> *As such, it appears that vehicle trips associated with the previous use did not have a significant impact on local air quality. As vehicle movements would increase only marginally during peak times, it would not affect local air quality conditions.*"

Grounds of Review

29. I turn to the three grounds of review in respect of which permission has been granted:

i) The defendant erred in treating the previous use as the 'baseline' for assessing the impact of the proposed use

ii) The defendant erred in concluding that the impact of the development on air quality would be the same as or comparable to the previous use in any event

iii) The defendant failed to have due regard to the Public Sector Equality Duty ('PSED')

Ground 1

30. Mr Hunter who appeared with Mr Riley-Smith for the claimant emphasised that a proper assessment of the impact the proposed development would have on (amongst other things) air quality, lay at the heart of the planning process in this case. That seems to follow from the Core Strategy, the NPPF and the IAQM guidance adopted by the defendant. Without an accurate assessment of the impact the development would have on air quality it would not be possible to determine how relevant policies should be applied (see *Mooreland* below at paragraph 36).

31. Mr Hunter's criticism is based squarely on the fact that Mott Mcdonald (and he submits Redmore) proceed on the basis that the site has existing (or "extant") planning permission for car park use. If it had the benefit of such permission and if there was a real possibility of the permission being acted upon, then it would be acceptable to take the historic use of the site as the "future baseline". I accept however that it does not have such permission, and that this assumption is an error.

32. The officer's report importantly picks up and compounds the error and, in any event, refers more than once to historic (and in essence unrepeatable, save with the grant of planning permission) use as a car park.

33. The assessment of impact is a comparative exercise as can be seen from the IAQM guidance which highlights the need to identify a "future baseline" (without development) and then compare it to the position that would prevail if the development went ahead. Although the Guidance also refers to the "existing baseline" in the present case there is no reason to suspect that the "future baseline" and the "existing baseline" are not exactly the same. I note that in *Bibb v Bristol CC* [2012] JPL 565, that Ouseley J described the "real baseline" as the position without development. The problem identified by Mr Hunter is that (given the absence of any extant permission to use the site as a car park) neither the future baseline nor the existing baseline is in fact identified.

34. The Redmore report devotes some time to identifying the "existing air quality conditions" (the existing baseline) at the site. It relies on "*recent NO_2 results recorded in the vicinity of the proposed site*" from 2018 when the retail park was open, and the site was being used as a car park. To examine the position "*with development*" Redmore assumes (by reference to the Mott Macdonald note) 1600 car movements per day (at least between 7am and 7pm) but sets off against that number, trips that would have been taken to the retail units on site, giving a net difference of 269. The report then informs the defendant that post development, some 269 more car journeys would be made than would have been made when 2 units were operating on the retail

park and the site was lawfully used as a car park up to May 2018. Mr Hunter submits that the netting off of historical journeys is wrong in principle.

35. The report goes on to conclude (as described above) that because NO_2 levels at the site and in the area do not appear to have been affected by the reduction in the number of operating units at the site (before May 2018) that there is no causal link between NO_2 levels in the locality and the number of cars that use the car park and that one is not directly proportionate to the other.

36. Mr Hunter submitted (by reference to *Bibb v Bristol City Council* [2011] EWHC 3057) that the correct baseline would involve a consideration of the position if there was no planning permission. I was also referred to the Northern Ireland decision in the *Matter of an application by Mooreland and Owenvarragh Residents' Association* [2014] NIQB 130 and to paragraphs 54 onwards dealing with the "fallback position". In that case Horner J pointed out (paragraph 55) that if a key element in the assessment of the proposed development is misunderstood, the planning authority could not "*have lawfully carried out the balancing exercise of all the material considerations, which it accepts is crucial to its final decision. It precluded the decision-maker from fairly weighing in the balance, for example, the adverse impact on the road network and on residential amenity of [the development] because the effect .... had not been lawfully and adequately assessed.*"

37. In answer to these points Mr Katkowski QC for the defendant submits that the defendant was entitled to take account of the past use of the site as a car park. I accept that submission. It does not however deal with Mr Hunter's argument. The point raised by the claimant is very specific: there has been no proper assessment of the impact the development would have on air quality because there has been no examination of the difference between the "future baseline" and the position with development. It seems to me that the defendant accurately summarises the meat of the claimant's argument at paragraph 43 of its skeleton argument. It seems to me that the proposition there cited and advanced by the claimant is exactly what the IAQM guidance requires.

