TRANSPORT AND WORKS ACT 1992

TRANSPORT AND WORKS (APPLICATIONS AND OBJECTIONS PROCEDURE) (ENGLAND AND WALES) RULES 2006

NORTHUMBERLAND LINE

PROOF OF EVIDENCE OF JEFFREY WILLIAM BOYD

ON BEHALF OF THE BERNICIA GROUP (OBJ 25)

APPENDICES

12 OCTOBER 2021

Appendices

Leeds
Manchester
Newcastle

ward hadaway

Your Ref:
Our Ref: FMO.BER090.109
Doc No: 33077459v1
Date: 08 October 2021

Duncan O'Connor
Pinsent Masons

By email:Duncan.O'Connor@pinsentmasons.com

Dear Duncan

Northumberland Line Transport and Works Act Order
Your Client: Northumberland County Council ("NCC")
Our Client: Bernicia Group ("Bernicia")

You will recall that at the Pre-Inquiry Meeting (PIM) that I sought clarification as to how any changes in the parallel planning applications process would be dealt with in relation to the promotion of the Order and its land take proposals. At the PIM Counsel for NCC advised that NCC did not envisage any further changes to the planning position.

A planning application ref 21/01106/CCD was submitted on 18 March 2021 for construction of a two platform railway station at Bedlington. From the outset Bernicia has identified the impacts upon residents of Sleekburn House immediately adjacent to Bedlington Station as a matter of considerable concern and it is acknowledged that there has been correspondence between the parties' various advisers seeking to understand and if possible address such impacts. Moreover it has become apparent that in respect of impacts from Bedlington Station that planning changes are necessary and indeed are presumably to be proposed by NCC.

I note that today a note dated 6 October from SLC Property to NCC Planning Department has been posted on NCC's Planning Portal.

It states that:

> *"at Sleekburn House a 3.5 metre barrier is required between the down line platform and the property to ensure that the impact for the NSR is law. This is assessed in the Noise Impact Assessment submitted in support of the application, and the Noise Memo submitted in support of the application on the 26 July 2021".*

At one and the same time Bernicia's advisers Sanderson Weatherall have this afternoon received an email from AECOM which states:

> *"Apologies for the delayed response – I appreciate that you are under tight timescales in providing your advice to Bernicia.*

Sandgate House, 102 Quayside
Newcastle Upon Tyne
NE1 3DX
UK
730360 Newcastle Upon Tyne 30

I understand that Jay Miller has provided you with CAD files of the existing and proposed fence line. PDF drawings were included with the planning application and are attached for assistance.

We have investigated the discrepancy between the TWAO and planning application drawings picked up by Nick. The drawings reference the same station model, including the existing and proposed fence. Therefore, there isn't a need to identify a revised proposed fence line on the drawings. The difference arises from the position of the Sleekburn House which is shown differently depending upon the background mapping being used. In this case, the planning application drawings have relied upon drone survey data to locate Sleekburn House, whereas the TWAO drawings use OS mapping. The third attached drawing illustrates the differences. Clearly there will need to be some rationalisation of this data to ensure that we arrive at the most accurate position, which we would suggest is confirmed on site.

Unconnected to the above, it has also become apparent that the noise assessment has modelled the noise barrier in a slightly incorrect location. The modelled location is closer to Sleekburn House than that shown on the drawings. We have now corrected the location of the fence in the noise model (so that it is slightly closer to the track) which results in the daytime railway noise level at first floor level of Sleekburn House reducing by 0.4dB. We would be happy to share the updated shape file with your consultants if that would assist.

Apologies again for the delay – but it took some time to investigate the above matters.

I should also highlight that NCC's solicitors are preparing a draft letter of assurance which will be sent to Bernicia's solicitors before the end of the week in connection with the objection to the TWA Order. It will set out assurances in respect of the proposed land take and mitigation measures which will be taken to seek to address your client's concerns as set out in their objection."

As regards noise impacts the two positions are clearly inconsistent and incompatible. Either the applicant relies upon the original noise assessment dated December 2020 and re-affirmed on 26 July 2021 or it intends to update it in line with the above AECOM e-mail. Can you please confirm your client's intention and in particular what changes if any are proposed to be made to the planning application itself and/or the information submitted in support of it.

It has been acknowledged by AECOM that the planning application and the Order have been prepared on different mapping bases resulting in a discrepancy as to the location of Sleekburn House. This is clearly material to both the proposed development and land-take positions and AECOM accept that "some rationalisation of this data" will be required. I should be obliged if you could clarify what rationalisation is proposed in respect of each of the planning application and the Order.

Underpinning my comments at the PIM was the concern that Bernicia would be faced both with an inordinately tight deadline for submission of evidence (some of which is technical and requires time to prepare) with a "moving target" in terms of what mitigation of impacts at Sleekburn House is proposed. Regrettably that would appear to be what has transpired with concomitant impacts in terms of potentially abortive work.

Bernicia looks forward to receiving the draft letter of assurance. However, both in respect of the contents thereof and the above recent information it is now so late in the day in terms of preparation of evidence for the 12 October deadline that it will not be possible for Bernicia's evidence at first instance to address the latest position let alone any forthcoming changes. In addition to the late provision of noise data, it has not been possible to date to undertake a light survey given the delay in supplying plans.

Therefore please note that Bernicia expressly reserves its right to add to or amend its evidence in the light of the ongoing changes to NCC's position as regards impacts on Sleekburn House.

Furthermore, as the applicant will be aware, the Court of Appeal in *Smith v Secretary of State for the Environment* [2003] Env LR 32 following *R v Cornwall County Council ex parte Hardy* [2001] Env LR 26 in the context of the EA Directive held that planning decisions in relation to the environment are required to be taken with the appropriate information in mind in order that full knowledge of a project's likely significant effects are taken into account. That principle applies equally in non-EIA cases where it is proposed to rely upon conditions to deliver mitigation. If consideration of some of the environmental effects, such as the scope for mitigation of the lengthy construction works impacts on Sleekburn House, is effectively to be postponed until the discharge of conditions stage then it is likely that any decision to grant planning permission will have been taken without full knowledge of the potential impacts of the project. As you are aware there is no obligation to consult at conditions stage. We therefore require clarification as to how any updated environmental information such as the revised noise assessments will be considered as part of the current planning process and what further public consultation will be undertaken by the County Council affording an opportunity to comment thereon. I am therefore copying this letter to the relevant Planning Case Officer.

Lastly, whilst the above comments focus primarily on Bedlington, can you please confirm whether or not the AECOM statement that mapping for the Order and planning have been undertaken on different bases in respect of Bedlington has wider application to the entire project. That is, can you please confirm: that the Order, in its entirety, has been mapped on an OS basis; how mapping has been undertaken in respect of all other planning applications submitted and works proposed; and what other differences or discrepancies have been identified.

Yours sincerely

Frank Orr
Consultant
For Ward Hadaway LLP

+44 (0) 330 137 3515
frank.orr@wardhadaway.com

Cc: Joanna Vincent, Public Inquiry Manager, Northumberland Line Inquiry and Gordon Halliday, Northumberland County Council

Nick Vincent

From:	Smedley, Matthew <matthew.smedley@aecom.com>
Sent:	07 October 2021 14:22
To:	Liz McLoughlin; Peter Eustance
Cc:	Russell Mills; Adrian Marston; nicholas.dobinson
Subject:	RE: Bernicia
Attachments:	60601435-ACM-06-PL-DRG-ECV-000002.pdf; 60601435-ACM-06-PL-DRG-ECV-000004_P02.pdf; 60601435-ACM-06-ZZ-SKT-LEP-000001-P01.2.pdf

Liz,

Apologies for the delayed response – I appreciate that you are under tight timescales in providing your advice to Bernicia.

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Regards

Matthew Smedley, BA (Hons), Dip TP, MRTPI
Associate Director – Town Planner
Environment and Sustainability
M 07739 720282
matthew.smedley@aecom.com

AECOM
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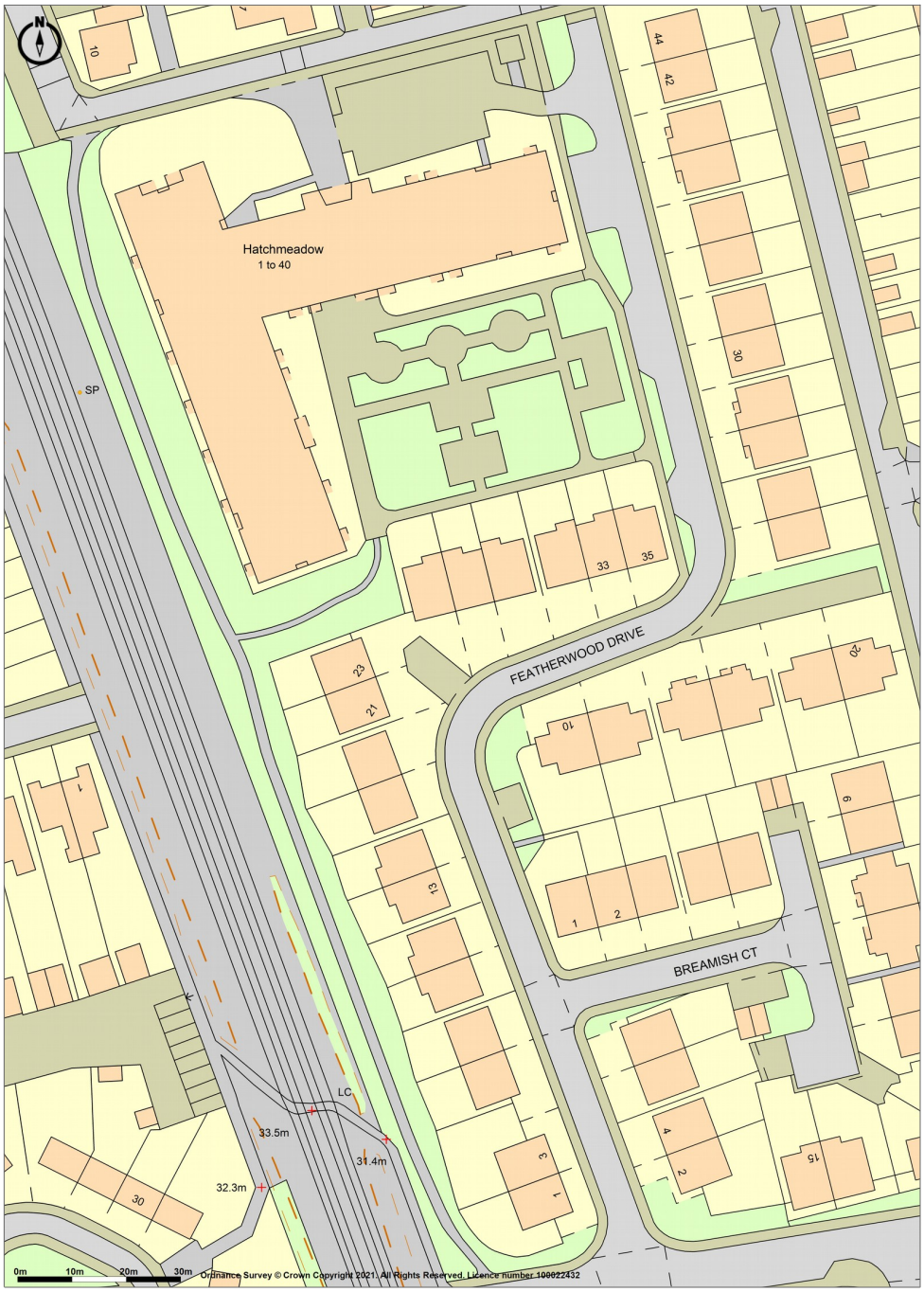
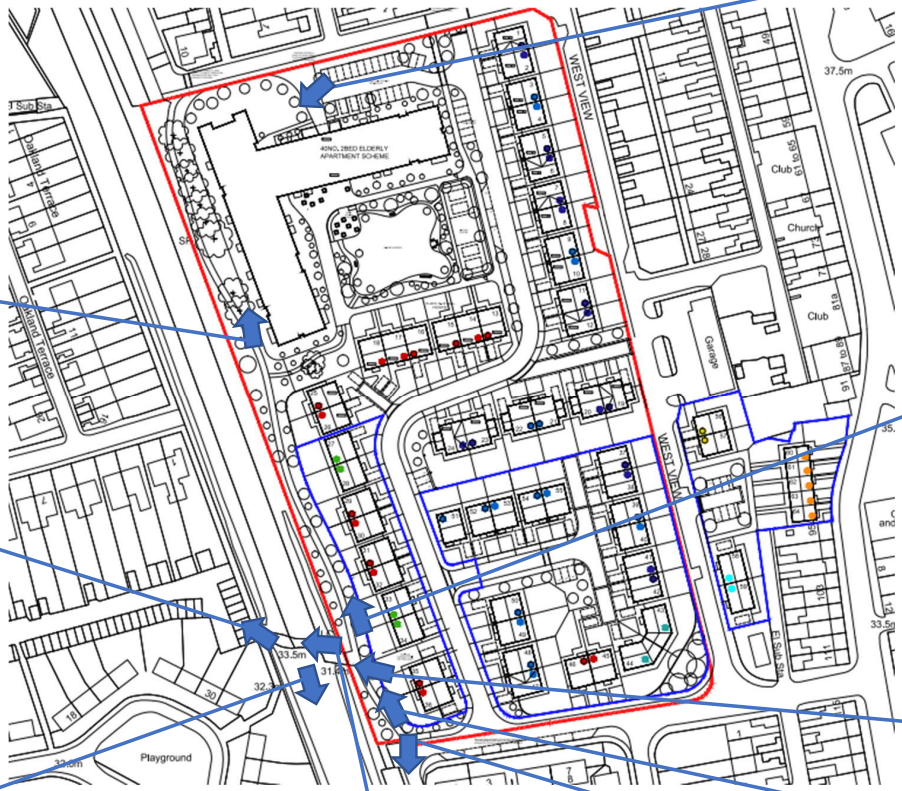
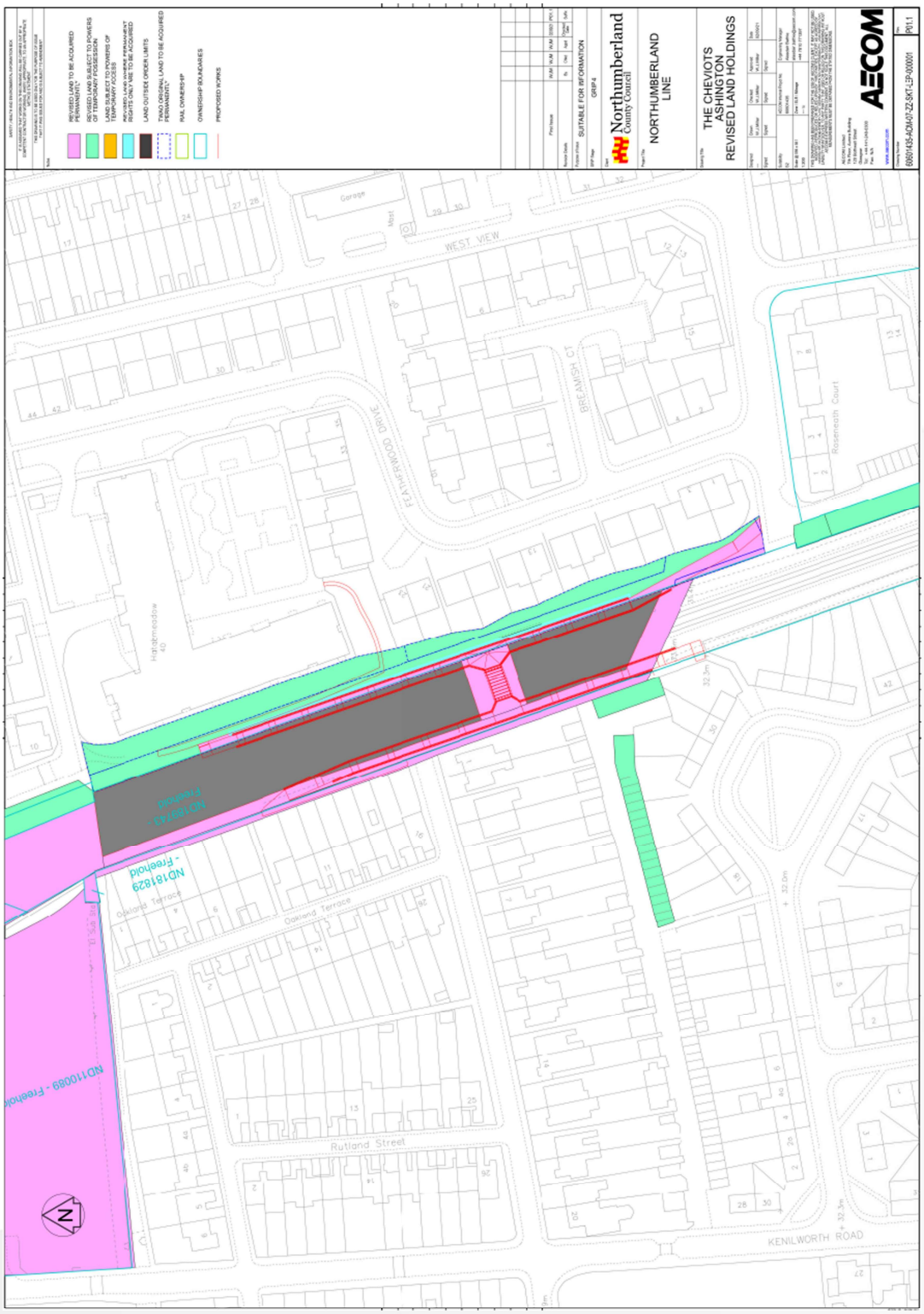
Leeds, LS11 9AR
T 0113 3916800
aecom.com

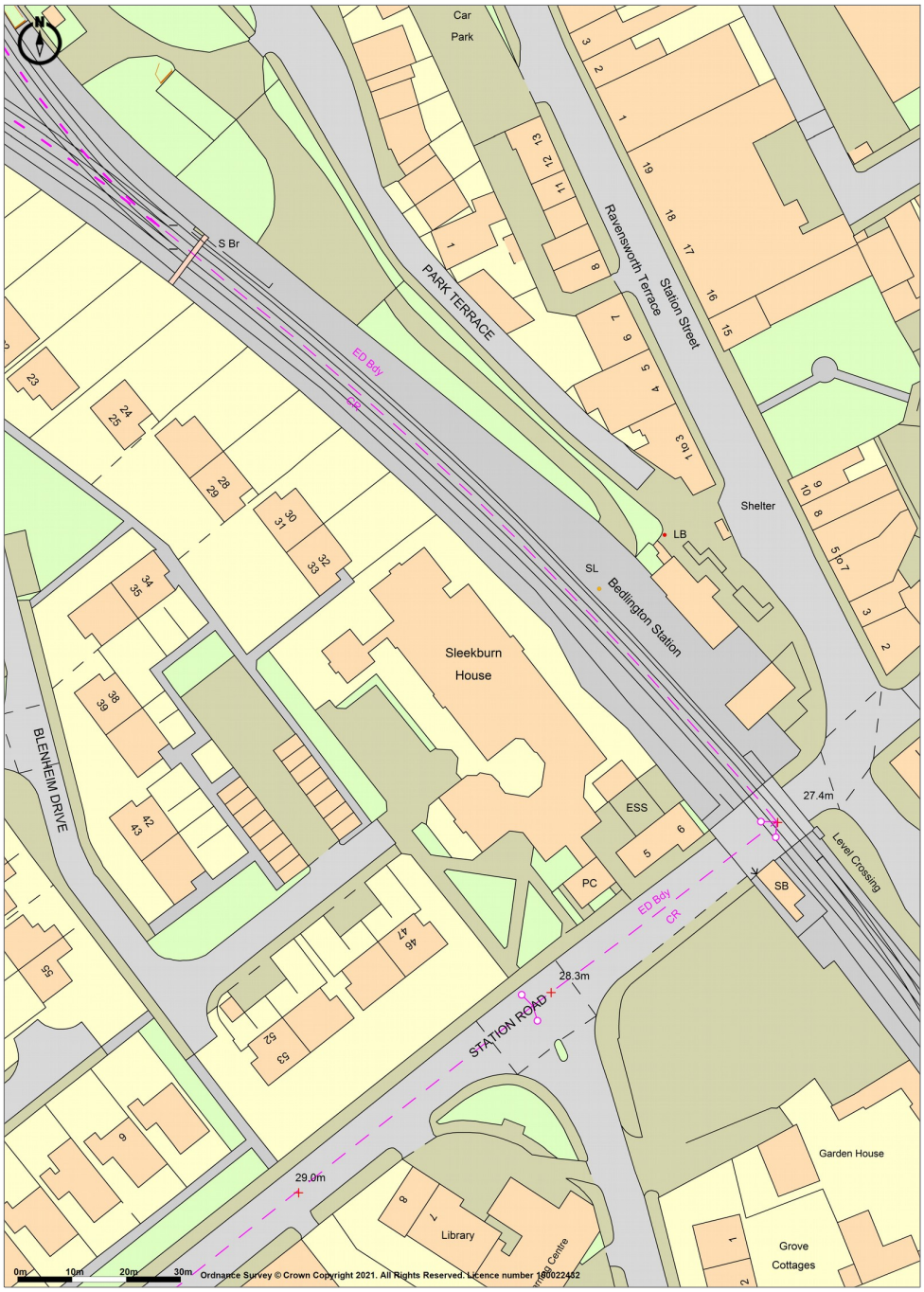
Delivering a better world



Photographs – The Cheviots, Ashington




REVISED LAND TO BE ACQUIRED PERMANENTLY
REVISED LAND SUBJECT TO POWERS OF TEMPORARY POSSESSION
LAND SUBJECT TO POWERS OF TEMPORARY POSSESSION
REVISED LAND WHERE PERMANENT RIGHTS ONLY ARE TO BE ACQUIRED
LAND OUTSIDE ORDER LIMITS
TWAO ORIGINAL LAND TO BE ACQUIRED PERMANENTLY
RAIL OWNERSHIP
OWNERSHIP BOUNDARIES
PROPOSED WORKS
SUITABLE FOR INFORMATION
GRIP 4
Northumberland County Council
NORTHUMBERLAND LINE
THE CHEVIOTS
ASHINGTON
REVISED LAND HOLDINGS
AECOM
P01.1
WEST VIEW
FEATHERWOOD DRIVE
BREAMISH CT
Rosemoth Court
Hargtemeadow
Oakland Terrace
Rutland Street
KENILWORTH ROAD
NU18829 - Freehold
NU18783 - Freehold
NU11089 - Freehold
N




CR
SL
Bedlington Station
Shelter
LB
Sleekburn
House
BLENHEIM DRIVE
STATION ROAD
ED Bdy
PC
SB
ESS
27.4m
28.3m
Lovel Cres
22
23
24
29
30
32
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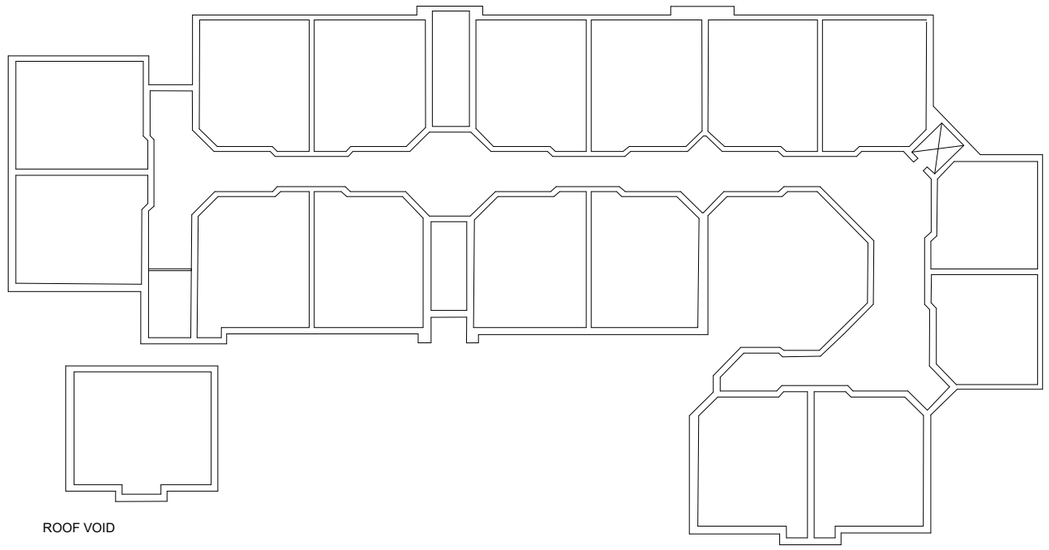
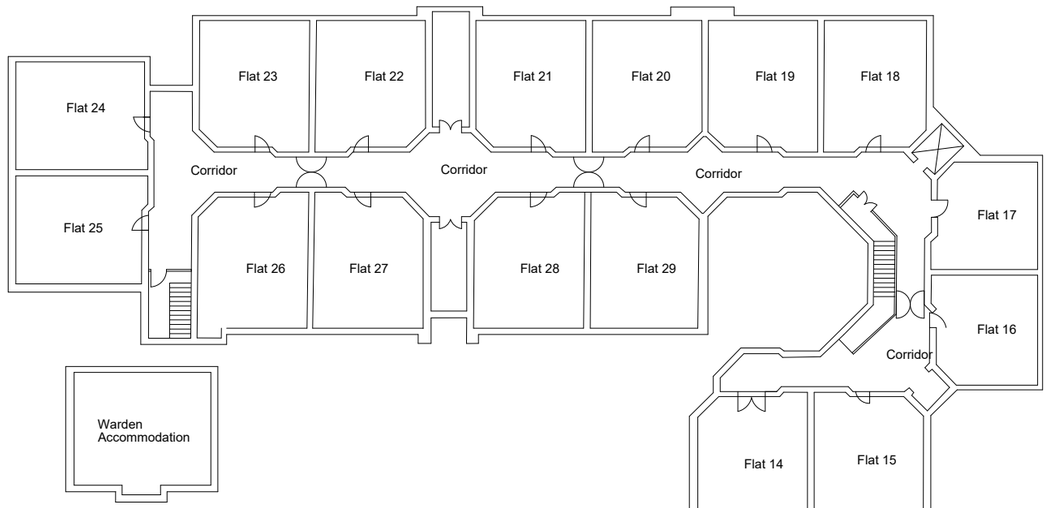
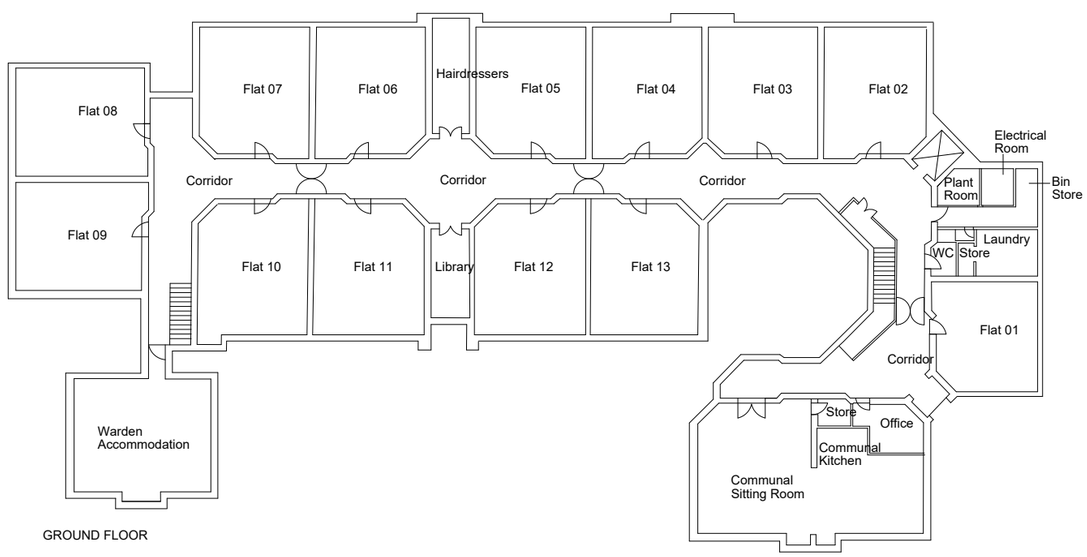
38
42
58
55
47
53
1 to 3
5
4
6
13
9
8
5 to 7