Discussion

38. In my view a proper assessment of the impact the development would have on air quality is required before the defendant can consider if relevant policies are met (or if not, if they should be departed from). A proper assessment of the impact on air quality is the subject of guidance published by the IAQM and adopted by the defendant. The assessment can take a number of forms (it can be simple or detailed). Whichever form it takes it must meet the minimum standard of providing: "*enough evidence that will lead to a sound conclusion on the presence, or otherwise, of a significant effect on local air quality*"

39. In my view the air quality assessment provided by Redmore is not capable of providing evidence that would allow the defendant to come to a sound conclusion about the impact of the development on air quality. Insofar as the report concludes (at section 4.4) that the IAQM's "indicative criteria" for an air quality assessment are not reached, I find that conclusion is wrong. Redmore are therefore wrong to conclude that it follows that impacts associated with the scheme will not be significant.

Paragraph 6.14 of the IAQM Guidance is perhaps to blame. In my view, the underlined words (my added emphasis) relate to stage 1 criteria set out in table 6.1. It appears that Redmore have (wrongly) applied them to the stage 2 "criteria" set out in table 6.2. says this:

> *"Stage 1 requires any of the criteria under (A) coupled with any of the criteria under (B) in Table 6.1 to apply before it is considered appropriate to proceed to Stage 2. If none of the criteria are met then there should be no requirement to carry out an air quality assessment for the impact of the proposed development on the local area, and the impacts can be considered to have insignificant effects"*

40. In dealing with air quality assessment the Redmore report concludes either (a) that an air quality assessment is not needed (see paragraph 24 above) or (b) (because historically the gradual closure of retail units did not affect the levels of NO_2) there is no causal link between the use of the car park and NO_2 levels that the impact of the development on air quality is insignificant. In either case the assessment in my judgment does not do what an assessment should do; it fails to compare the future baseline with the position that would prevail if the development was in place.

41. The report itself notes that potential air quality impacts associated with vehicles travelling to and from the site were considered "*through comparison of historical and future trip generation, review of local monitoring results and use of the IAQM screening criteria*". In my view this makes the point and reveals the inadequacy of the report: a comparison made between historical and future trip generation is not an appropriate assessment of the impact the development will have on air quality. The review of local monitoring results does not indicate what the future (or present) baseline is and for the reasons given it seems to me that the IAQM screening criteria have been misunderstood.

I accept Mr Katkowski's submission that I am not directly concerned with the correctness of the expert reports. But in the present case those reports have been effectively adopted by the officer's report. The report notes when considering policy ***EN06*** that given the previous use of the site there would be a neutral impact on air quality and when looking at policy ***EN16*** there the impact would be neutral because "*there has been a 440-space car park on this site for many years*". Looking at Planning Practice Guidance the report concludes that "*the impact on air quality in the local area will not be material when measured against the operations of the car park when in association with the retail park.*" Dealing with the impact on air quality the report states: "*The use of the site as a 440-space car park forms the baseline from which the proposal should be assessed*"; it refers to "*an air quality report*" which "*notes that any air quality impacts would be from exhaust emissions and confirms that the proposal would not have a significant material impact on local air quality conditions. The assessment concludes that the differences in trip generation between the previous and proposed use are negligible and would not warrant refusal of this planning application*". The conclusion notes: "*The operations of the car park would be comparable with the previous parking use.*"

42. The parties remind me that I must not read the officer's report "*with undue vigour but with reasonable benevolence and bearing in mind that they are written for councillors with local knowledge*" (*Morge v Hants* [2011] UKSC 2). He also reminds me in the absence of evidence to the contrary (there is none here) it can reasonably be assumed that by following the officer's recommendations the members were accepting the advice proffered (see *Palmer v Herefordshire* [2016] EWCA Civ 1061). I am satisfied that on a fair reading of the report as a whole, the officer has materially misled the members on a matter bearing upon their decision, and the error has gone uncorrected before the decision was made (*Mansell v Tonbridge Borough Council* [2017] EWCA Civ 1314 per Lindblom LJ at [42]).

43. With that guidance in mind, I have come to the conclusion that it is clear that the officer's report proceeded expressly on the (wrong) basis that use of the site as a car park was the correct baseline. For the reasons given above I am satisfied that is an error. In summary:

    i) The correct future (and present) baseline would be to treat the site as an abandoned car park or an empty piece of land.

    ii) There is no relevant air quality assessment. Rather there is a comparison of resultant air quality when the site was a car park and if it becomes a car park again. It is perhaps unsurprising that the conclusion was that there would be no material change.