ROOF VOID



FIRST FLOOR



GROUND FLOOR

1	SEALED	BJ 07.11.19
ISSUE	REASON FOR CHANGE	APPROVED & DATE

CLIENT

BERNICIA

OAKWOOD WAY
ASHWOOD BUSINESS PARK
ASHINGTON
NORTHUMBERLAND
NE63 0XF

E: enquiries@bernicia.com
T: 0344 800 3900
W: www.bernicia.com

PROJECT

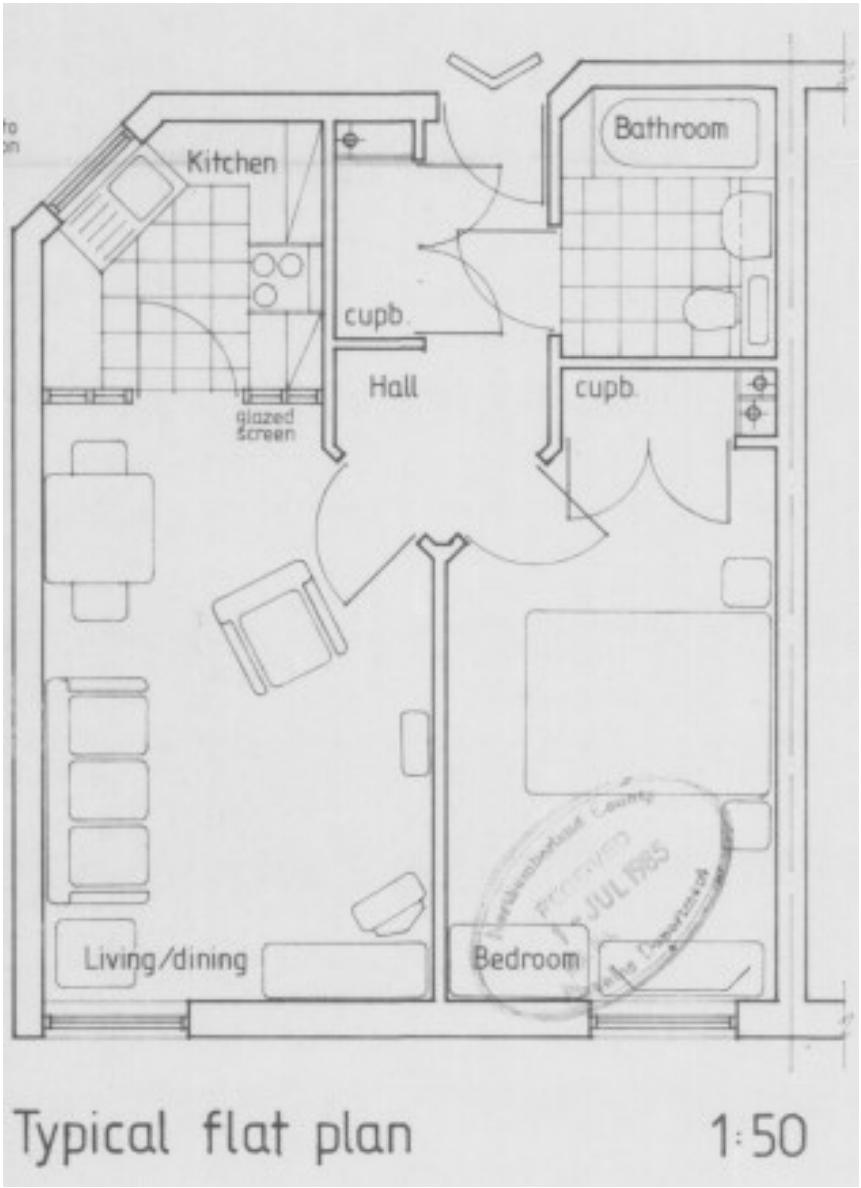
1-30 SLEEKBURN HOUSE
BEDLINGTON
NORTHUMBERLAND
NE22 5NX
BUILDING LAYOUT

DRAWING No.

105-P1-0015

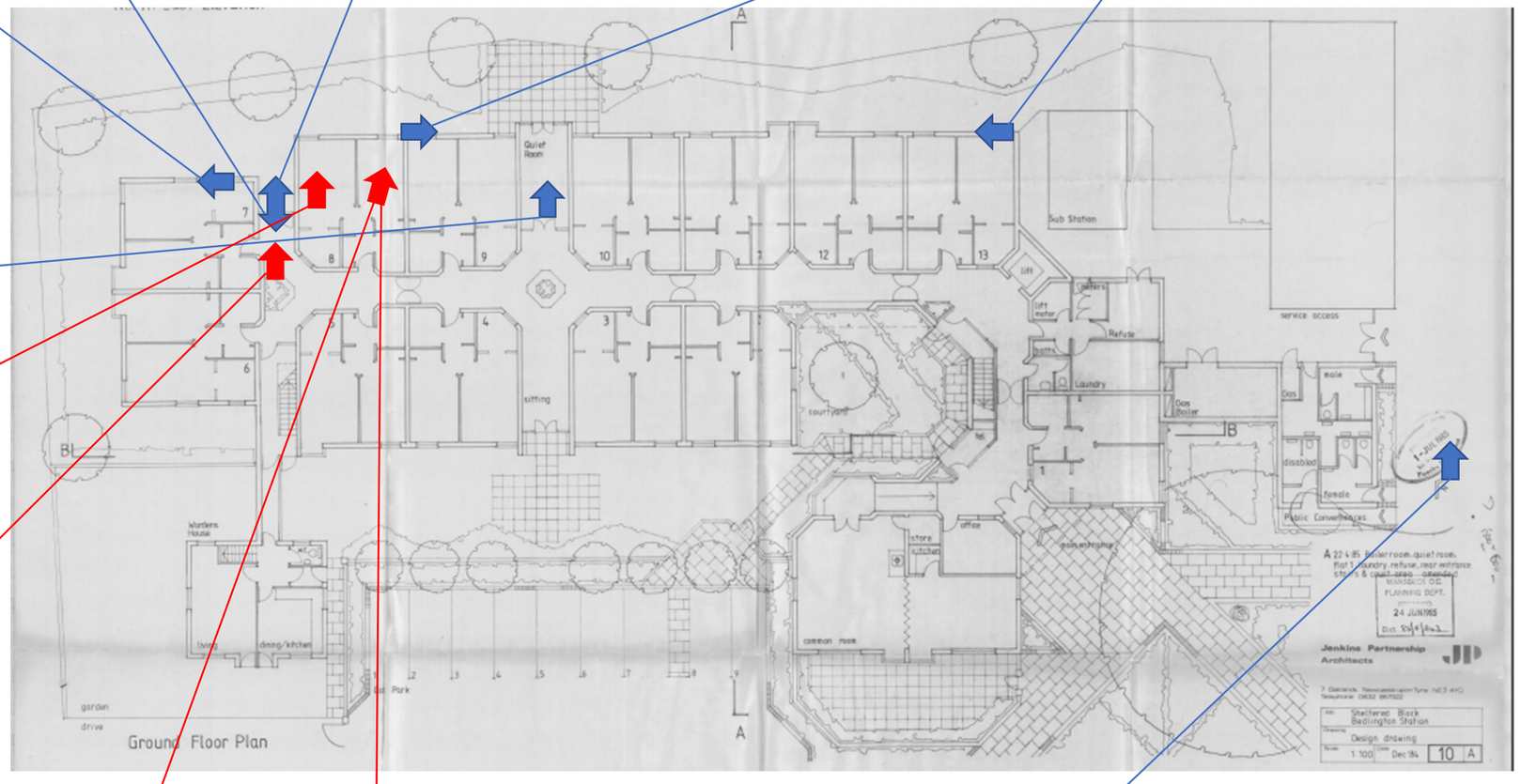
DESIGN	DATE	CHECKED	DATE	SCALE	REVISION
glat 07.11.19		BJ 07.11.19		n/a	1

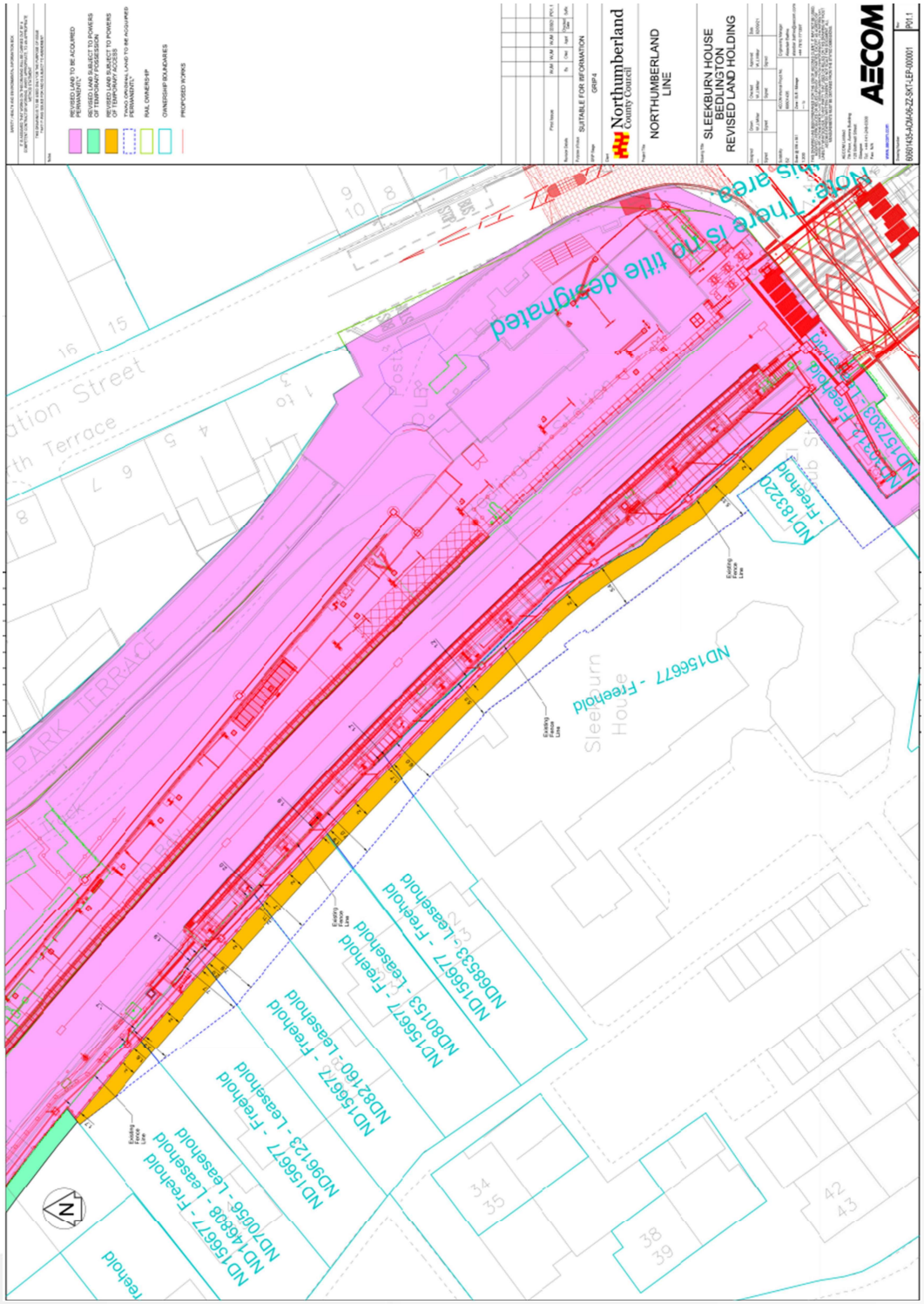
DIMENSIONS IN MILLIMETRES	DO NOT SCALE DRAWING	SHEET SIZE A1	SHEET 1 OF 1

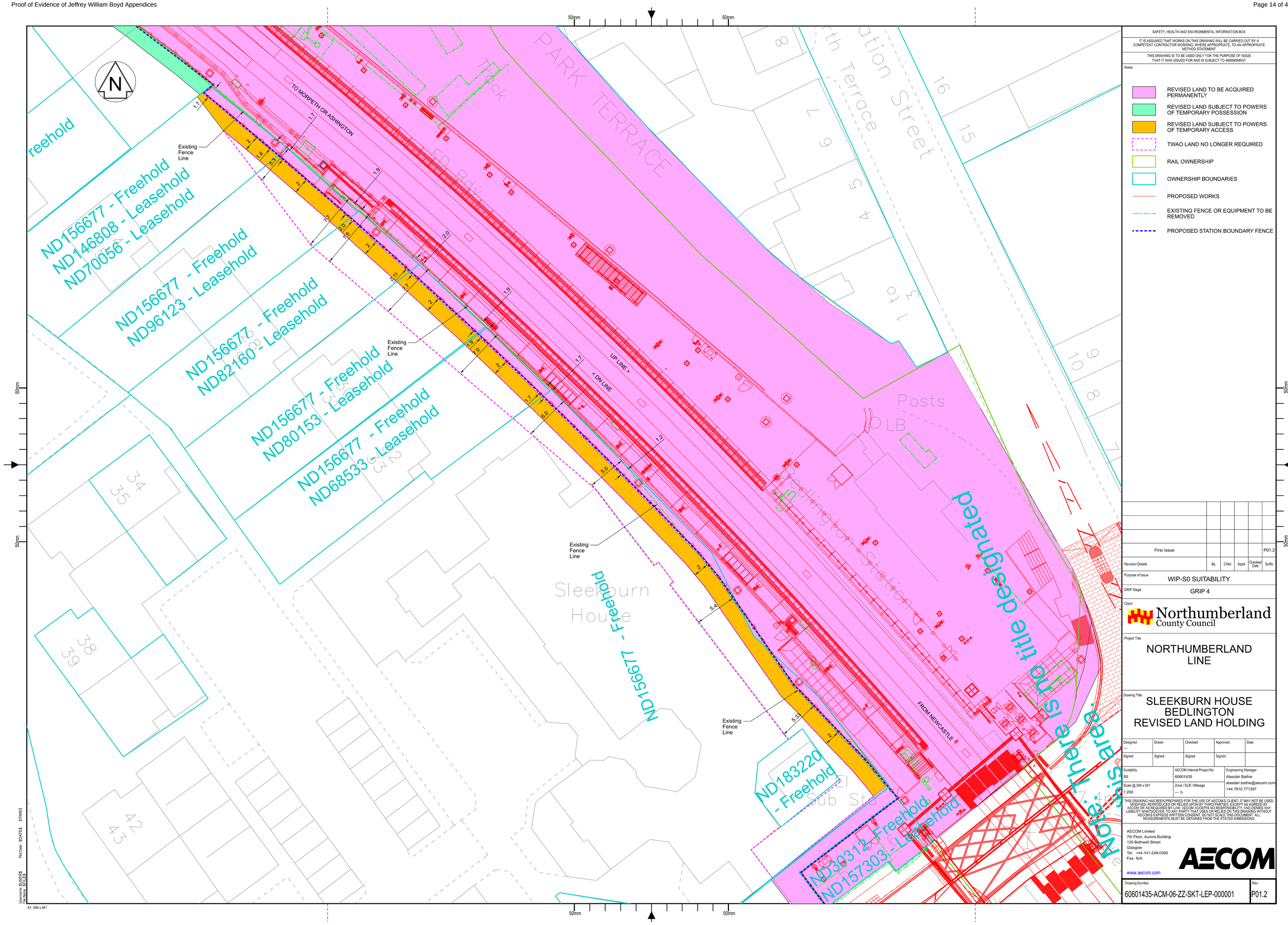

Kitchen
Bathroom
cupb
Hall
cupb
glazed screen
Living/dining
Bedroom
Typical flat plan
1:50

Photographs – Sleekburn House, Bedlington

Blue indicates a photograph taken at ground floor. Red indicates a photograph taken from the first floor.




NORTHUMBERLAND LINE
SLEEKBURN HOUSE BEDLINGTON REVISED LAND HOLDING
AECOM
Northumberland County Council
SUITABLE FOR INFORMATION
GRIP4
PROPOSED WORKS
OWNERSHIP BOUNDARIES
RAIL OWNERSHIP
PERMANENT
TEMPORARY POSSESSION
REVISED LAND TO BE ACQUIRED PERMANENTLY
Note - This area has no title designated
NU157303 - Freehold
NU183220 - Freehold
NU156677 - Freehold
NU156677 - Freehold
NU685533 - Leasehold
NU156677 - Freehold
NU801533 - Leasehold
NU156677 - Freehold
NU824160 - Leasehold
NU156677 - Freehold
NU961233 - Leasehold
NU156677 - Freehold
NU146808 - Freehold
NU700356 - Leasehold
Sleekburn House
PARK TERRACE
Station Street
Terrace



SAFETY, HEALTH AND ENVIRONMENTAL INFORMATION BOX

IT IS ASSUMED THAT WORKS ON THIS DRAWING WILL BE CARRIED OUT BY A COMPETENT CONTRACTOR WORKING, WHERE APPROPRIATE, TO AN APPROPRIATE METHOD STATEMENT

THIS DRAWING IS TO BE USED ONLY FOR THE PURPOSE OF ISSUE THAT IT WAS ISSUED FOR AND IS SUBJECT TO AMENDMENT

Notes

- REVISED LAND TO BE ACQUIRED PERMANENTLY
- REVISED LAND SUBJECT TO POWERS OF TEMPORARY POSSESSION
- REVISED LAND SUBJECT TO POWERS OF TEMPORARY ACCESS
- TWAO LAND NO LONGER REQUIRED
- RAIL OWNERSHIP
- OWNERSHIP BOUNDARIES
- PROPOSED WORKS
- EXISTING FENCE OR EQUIPMENT TO BE REMOVED
- PROPOSED STATION BOUNDARY FENCE

Revision Details	By	Chkd	Appd	Checked Date	Suffix
First Issue					P01.2

Purpose of Issue: WIP-S0 SUITABILITY

GRIP Stage: GRIP 4

Client: Northumberland County Council

Project Title: NORTHUMBERLAND LINE

Drawing Title: SLEEKBURN HOUSE BEDLINGTON REVISED LAND HOLDING

Designed	Drawn	Checked	Approved	Date

Signed	Signed	Signed	Signed	

Suitability	AECOM Internal Project No.	Engineering Manager
S0	60601435	Alasdair Bathie
Scale @ 594 x 841	Zone / ELR / Mileage	alasdair.bathie@aecom.com
1:200	--- to	+44 7810 771397

AECOM Limited
7th Floor, Aurora Building
120 Bothwell Street
Glasgow
Tel: +44-141-248-0300
Fax: N/A
www.aecom.com

Drawing Number: 60601435-ACM-06-ZZ-SKT-LEP-000001

Rev: P01.2

Plot Date : $DATES $TIMES

Username: $USERS
File Name: $FILES

A1: 594 x 841

AECOM Limited
1 Tanfield
Edinburgh EH3 5DA
United Kingdom

T: +44 131 301 8600
aecom.com

Project name:
Northumberland Line Upgrades

Project ref:
60628487

To:
Alannah Healey
SLC

CC:

From:
Tim Britton

Date:
26 July 2021

Memo

Subject: Response to objection to planning application for Bedlington Station

The objection received from Bernicia in regard to the above planning application includes concerns regarding the noise impacts of the proposed development on the residents of Sleekburn House. The following responses are provided:

Paragraph 1.2 states "*the works are proposed to be undertaken between 22:00 hours and 05:00 hours; we would submit that the entire period comprises "sensitive times".*" This is a misunderstanding of the proposed construction hours, which, over the construction schedule, will be between 22:00 on Thursday and 05:00 on the following Monday, potentially including activities during both the daytime and night-time. This includes times which are typically considered less noise sensitive (e.g. during the day). British Standard BS 5228-1:2009+A1 contains a methodology for the assessment of the significance of effect of construction noise in relation to the ambient noise levels, known as the "ABC method". This method identifies threshold values for noise impacts depending on the time period as follows:

- Daytime (07:00 – 19:00) and Saturdays (07:00 – 13:00) – highest threshold value (i.e. least sensitive to noise)
- 19:00 – 23:00 weekdays, 13:00 – 23:00 Saturdays, 07:00 – 23:00 Sundays
- Night-time (23:00 – 07:00) – lowest threshold value (i.e. most sensitive to noise)

For typical residential properties, the time between 09:00 and 17:00 on a weekday is commonly defined as less sensitive than the remaining hours for which the BS 5228-1 highest threshold value applies. This is because typically the residents are at work, although it is recognised that, in the case of Sleekburn House, this is unlikely to be the case. Nevertheless, the times when the works will be conducted include between 07:00 to 19:00 on Fridays and 07:00 to 13:00 on Saturdays, which would fall into the least sensitive times of the day according to BS 5228-1.

Paragraph 1.3 states "*BS 5228-1 advises noise insulation measures and temporary rehousing where the construction noise levels are above the threshold values for more than a total of 40 days in any 6 consecutive months. On the basis of the above construction schedule that threshold is likely to be met.*" It should be recognised that the works will only be undertaken between Thursday and Monday i.e. 3 or 4 days per week or approximately 50% of the total duration of the works at the station. The noise emissions from the works will also vary with the activities that are undertaken. Construction noise levels will also depend on the distance of the works from the property. Whilst works at the platform location will be relatively close to the property, those at the car park will be further away and therefore quieter. With the level of construction information currently available, it is not apparent at this stage whether or not the threshold values will be exceeded for a total of 40 days in any 6 month period.

Paragraph 1.3 goes on to state "*No mitigation has as yet been proposed to Bernicia in respect of potential noise insulation works at Sleekburn House, and therefore it is not yet known whether any mitigation measures would adequately address the predicted noise levels*." The mitigation measures to Sleekburn House have been discussed with the Northumberland County Council Environmental Health Officer, who has recommended that the currently installed trickle ventilators are surveyed to confirm that they provide adequate background ventilation as per the requirements of Part F of the Building Regulations. Assuming that this is the case, opening these ventilators will provide adequate ventilation to the building for most of the time, with windows only needing to be opened to provide purge ventilation. A contractor has been engaged and Bernicia have granted access to survey the installed trickle ventilators in the building.

Paragraph 1.3 goes on to state "*it is not acceptable to leave such a matter to a planning condition and that the assessment should instead be undertaken now as part of the process for determining the Application.*" At present, a construction contractor has not been appointed and as such the construction methods and plant to be used are not known. Therefore, the assessment requested cannot be conducted and a qualitative construction noise and vibration assessment has been carried out. The matter is not being left to a planning condition, rather, as is appropriate for temporary issues such as construction noise, it will be controlled using the council's powers under the Control of Pollution Act 1974 (CoPA). The construction contractor will apply to the local authority for 'prior consent' to undertake the works under Section 61 of the CoPA. Under Section 60 of CoPA the local authority can serve a notice specifying how construction works should be carried out, including working hours and noise/vibration limits. Breaching the terms of the notice is an offence.