44. Unsurprisingly in the facts of this case, it is not suggested that the outcome of the planning decision would have been the same if the members had been properly advised. It follows that I find ground 1 to be made out and will quash the decision to grant planning permission.

Ground 2

45. Having reached that conclusion ground 2 in my judgment (and as I understood the parties to accept) falls away.

46. There appears to be a clear overlap between the first and second grounds. Ground 2 attacks the substance of the reports and relies on some of the points I have set out above. I have dealt with some of those points above. I would only add that the purported air quality assessment in this case (relying as it does on historical use and future use and missing out any analysis of the present position) is such that it precludes any meaningful consideration of how air quality might be improved (as required in appropriate circumstances by ***EN16*** and ***S06***).

Ground 3

47. Ground 3 started out as a wide-ranging allegation of a failure on the part of the officer to provide adequate advice. A failure to deal with the Public Sector Equality Duty ("PSED") was only one of a number of complaints. Paragraph 69 of the Statement of Facts and Grounds sets out the following:

> *"The Defendant was also obliged to take into account the effects on children's health as a primary consideration and pay "due regard" to effects on the*

> *disabled people in accordance with the Public Sector Equality Duty in section 149 of the Equality Act 2010. However, no consideration (or no proper consideration) was given to whether the approval of an application for a major new car park was consistent with the above".*

48. The Defendant joined issue with this ground and in particular complained that there was an absence of detail as to how the PSED might arise.

49. In the reply to the summary grounds of resistance the claimant included this at paragraph 21 (emphasis added):

> *"Paragraph 62 of the SGR denies that being a child is a protected characteristic under the Equality Act 2010. However, 'age' as well as 'disability' is explicitly a relevant protected characteristic (see s.149(7)). Therefore, since s.149(1) and (3) of the Act require "due regard" to be had to, amongst other things, advancement of equality between those sharing a relevant protected characteristic and those who do not (including by taking steps to remove or minimise disadvantages suffered by the former which are connected to that characteristic), the Defendant was obliged to consider the potential for the development to have a greater/more disadvantageous impact on children living locally and/or attending the school, on the basis that they share a relevant protected characteristic. For essentially the same reasons set out above in relation to the children's best interests, it is submitted that the Defendant similarly failed to pay 'due regard' to the need to avoid/minimise particular harm/disadvantage to them."*

50. The reference to children's best interests is rehearsed at paragraph 20 (emphasis added):

> *"The Defendant does not dispute that the best interests of children had to be treated as a primary consideration, but appears to claim that this duty was satisfied by the Committee Report (SGR, paragraphs 60-61). However, the requirement to treat them as a 'primary consideration' means that the Defendant had to give proper and lawful consideration to them and ensure that they were not treated as inherently less important than any other consideration. One issue of particular concern to objectors, however, was the impact on children's health from a reduction in air quality due to the proposed use, as it is well-known that children are at risk of particular harm in this respect and there is a school is directly adjacent to the site, as well as children living locally and/or attending that school with respiratory conditions. Thus, the issue was fairly and squarely raised before the Defendant. Despite this, there is simply nothing in the Air Quality Report which addresses the potential impact on children. It appears, therefore, that the Defendant did not ask Redmore to consider it (and may not even have made them aware of the existence of the school or its proximity to the site). This was a major omission because, as the IAQM guidance makes clear that, "in certain circumstances, it may be necessary to consider whether the site itself is suitable for the introduction of new emission sources. This*

> *could be because the neighbouring land use has particular sensitivities to increased exposure to air pollutants". It follows that the Defendant failed to treat the best interests of the children (which obviously include their health and physical development) as a 'primary consideration'.*"

51. In the claimant's skeleton argument Mr Hunter argues that no steps were taken to consider the impact the grant of permission would have on children in the school with respiratory conditions. This is in effect an amalgam of the 2 separate points raised at paragraphs 20 and 21 of the reply.

52. Because I have already found for the claimant on ground 1 it seems to me that this ground is of little practical relevance. However, given that it is of some real importance to the claimant I will deal with it, albeit shortly. It seems to me that the defendant understood the argument in respect of PSED to be that the defendant had failed to have due regard to the rights of children as a class. In my view the claimant is entitled to take a wider view and to argue the point as it was put in her skeleton argument.