Paragraph 1.4 states "*Acceptable internal noise levels in respect of these properties are identified as only being capable of being achieved if windows are kept closed. This is not an acceptable means of mitigating the noise levels.*" The Bedlington Station noise impact assessment (NIA) identified that, with windows closed and trickle ventilators open, internal daytime railway noise levels would comply with the relevant criterion in British Standard BS 8233:2014 'Guidance on sound insulation and noise reduction for buildings'. This calculation is based on an assumed typical acoustic performance for the installed trickle ventilators. The actual acoustic performance will be confirmed during the survey mentioned above. With windows open, the internal noise levels are anticipated to exceed the adopted criterion; however, as discussed above, this should be a relatively infrequent occurrence.

Section 122 of the Railways Act 1993 provides Network Rail with a 'statutory authority as a defence to actions in nuisance'. The impacts identified in the NIA as a result of introducing new trains onto the railway fall within this statutory authority; therefore, there is no legislative requirement to mitigate them. Whilst the criteria in BS 8233 define "desirable ambient noise levels", the only legislative requirement on Network Rail to mitigate operational train noise impacts is the Noise Insulation Regulations (Railways and Other Guided Transport Systems) 1996. These Regulations apply to new or altered railways but not to intensification, therefore they do not apply to the proposed development. Nevertheless, the NIA identifies that the noise level criteria in the Regulations are not exceeded at Sleekburn House.

RE: Seaton Delaval

Alannah Healey <Alannah.Healey@slcproperty.co.uk>
Fri 10/1/2021 4:32 PM
To: Gordon Halliday <Gordon.Halliday@northumberland.gov.uk>

Dear Gordon,
Thanks for your email. I have summarised indicative timescales below. Please note, these have been taken from the latest draft programme and are likely to change likely as the programme develops. All timescales include an allowance for 2-3 months site clearance/enabling works and a month or so for demobilisation.

The 'overall timescales' for construction are as follows:

Bedlington: 3 months for car parks, 5 months for platforms, preceded by 2-3 months of demolition and site preparation/clearance works. The Park Terrace Car Park will be one of the last sites to be completed, as it is the intention of the contractor to utilise this land as a compound and will only complete construction once those cabins are removed. This means that the construction is likely to be spread over an 18 month window but construction **will not be continuous**.

Bebside: The construction of the station and car park is proposed to be approximately 17 months. The construction of the foot and cycle bridge is proposed to be approximately 11 months. The construction of the foot and cycle bridge will occur concurrently to the station and car park.

I hope this helps, in the meantime any questions or queries, please do not hesitate to get in touch.

Kind Regards

Alannah Healey MSc MRTPI
Chartered Planner
01912092564/07516727965

From: Gordon Halliday <Gordon.Halliday@northumberland.gov.uk>
Sent: 01 October 2021 13:40
To: Alannah Healey <Alannah.Healey@slcproperty.co.uk>
Subject: Re: Seaton Delaval

This Message originated outside your organisation.

Thanks Alannah.

Could you let me have construction time estimates for the various elements of the Bedlington Station, Bebside and Liddle's Street applications?

Gordon

Gordon Halliday MRTPI
Planning Consultant

Development Management
Planning Services

Northumberland County Council

Email: gordon.halliday@northumberland.gov.uk
Telephone: 07785 727053

From: Alannah Healey <Alannah.Healey@slcproperty.co.uk>
Sent: Thursday, September 30, 2021 9:02 AM
To: Gordon Halliday <Gordon.Halliday@northumberland.gov.uk>
Subject: RE: Seaton Delaval

Good morning Gordon,
Further to the below I have spoken to the project manager and I can advise that whilst 11-13 months is the approximate total length of construction, the phase are likely to be broken down as follows:

- Construction of car parks re likely to be 3 months each.
- Construction of platforms are likely to be 5 months each, preceded by 2 – 3 months of demolition and site preparation / clearance works.

As always, any questions or queries, please do not hesitate to get in touch.

Kind Regards

Alannah Healey MSc MRTPI
Chartered Planner
01912092564/07516727965

From: Gordon Halliday <Gordon.Halliday@northumberland.gov.uk>
Sent: 27 September 2021 17:18
To: Alannah Healey <Alannah.Healey@slcproperty.co.uk>
Subject: Seaton Delaval

This Message originated outside your organisation.

Hi Alannah

The Planning Statement refers to a construction period of 4-5 months which seems optimistic.

Following the appointment of the main contractor is there any update on this?

Gordon

Gordon Halliday MRTPI
Planning Consultant

Development Management
Planning Services
Northumberland County Council

Email: gordon.halliday@northumberland.gov.uk
Telephone: 07785 727053

Save Time Do It Online!
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ND156677 - Freehold
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ND30312 - Freehold
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Note: there is no title designated
Sleekburn House
PARK TERRACE
TO MORPETH OR ASHINGTON
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FROM NEWCASTLE
Existing Fence Line
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First Issue WJM WJM WJM 07/10/21 P01.2
Revision Details By Chkd Appd Checked Date Suffix
Purpose of Issue SUITABLE FOR INFORMATION
GRIP Stage GRIP 4
Client Northumberland County Council
Project Title NORTHUMBERLAND LINE
Drawing Title SLEEKBURN HOUSE BEDLINGTON REVISED LAND HOLDING
Designed --- Drawn W.J.Miller Checked W.J.Miller Approved W.J.Miller Date 07/10/21
Signed Signed Signed Signed
Suitability S2
AECOM Internal Project No. 60601435
Engineering Manager Alasdair Bathie alasdair.bathie@aecom.com +44 7810 771397
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   - 60601435-ACM-06-PL-DRG-ECV-000003
   - 60601435-ACM-06-PL-DRG-ECV-000004
   - 60601435-ACM-06-PL-DRG-ECV-000005
   - 60601435-ACM-06-PL-DRG-ECV-000006
   - 60601435-ACM-06-PL-DRG-ECV-000100

Revision Details	By	Chkd	Appd	Checked Date	Suffix
Planning Issue	RP	PP	AB	29/01/21	P01

Purpose of Issue: WIP-S0 SUITABILITY

GRIP Stage: GRIP 4

Client: Northumberland County Council

Project Title: NORTHUMBERLAND LINE

Drawing Title: BEDLINGTON PLATFORM GENERAL ARRANGEMENT

Designed	Drawn	Checked	Approved	Date
D.Foy	R.Price	P.Pacey	A.Bathie	29.01.2021
Signed D.Foy	Signed R.Price	Signed P.Pacey	Signed A.Bathie	

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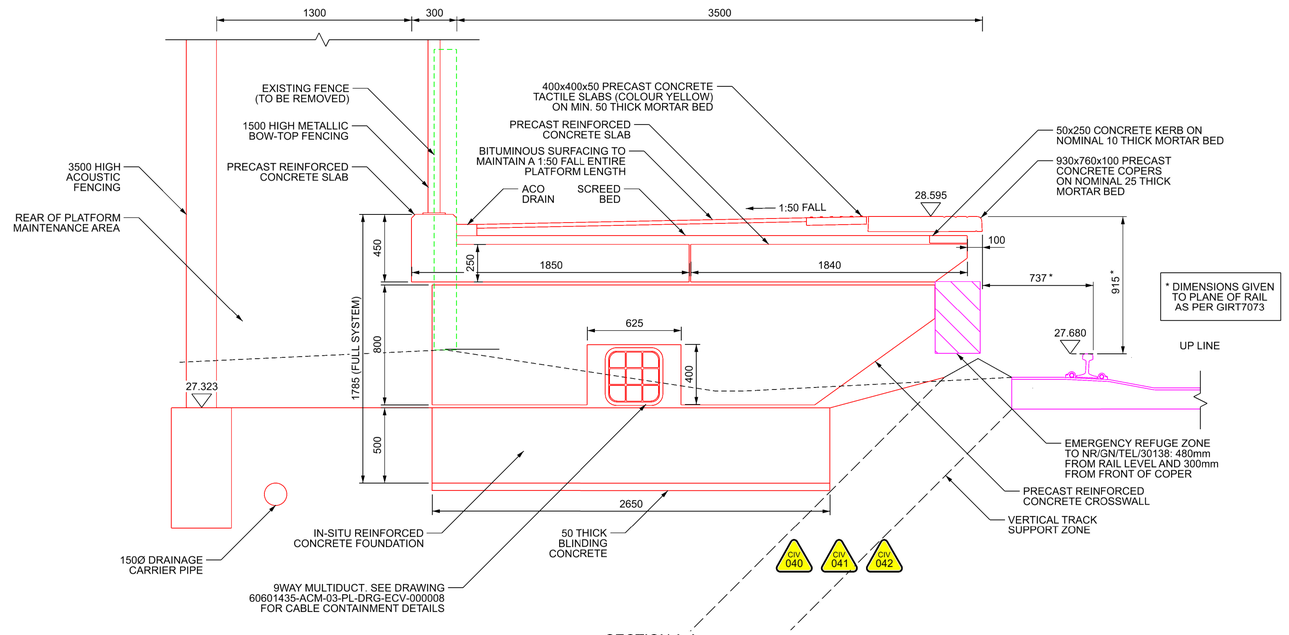
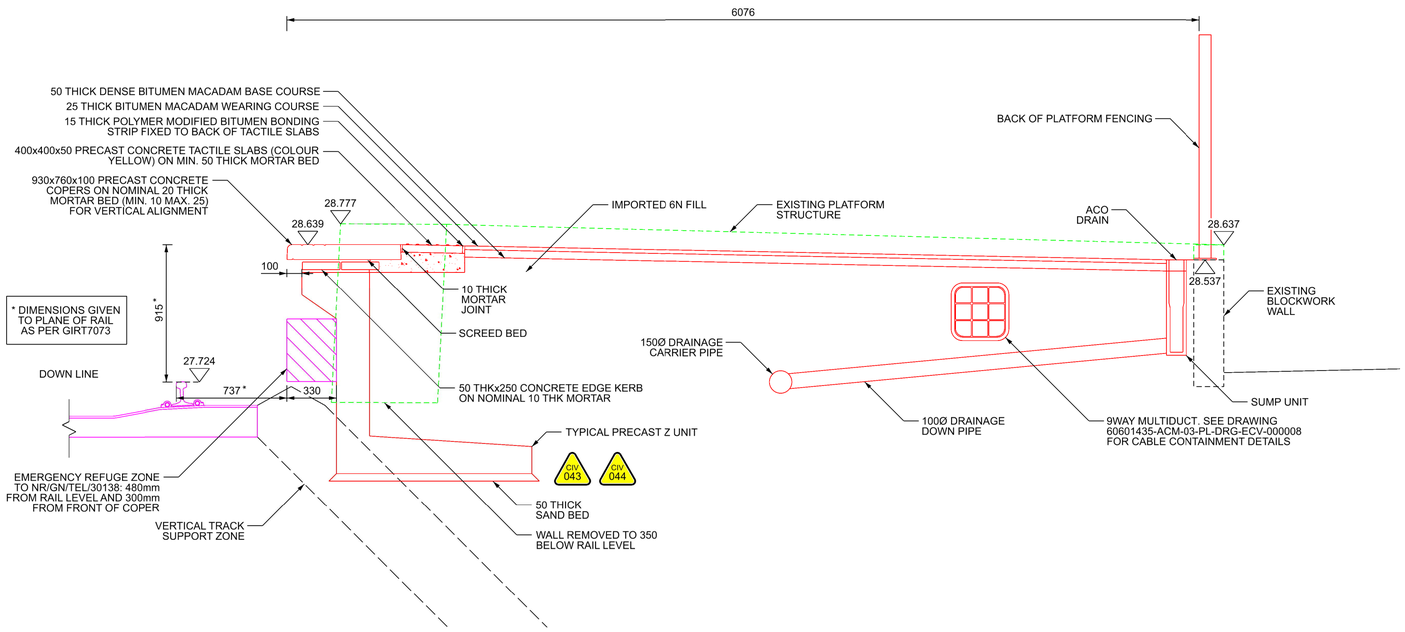
Drawing Number: 60601435-ACM-06-PL-DRG-ECV-000002

Rev: P01



SECTION A-A

SEE DRAWING 60601435-ACM-06-PL-DRG-ECV-000002
SCALE 1:20



SECTION B-B

SEE DRAWING 60601435-ACM-05-PL-DRG-ECV-000002
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   - 60601435-ACM-06-PL-DRG-ECV-000005
   - 60601435-ACM-06-PL-DRG-ECV-000006
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- BY OTHERS
- OS/SURVEY DATA

SAFETY, HEALTH AND ENVIRONMENTAL INFORMATION

NOTES BELOW ARE ADDITIONAL TO HAZARDS/RISKS NORMALLY ASSOCIATED WITH THIS TYPE OF WORK:

CIV040. OPEN EXCAVATIONS. RISK OF PERSONNEL FALLING IN DURING CONSTRUCTION OF CROSSWALL FOUNDATIONS

CIV041. UNKNOWN AVAILABLE CABLE SLACK IN EXISTING LINESIDE TELECOMS CABLE.

CIV042. RISK OF STRIKING FORMER MINES & COAL SEAMS CAUSING COLLAPSE OR FIRE.

CIV043. RISK OF COLLAPSE OF EXISTING PLATFORM DURING MODIFICATION WORKS.

CIV044. EXCAVATIONS WITHIN THE TRACK SUPPORT ZONE HAVE THE POTENTIAL TO CAUSE LOCALISED TRACK BUCKLING DUE TO THE CRITICAL TEMPERATURE.

THESE NOTES ARE BASED ON THE USE OF EXPERIENCED AND COMPETENT CONTRACTORS CARRYING OUT THE WORK USING AN APPROVED SAFE METHOD OF WORKING.

Drawing title change	RP	PP	AB	19/03/21	P02
Planning Issue	RP	PP	AB	29/01/21	P01
Revision Details	By	Chkd	Appd	Checked Date	Suffix

Purpose of Issue: WIP-S0 SUITABILITY

GRIP Stage: GRIP 4

Client: Northumberland County Council

Project Title: NORTHUMBERLAND LINE

Drawing Title: BEDLINGTON EXISTING & PROPOSED PLATFORM SECTIONS SHEET 1 OF 2

Designed	Drawn	Checked	Approved	Date
D.Foy	R.Price	P.Pacey	A.Bathie	29.01.2021
Signed D.Foy	Signed R.Price	Signed P.Pacey	Signed A.Bathie	

Suitability	AECOM Internal Project No.	Engineering Manager
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Drawing Number	Rev
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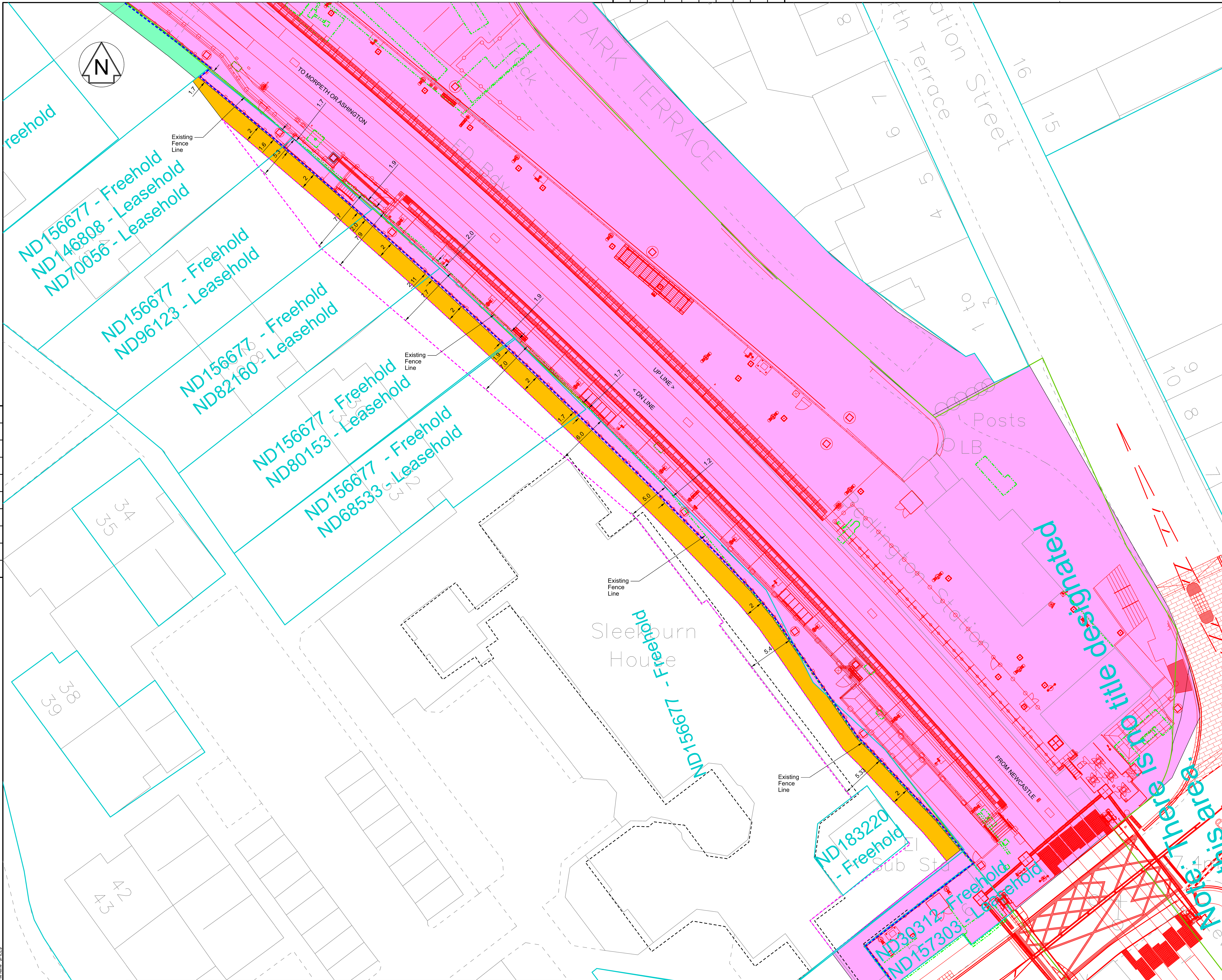

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Revision Details	By	Chkd	Appd	Checked Date	Suffix
First Issue	WJM	WJM	WJM	07/10/21	P01.2

Purpose of Issue: SUITABLE FOR INFORMATION

GRIP Stage: GRIP 4

Client: Northumberland County Council

Project Title: NORTHUMBERLAND LINE

Drawing Title: SLEEKBURN HOUSE BEDLINGTON REVISED LAND HOLDING

Designed	Drawn	Checked	Approved	Date
---	W.J.Miller	W.J.Miller	W.J.Miller	07/10/21
Signed	Signed	Signed	Signed	

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Drawing Number: 60601435-ACM-06-ZZ-SKT-LEP-000001
Rev: P01.2

A1: 594 x 841

Article 8 (1) and 8 (2) of the European Convention on Human Rights (ECHR)

Article 8
Right to respect for private and family life
1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 1 of the First Protocol of the ECHR

Article 1
Protection of property
Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

Equality Act 2010

2010 CHAPTER 15

PART 11

ADVANCEMENT OF EQUALITY

CHAPTER 1

PUBLIC SECTOR EQUALITY DUTY

149 Public sector equality duty

(1) A public authority must, in the exercise of its functions, have due regard to the need to—

(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;

(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;

(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

(2) A person who is not a public authority but who exercises public functions must, in the exercise of those functions, have due regard to the matters mentioned in subsection (1).

(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—

(a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;

(b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;

(c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.

(4) The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.

(5) Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—

(a) tackle prejudice, and

(b) promote understanding.

(6) Compliance with the duties in this section may involve treating some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act.

(7) The relevant protected characteristics are—

age;
disability;
gender reassignment;
pregnancy and maternity;
race;
religion or belief;
sex;
sexual orientation.

(8) A reference to conduct that is prohibited by or under this Act includes a reference to—

(a) a breach of an equality clause or rule;

(b) a breach of a non-discrimination rule.

(9) Schedule 18 (exceptions) has effect.

Changes to legislation:
There are currently no known outstanding effects for the Equality Act 2010, Section 149.

Stuart Bracking and others v Secretary of State for Work and Pensions

Positive/Neutral Judicial Consideration

Court
Court of Appeal (Civil Division)

Judgment Date
6 November 2013

Case No: C1/2013/1283

Court of Appeal (Civil Division)

[2013] EWCA Civ 1345, 2013 WL 5904702

Before: Lord Justice Elias Lord Justice Kitchin and Lord Justice McCombe

Date: Wednesday 6th November 2013

On Appeal from High Court QBD Admin Court

Mr Justice Blake

CO106322012

Representation

David Wolfe QC (instructed by Scott Moncrieff and Deighton Pierce Glynn) for the Appellants.
Lisa Busch (instructed by The Treasury Solicitor) for the Respondent.
Helen Mountfield QC (instructed by Clare Collier) for the Intervener, The Equality and Human Rights Commission.

Judgment

Lord Justice McCombe:

(A) Introduction

1. This is an application for permission to appeal from the Order of Mr Justice Blake of 24 April 2013, with the hearing of the appeal having been directed to follow if permission to appeal is granted. For my part, I would grant permission.

2. By his order the learned Judge dismissed the Appellants' application for Judicial Review of the decision of the Respondent, made on 18 December 2012, whereby the Respondent (in the person of the Minister of State in the Respondent's Department – the Minister for Disabled People) decided to close the fund known as “The Independent Living Fund” (“the ILF”) with effect from the end of March 2015. The Appellants apply for an order that that decision be quashed. The Appellants are all persons with disabilities who currently receive funding from the ILF, assisting them with their needs and helping them to live their lives with an enhanced degree of independence.

3. Although somewhat differently expressed in the formal grounds of appeal, the Appellants' written and oral arguments are: first, that the Respondent failed in making the decision to close the fund lawfully to discharge the public sector equality duty imposed under section 149 of the Equality Act 2010 ("the PSED"); secondly, that the consultation which preceded the decision was inadequate; thirdly, that the decision was based unlawfully upon the assumption that proposals in a Government White Paper, "Caring for the Future, reforming care and support" and draft Social Care Bill would pass into law; and fourthly, that the judge in dismissing such arguments failed to give adequate reasons for his decision (paragraph 3 of the Appellants' skeleton argument).

(B) Background Facts

4. The factual background on this appeal, which is largely uncontroversial, is set out in paragraphs 2 to 23 of the Judge's judgment in the court below ([2013] EWHC 897 (Admin)) and needs only to be summarised here.

5. The ILF is a Non-Departmental Government Body operating an independent discretionary trust, funded by the Respondent's Department ("the DWP") and managed by a board of trustees. In its original form the ILF was set up in 1988; it was re-constituted in 1993. It operates in partnership with local authorities to devise and provide joint care packages of services and direct payments to assist disabled persons, as the fund's name suggests, to lead independent lives, away from full time residential care, and as fully as possible in the community. The very worthy aim is to combat social exclusion on the grounds of disability. Applications to the ILF were received through local authority social services departments and are considered, after the intervention of the fund's own social workers in assessing the position of the individual applicants. The terms of the ILF trust prevents payments out of the fund in excess of funding received from the DWP. In 2010–2011 the ILF received some £359 million from the DWP for fulfilment of its purposes. For the purpose of the proceedings, we understand that somewhat over 19,000 people are currently in receipt of assistance through the ILF.

6. In December 2010 a Ministerial Statement was issued indicating that the existing arrangements for the fund were considered to be financially unsustainable and that in due course a consultation would be conducted to develop a new model for future care and support of present users.

7. In the background to the present dispute are the statutory duties imposed upon local authorities to assess the needs of persons claiming to require community care services, and to make suitable provision accordingly. The relevant criteria for assessment are set out in "Fair Access to Care Services" ("FACS") which identifies four categories of need: "Immediate Risk/Crisis", "Substantial High Risk", "Moderate Risk" and "Low Risk". In the face of budgetary constraints, many local authorities are presently only able to fund individual needs falling within the two higher categories. In these circumstances, the ILF has played an important role in supplementing the provision for disabled persons, over and above provision made by local authorities, and to make provision to enable or facilitate independent living by such persons, where such living would otherwise be impossible or difficult.

8. In July 2012 the DWP launched its consultation upon the future of the ILF. Its stated purpose was,

> "…to seek views on the Government's proposal as to how the 19,373 existing users of the ILF should have their care and support needs met from 2015. While the Government is fully committed to funding users' care package up to 2015, we do not believe that the continued operation of the ILF as a legacy fund would be sustainable or justifiable."

In the next paragraph this appeared:

> "The Government's preferred option for the future support of existing ILF users is that the ILF is closed in 2015, and that ILF funding is devolved to local government in England and to the devolved administrations in Scotland and Wales."

9. The consultation was said to be designed to obtain the views of fund users, their families and carers, interested individuals and organisations on the proposal and on how best to meet the future needs of ILF users.