53. I accept that there is no reference in the officer's report to the PSED. Nonetheless, I bear in mind that the failure to make such specific reference will not of itself necessarily mean that the decision maker has failed to comply with its statutory duty (see the decision of Lewis J as he then was in *R (Buckley) v Bath and North East Somerset Council & Curo* [2018] EWHC 1551).

54. Section 149 of the Equality Act 2010 requires a public authority to "have regard to" the public sector equality duty.

55. There was some suggestion by the defendant (it seems to me because the argument was taken to apply to children as a class) that the duty might not apply in the present case. I am satisfied that it does. It was found by the Court of Appeal to apply in the case of *Gathercole v Suffolk* [2020] EWCA Civ 1179 to children with protected characteristics. I do not see therefore why it could not apply here.

56. In that case, permission was sought to develop a Primary School in Lakenheath close to an American Airforce Base and therefore in an area exposed to aircraft noise. The officer's report referred to the presence of excessive noise and a noise impact assessment. Outside teaching at the school would be interrupted by the noise. It was accepted that granting permission for the development would amount to a breach of policy by reason of the noise levels. The breach could not be mitigated but the effects of noise would be sporadic. The officer's report recommended that adverse impacts were outweighed by the benefits of having a school.

57. The Court of Appeal found that the defendant had not had due regard to the needs of children with protected characteristics (in particular those with hearing impairment and ADHD) when considering the effect of noise in the outside areas of the school. There was therefore a breach of the PSED (as it turned out the Court of Appeal concluded this made no difference and so rejected the claim). It was notable in that case that an environmental statement made specific reference (at chapter 7 under the heading of noise) to the PSED and made it plain that different acoustic criteria would apply to spaces for use by students with special hearing or communication needs. The

officer had nonetheless failed to make any mention of the particular needs of children with these protected characteristics in the report. Thus, Coulson LJ felt that the failure to raise the issue in the officer's report was a serious matter which could not be overlooked.

58. In the present case, Mr Hunter points out (in his skeleton argument at paragraphs 76 and 77) that objections made specific reference to the detrimental impact the development would have on children at the school with respiratory problems (see paragraph 6 above) and that this was ignored. He points out that the New Islington Free School is only 26 metres away from the proposed development (as was briefly acknowledged in the officer's report) and that children are identified as a sensitive population group in the Air Quality Directive.

59. The defendant had no information on which it could sensibly assess the extent to which the car park would impact on the health of those children at the school with respiratory conditions. It was under a duty to make inquiries and so be properly informed to ensure that it was in a position to consider the discharge of its duty (see *R (Hurley & Moore) v Secretary of State for Business, Innovation and Skills* [2012] EWHC 201 (Admin)).

60. In my judgment the present case raises the same issues that were raised in *Gathercole*. The defendant did not take me to any other authorities on this question and argued that point very briefly. If I had rejected ground 1 and so in essence found that the officer was entitled to advise members that the impact on air quality was negligible it is possible (as the defendant argued at paragraph 76 of its skeleton argument) that this ground would probably also have fallen away. It is perhaps understandable that the defendant did not concentrate its fire on this point, preferring instead to fight the main battle on ground 1.

61. For all of those reasons, I have come to the conclusion that the defendant failed to have regard to the PSED. The finding adds nothing to my conclusion, but it does stand as a reminder that when development within an AQMA is under consideration the obligation to consider the PSED is likely to arise because of the potentially disproportionate impact some types of development might have on those who suffer from respiratory conditions. This is particularly the case when the AQMA is in place because of the high presence of NO_2 because it is well understood that NO_2 is capable of playing an "*adverse role in exacerbating asthma, bronchial symptoms (even in healthy individuals), lung inflammation and reduced lung function*" (see paragraph 10 above and the IAQM guidance) and particularly the case when there is a school (because on any view children are more susceptible to the effect of NO_2 see for example Air Quality Directive 2008/50/EC Art.23.1) in the close vicinity to the area of potential development. In such cases the duty may well be discharged by a careful consideration of the issue noted in the officer's report and backed by expert evidence. In my view this approach would be entirely in line with the defendant's clear commitment (see policies ***EN16*** and ***SO6***) to improve air quality.

Conclusion

62. I am grateful to counsel for their helpful and focussed submissions. If an order can be agreed in the light of this judgment I will hand down without the parties in attendance.