10. In its introduction the consultation document set out a summary history of the ILF up to its closure to new users in 2010 and outlined the Government's current thinking about the fund as follows:

> "10. On a number of occasions since the ILF was created the eligibility criteria have been changed to match changing demand and funding allocations. In 2008, in the face of increasing applications and costs, funding was changed from a demand led to a cash limited basis, and the eligibility criteria were changed to focus support on applicants with the greatest needs. Further changes to the eligibility criteria were required when the budget allocation for 2010/11 was reduced by the previous Government. However, ahead of, and in anticipation of the new rules, a very sharp increase in applications put the ILF budget under significant pressure, and in June 2010 the trustees had to take the decision that the fund would be temporarily closed to new users. At this point, it was clear that a strategic decision was needed on the role of the ILF from 2010/11, taking account of changes in the wider care and support system, in particular the roll-out of direct payments across the UK, personal budgets in England and other models of self-directed support in Scotland, Wales and Northern Ireland.
>
> 11. Unlike direct payments which are a payment of the cash equivalent of commissioned services, personal budgets let users know up front what funding they are eligible for and give them maximum flexibility over how that funding is used to meet agreed outcomes. Funding can be taken as a direct cash payment, in the form of services or a combination of both. This model of self-directed support incorporates many of the features which made the ILF approach popular, but supports much greater flexibility in how funding can be used to deliver independent living outcomes. The social care white paper, "Caring for our future: reforming care and support", published this week sets out the Government's plans to reform care and support, which includes the intention to put personal budgets on a proper legal footing, and to create a new legal right to receiving care and support through a personal budget. This will be supported by the improved availability of high quality information and advice, enabling people to exercise genuine choice and control over the care and support they need.
>
> 12. It was against this policy backdrop that the Government concluded that it was no longer appropriate for a NDPB operating as a trust to administer an increasing amount of social care funding in parallel to the mainstream social care system. The objectives of the ILF could be met within the care system administered by local authorities, in a way that is more responsive to the needs of, and accountable to local people. Alongside that decision the Government committed to fully protecting [sic] care packages of existing users until 2015."

11. The questions posed by the consultation were these:

> "Question 1: Do you agree with the Government's proposal that the care and support needs of current ILF users should be met within the mainstream care and support system, with funding devolved to local government in England and the devolved administrations in Scotland and Wales? This would mean the closure of the ILF in 2015.
>
> Question 2: What are the key challenges that ILF users would face in moving from joint ILF/Local Authority to sole Local Authority funding of their care and support needs? How can any impact be mitigated?
>
> Question 3: What impact would the closure of the ILF have on Local Authorities and the provision of care and support services more widely? How can any impact be mitigated?
>
> Question 4: What are the specific challenges in relation to Group 1 users? How can the Government ensure this group are able to access the full range of local Authority care and support services for which they are eligible?

> Question 5: How can DWP, the ILF and Local Authorities best continue to work with ILF users between now and 2015? How can the ILF best work with individual Local Authorities if the decision to close the ILF is taken?"

12. With regard to "equality impact", the document said this in paragraph 27:

> "We will publish our response to this consultation in Autumn 2012. Alongside that response, which will set out the detail of our decision, we will publish a full Impact and Equality Impact Assessment. It would be premature to attempt to conduct a full Impact and Equality impact assessment at this stage because the details of our proposal have not yet been developed. The overview below is our initial assessment of the potential impacts for the different equality groups, as far as we are able to tell at this stage."

With regard to disability, the paper went on to say this,

> "In general, ILF payments are not paid on the basis of a particular impairment or health condition, but according to support needs. Nonetheless, we know that current users have a range of primary and secondary disabilities and we will be assessing how the closure of the ILF would impact particular groups of users on the basis of their impairments."

13. On the same day as the publication of the Respondent's consultation document, the Secretary of State for Health published the White Paper referred to above. In its foreword that Paper stated that the desire was to promote "a full and active life" for all, with "independent living" and ability to "play an active part in our local communities". It went on to state that there were two "core principles" in these terms:

> "Two core principles lie at the heart of this White Paper. The first is that we should do everything that we can — as individuals, as communities and as a Government — to prevent, postpone and minimise people's need for formal care and support. The system should be built around the simple notion of promoting people's independence and well-being.
>
> The second principle is that people should be in control of their own care and support. Things like personal budgets and direct payments, backed by clear, comparable information and advice, will empower individuals and their carers to make the choices that are right for them. This will encourage providers to up their game, to provide high quality, integrated services built around the need of individuals. Local authorities will have a more significant leadership role to play, shaping the local market and working with the NHS and others to integrate local services."

14. By September 2013 solicitors for the Appellants were writing letters before claim criticising the nature of the consultation and what was stated to be the inadequacy of the information provided. As ultimately distilled in the grounds of claim in these proceedings, the Appellants complained about insufficient explanation of what was being proposed as to the meaning of "devolved" funding about what the reasons were for the proposal and its likely impact on the Appellants and persons in similar positions. It was argued at that stage already that the failure to provide such information to consultees would make it inevitable that there would be a failure by the Respondent to comply with the PSED.

15. The Respondent rejected these criticisms and I will return below to the remaining arguments relating to the lawfulness of the consultation, but for the present I am merely seeking to outline the factual background to these proceedings which were commenced on 4 October 2012 (dealing with the consultation alone). An acknowledgment of service with grounds of defence was lodged on 25 October 2012.

16. On 18 December 2012, the Minister issued a statement announcing the decision to close the ILF on 31 March 2015. The statement said this:

> "It is clear from the responses to consultation that the prospect of the ILF closing is causing current users anxiety, and that the fund has played a really important role in the lives of users and their families. But we also heard that the ILF had had its problems, that the current arrangement is unsustainable and that local authorities face challenges in supporting disabled people in a consistent and equitable manner given the complex way in which ILF funding interacts with the local authority funding for each user.
>
> We have considered all views carefully and, while I understand user concerns, I do not think the current situation is sustainable. Our commitment to maintaining current awards until 2015 remains, but on 31 March 2015 the ILF will close, and from that point local authorities in England, in line with their statutory responsibilities, will have sole responsibility for meeting the eligible care and support needs of current ILF users. The devolved administrations in Scotland, Wales and Northern Ireland will determine how ILF users in each of those parts of the UK are supported within their distinct care and support system. Funding will be devolved to each local authority and to the devolved administrations on the basis of the pattern of expenditure in 2014/15.
>
> To ensure a smooth transition Government and the ILF will be working with the social care sector in England to produce a Code of Practice to guide local authorities on how ILF users can be supported through the transition. I expect that the devolved administrations in Scotland, Wales and Northern Ireland will engage with the ILF to develop processes and guidance reflecting the distinct approaches to care and support in those parts of the UK.
>
> The ILF will also be conducting a transfer review programme over the next 2 years which will ensure that the details of the care arrangements are captured and shared with their local authority and help those users not currently receiving any local authority funding to engage with the mainstream care systems so they can access the services they are eligible for."

17. On 18 January 2013, the Appellants presented amended grounds of claim challenging the Minister's decision on the basis of inadequacy of the equality impact assessment (EIA) and the failure by the Minister to discharge the PSED. Subsequently, the Intervener, the Equality and Human Rights Commission, sought and obtained leave to intervene in the proceedings. The Commission has presented both written and oral arguments to the Judge and to this court, through Ms Mountfield QC, broadly in support of the Appellants' criticisms of the Respondent's approach to the PSED in this case.

18. A draft EIA had been presented to the Minister on 31 October 2012 and a final version was presented with further Ministerial submissions of 12/16 November 2012. Subject to one point relating to the costs of closure of the ILF (to which I will return) the EIA documents (draft and final) are in essentially the same form. They set out again a history of the ILF, its workings and a statement of the reform proposals, much as outlined above, and then dealt with equality issues under a number of headings of which the only one relevant to these proceedings is "Disability".

19. The final EIA document dated 18 December 2012 dealt with disability in paragraphs 26 to 32. It began with an express reference to the 2010 Act (but not its specific provisions) and with a table of the impairments of ILF users, identifying cerebral palsy and learning difficulties as the two most common relevant impairments. It is necessary to set out the "Risk of Negative Impact" identified and the "Conclusion" to the EIA. This was as follows:

> "28. The proposal to close the ILF in 2015 and devolve funding to local authorities in England and the devolved administrations in Scotland and Wales will mean that all users have their needs assessed and met through the mainstream care and support system under one eligibility and charging regime. It will allow local authorities to use all the available funding to support every user of the social care system in a fair and consistent way. See paragraph six for information on ring-fencing. This reform is likely to allow local authorities to provide increased funding or provide a better service to some users of the social care system. We cannot systematically identify who will benefit from this reform given the variations in policies and approaches across local authorities and the very large number of users, approximately 1.575m

in England, of the social care system. The devolved administrations are free to distribute and use the funding as they see fit. However, we anticipate they would also pass on funding to local authorities to help meet the care and support needs of current users.

29. Current ILF users may face reductions or alterations in their care packages due to the reform. Currently the ILF funds some aspects of care that some local authorities do not and may provide different levels of flexibility in the use of funding compared to the ILF. The ILF may also provide a greater level of funding than the local authorities would do if the user were transferred to their care.

30. Under the reforms laid out in the Department of Health White Paper, entitled "Caring for our future: reforming care and support", there would be a national minimum eligibility criteria introduced in England before this reform was enacted. Group 2 users require at least £200 of local authority funding per week to meet the ILF eligibility criteria. Therefore, it is reasonable to presume that all Group 2 users will be provided with support by local authorities from 2015 in line with their statutory duty to fund assessed care needs if their needs remain similar to their current needs. However, there may be some alterations or reductions to some users' current packages. Some Group 1 users may have needs that would be defined as moderate or low under the FACS criteria as Group 1 users do not have to a minimum level of local authority funding or any local authority contact to qualify for ILF payments. It is unlikely that local authorities would provide any funding for those individuals. This would have a negative impact on those individuals. 1,812 of the 3,008 Group 1 users have some local authority contribution to their care package and are therefore likely to have needs that would be assessed as eligible for support under the national minimum eligibility criteria. The remaining 1,196 Group 1 users are not known to have a local authority contribution. 759 of these users reside in England, 274 are in Scotland, 74 are in Wales and 89 are in Northern Ireland. Those users may have needs which would be assessed at any of the four levels of the Fair Access to Care Services (FACS) criteria. Therefore, some are likely to be eligible for local authority support and some will not. It is not possible to predict which FACS criteria classification those users would fall into when assessed by the local authority due to the wide variation in funding usage and uncertainty over how much of their funding is currently used to fund needs which the local authority would fund under their system.

31. It is not possible to provide information on the care packages that each individual will receive from local authorities in 2015. This is because there are differing circumstances in each individual case and local authority policies differ. Some needs may also change in the time before ILF closure and this will alter any packages that individuals receive in the future from local authorities.

Conclusion

32. There is a potential negative impact on users of the ILF fund although whether there is any actual impact and how great that impact will be is dependent on individual circumstances. There is a potential positive impact for some users of the social care system who are not ILF users as they may get an improved service or level of funding from their local authority due to the greater amount of funding available. The Government's belief is that any negative impacts are justified by the policy aims of providing greater equity and fairness in the social care system and delivering this funding at a local level in a way which is accountable to local people through the electoral system."

20. It is the Appellants' case that this document and the other materials presented to the Minister provided an inadequate base from which the Minister could discharge the PSED that was imposed upon her under the terms of the 2010 Act. This criticism is rejected by the Respondent and was rejected by the Judge.

21. Before dealing with these rival contentions, I will set out the legal principles applicable, which are broadly uncontroversial. It is the application of those principles to the facts that is in issue on the appeal.

22. I would wish to add that on initial reading of the papers in this case it seemed to me that the criticisms of the consultation process and of the alleged failures to meet the PSED and the basis of the alleged failures were difficult to identify with

precision within the very diffuse materials presented. The core of the criticisms emerged during the hearing and I will endeavour to set them out below, as I understand them to be. However, I think for the future when such claims are made, claimants should be required to provide in the Claim Form (or at least by way of "Further Information" in the course of the proceedings) succinct and precise particulars of the deficiencies alleged and the specific provision of the statute said to have been infringed in each respect.

(C) The Law

Consultation

23. The law on the legal principles affecting consultations by public bodies is to be found in *R v North and East Devon Health Authority, ex p. Coughlan [2001] QB 213* . These principles can be found shortly stated in paragraphs 108 and 112 of the judgment of Lord Woolf MR (as he then was) (giving the judgment of the court, consisting also of Mummery and Sedley LJJ) as follows:

"108. It is common ground that, whether or not consultation of interested parties and the public is a legal requirement, if it is embarked upon it must be carried out properly. To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken: R v Brent London Borough Council, Ex p Gunning (1985) 84 LGR 168 .

…

112 …It has to be remembered that consultation is not litigation: the consulting authority is not required to publicise every submission it receives or (absent some statutory obligation) to disclose all its advice. Its obligation is to let those who have a potential interest in the subject matter know in clear terms what the proposal is and exactly why it is under positive consideration, telling them enough (which may be a good deal) to enable them to make an intelligent response. The obligation, although it may be quite onerous, goes no further than this."

PSED

24. The PSED is imposed upon public authorities by section 149 of the Equality Act 2010 which, in its material parts, provides as follows:

"149 Public sector equality duty

(1) A public authority must, in the exercise of its functions, have due regard to the need to —

(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;

(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;

(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it;

(2) A person who is not a public authority but who exercises public functions must, in the exercise of those functions, have due regard to the matters mentioned in subsection (1).

(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to-

(a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;

(b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;

(c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.

(4) The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.

(5) Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to–

(a) tackle prejudice, and

(b) promote understanding.

(6) Compliance with the duties in this section may involve treating some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act.

(7) The relevant protected characteristics are–

age;

disability;

gender reassignment;

pregnancy and maternity;

race;

religion or belief;

sex;

sexual orientation."

25. Two lever arch files of authorities were placed before the court which included some thirteen cases in which relevant duties and the requirements placed on public authorities have been considered. Fortunately the principles were not significantly in dispute between the parties. I summarise the points identified, which are not, I think, different in substance from those summarised by the Judge in paragraph 32 of his judgment.

(1) As stated by Arden LJ in *R (Elias) v Secretary of State for Defence [2006] 1 WLR 3213; [2006] EWCA Civ 1293* at [274], equality duties are an integral and important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation.
(2) An important evidential element in the demonstration of the discharge of the duty is the recording of the steps taken by the decision maker in seeking to meet the statutory requirements: R (BAPIO Action Ltd) v Secretary of State for the Home Department [2007] EWHC 199 (QB) (Stanley Burnton J (as he then was)).
(3) The relevant duty is upon the Minister or other decision maker personally. What matters is what he or she took into account and what he or she knew. Thus, the Minister or decision maker cannot be taken to know what his or her officials know or what may have been in the minds of officials in proffering their advice: *R (National Association of Health Stores) v Department of Health [2005] EWCA Civ 154* at [26 – 27] per Sedley LJ.
(4) A Minister must assess the risk and extent of any adverse impact and the ways in which such risk may be eliminated before the adoption of a proposed policy and not merely as a "rearguard action", following a concluded decision: per

Moses LJ, sitting as a Judge of the Administrative Court, in Kaur & Shah v LB Ealing [2008] EWHC 2062 (Admin) at [23 – 24].
(5) These and other points were reviewed by Aikens LJ, giving the judgment of the Divisional Court, in R (Brown) v Secretary of State for Work and Pensions [2008] EWHC 3158 (Admin), as follows:

i) The public authority decision maker must be aware of the duty to have "due regard" to the relevant matters;
ii) The duty must be fulfilled before and at the time when a particular policy is being considered;
iii) The duty must be "exercised in substance, with rigour, and with an open mind". It is not a question of "ticking boxes"; while there is no duty to make express reference to the regard paid to the relevant duty, reference to it and to the relevant criteria reduces the scope for argument;
iv) The duty is non-delegable; and
v) Is a continuing one.
vi) It is good practice for a decision maker to keep records demonstrating consideration of the duty.

(6) "[G]eneral regard to issues of equality is not the same as having specific regard, by way of conscious approach to the statutory criteria." (per Davis J (as he then was) in R (Meany) v Harlow DC[2009] EWHC 559 (Admin) at [84], approved in this court in *R (Bailey) v Brent LBC [2011] EWCA Civ 1586* at [74–75].)
(7) Officials reporting to or advising Ministers/other public authority decision makers, on matters material to the discharge of the duty, must not merely tell the Minister/decision maker what he/she wants to hear but they have to be "rigorous in both enquiring and reporting to them": *R (Domb) v Hammersmith & Fulham LBC [2009] EWCA Civ 941* at [79] per Sedley LJ.
(8) Finally, and with respect, it is I think, helpful to recall passages from the judgment of my Lord, Elias LJ, in R (Hurley & Moore) v Secretary of State for Business, Innovation and Skills [2012] EWHC 201 (Admin) (Divisional Court) as follows:

(i) At paragraphs [77–78]

> "[77] Contrary to a submission advanced by Ms Mountfield, I do not accept that this means that it is for the court to determine whether appropriate weight has been given to the duty. Provided the court is satisfied that there has been a rigorous consideration of the duty, so that there is a proper appreciation of the potential impact of the decision on equality objectives and the desirability of promoting them, then as Dyson LJ in *Baker* (para [34]) made clear, it is for the decision maker to decide how much weight should be given to the various factors informing the decision.
> [78] The concept of 'due regard' requires the court to ensure that there has been a proper and conscientious focus on the statutory criteria, but if that is done, the court cannot interfere with the decision simply because it would have given greater weight to the equality implications of the decision than did the decision maker. In short, the decision maker must be clear precisely what the equality implications are when he puts them in the balance, and he must recognise the desirability of achieving them, but ultimately it is for him to decide what weight they should be given in the light of all relevant factors. If Ms Mountfield's submissions on this point were correct, it would allow unelected judges to review on substantive merits grounds almost all aspects of public decision making."

(ii) At paragraphs [89–90]

> "[89] It is also alleged that the PSED in this case involves a duty of inquiry. The submission is that the combination of the principles in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council [1977] AC 1014* and the duty of due regard under the statute requires public authorities to be properly informed before taking a decision. If the relevant material is not available, there will be a duty to acquire it and this will frequently mean than some further consultation with appropriate groups is required. Ms Mountfield referred to the following passage from the judgment of Aikens LJ in Brown (para [85]):
>
> > '….the public authority concerned will, in our view, have to have due regard to the *need* to take steps to gather relevant information in order that it can properly take steps to take into account disabled persons' disabilities in the context of the particular function under consideration.'
>
> [90] I respectfully agree…."

26. It is the application of these uncontroversial principles (relating to consultation and the PSED) that is in issue in this case.

(D) The Arguments and my Conclusions on them

Consultation

27. By the time of the hearing before us, the arguments as to the adequacy of the consultation process were confined to four points:

i) The failure to reveal in the consultation that the anticipated costs of closure of the ILF were some £39 million;
ii) The Minister had considered submissions from officials as to the possible postponement of closure of the ILF which she was advised was "not in the best interests of" ILF users, without consultation with such users on that point;
iii) The consultation was said to be flawed because it failed to explain why closure of the ILF was being proposed at all;
iv) It was submitted for the Appellants that the Judge failed to give adequate reasons for finding that the consultation was adequate.

28. For the Respondent, Ms Busch submitted that there was no obligation to ensure that consultation extended to the costs of closure. These estimated costs had been included in the first draft EIA but did not appear either in the consultation document or in the EIA published at the time of the decision. Ms Busch submitted that these costs were essentially matters of internal accounting and did not affect the impact of the fund closure on users. She submitted that the likely costs were also subject to changes as they could not be fully predicted.

29. I agree with Ms Busch's submissions on this point. In my judgment, as the Judge found, the omission of this matter did not detract from the ability of consultees to explain how the closure of the fund would impact on them: see paragraph 38 of the judgment of the Judge below. Further, as can be seen from the consultation responses actually received, respondents were well able to state clearly and fully their fears for the adverse impact on them from the closure of the ILF. The amount of provision of devolved funding to local authorities in future years under the proposed new regime would obviously be a matter for discussion between HM Treasury and funding departments and would be unrelated to the costs of closure incurred by the ILF itself and/or the Respondent's department. The consultees had no special insight or experience as to the relevance of the costs of closure on the decision and the Minister was fully entitled to conclude that she would not be assisted by any views they may express on that subject.

30. I do not accept the criticism of the failure to consult upon the possible postponement of the closure beyond 2015. It is clear from the relevant submission to the Minister that the possibility of postponement of closure was a reaction to the responses received from the consultation. In the light of concerns expressed as to the practical impact of the closure, officials were advising the Minister as to whether a postponement might be desirable or practicable: see paragraphs 17 to 22 of the submission dated 31 October 2012 (pp. 208–9 of the Appeal Bundle).

31. It seems to me that the fact that the officials thought it right to consider a postponement of the closure in the light of what had been learnt does not detract from the consultation exercise itself. The Respondent's unqualified proposal at the time of the consultation was to close the ILF in 2015; postponement was not envisaged. There was no plan or policy to consider alternative dates for closure and there could, therefore, be no need to consult upon a non-existent proposal. The postponement options were merely ventilated in the light of answers to the consultation. There was no obligation to consult further upon those options thereafter.

32. I would also reject the Appellant's contention that the reasons for the proposed closure of the fund were not explained. In my judgment, the explanation was a short one and was given, as Miss Busch submitted, in section 4 of the consultation document itself and in the Ministerial foreword. The Government wished to achieve an integrated statutory care system and (as it saw it) to avoid duplication of function and unnecessary bureaucracy. The proposal was explained in the foreword as being made in the context of the wider reforms of the care system proposed in the White Paper issued on the same day as the consultation.

33. For much the same reason, I would reject the criticism of the ultimate decision which the Appellants make of the Minister's decision being in part upon the basis that the Department of Health White Paper would be implemented. There is much criticism in our society of failures, real or imagined, to achieve "joined up government". It would have been absurd for this Minister not to work upon the basis of the Government's overall policy in the same field. No doubt the Minister could have considered whether further consultation would be appropriate had the White Paper proposals not been implemented.

34. In my judgment, therefore, I consider that the Appellants' outstanding criticisms of the consultation process fall away and it is not necessary, therefore, to consider whether the Judge gave adequate reasons for dismissing the judicial review claim on this part of the case. Suffice it to say that I think that they were adequate, if succinct.

PSED

35. The main thrust of the Appellants' attack in this court upon the Minister's decision was under this head. It is submitted that the Minister failed to discharge the PSED in the process of making her decision.

36. Mr Wolfe QC for the Appellants submits that, when one examines the materials presented to the Minister, the EIA documents and the decision itself, it is clear that the Minister failed to comply with a number of the principles underlying the PSED, as explained in the previous cases and summarised in paragraph 27 above.

37. It is submitted (1) that the Minister had inadequate information from her officials as to the true impact of the proposal on persons such as the Appellants; there was not sufficient done to ensure that the potential risks to the such persons were integral to the formulation of the policy; (2) that there was not a conscious directing of the mind to the statutory criteria over and above a merely general regard to equality issues; (3) the reports to the Minister were over-optimistic in expression of the negative impacts. In terms of the decision in *Hurley and Moore* , Mr Wolfe argues that (4) it has not been shown that the Minister was clear what the equality implications were and (5) that there is no evidence of any structured attempt to focus upon the details of the duty nor was there a conscious consideration of the criteria which the law requires. In particular, it is argued (6) that the Minister was not informed in sufficiently clear terms of the danger that significant numbers of ILF users might no longer be able to live in their own homes, to remain in employment or to continue education.

38. In terms of the statutory duty itself, it is argued that the materials underlying the decision, now disclosed, show that the Minister did not specifically consider "the need to … advance equality of opportunity" between disabled people and those who are not disabled (Section 149(1)(b)) or to "have due regard to the need to advance equality of opportunity"… in particular to the need to – "…take steps to meet the needs of" disabled people "which are different from the needs of" those who are not disabled (Section 149(3)(b)).

39. In the course of argument, I suggested to Ms Mountfield QC for the Intervener that the approach taken by the Appellants and that taken by her client, the Intervener, amounted to elevating the class of disabled persons who were ILF users into a separate category of persons with "protected characteristics" over and above other persons with disability. I put it that in effect she was amplifying the categories of "protected characteristics" as provided by Section 149(7) .

40. Her answer was, I think, that the duty in this case was to have due regard to the impact of what was proposed upon *all* disabled persons *and* specifically upon this particular class of persons, whose position might most obviously be adversely affected by the proposal, in the context of the wider duty to have due regard to the need to advance equality of opportunity for disabled persons generally. Indeed, how the balance was to be struck between these groups was for the Minister, but she must fully appreciate the impact on those adversely affected. It was not, Miss Mountfield argued, a case of seeking to prefer the interests of one group of disabled persons (ILF users) over another such group (those who do not use the fund). I accept that answer as correct.

41. Ms Mountfield was also at pains to emphasise the international obligations of the United Kingdom under United Nations Convention on the Rights of Persons with Disabilities. She stressed in particular the obligation in Article 19 on independent living and inclusion in the community at large. [1] Putting the Convention into the domestic context, Ms Mountfield referred us, in her written submissions, to a passage in the judgment of Carnwath LJ (as he then was) in AH v West London Mental Health Trust [2011] UKUT 74 (AAC) where he said,

> "16 ….The CRPD prohibits discrimination against people with disabilities and promotes the enjoyment of fundamental rights for people with disabilities on an equal basis with others….
>
> 17. The CRPD provides the framework for member states to address the rights of persons with disabilities. It is a legally binding international treaty that comprehensively clarifies the human rights of persons with disabilities as well as the corresponding obligations on state parties. By ratifying a convention, a state undertakes that wherever possible its laws will conform to the norms and values that the convention enshrines. [2] "

42. To give an impression of the evidential basis of Mr Wolfe's submissions it is necessary to refer to a selection of the various documents that went before the Minister in the run up to the decision under challenge. The extracts which I quote, which were among a number pointed out by Mr Wolfe in his oral submissions, were designed to illustrate that the Minister did not receive a sufficient understanding of the true threat to independent living for ILF users posed by the proposal to close the fund. The information, it is argued, was insufficient to communicate the true message of the responses. That message was not just that the care packages provided to ILF users might be reduced, but that the effect would be to make it impossible for many of them to continue to live independently at all.

43. An "Early Analysis of the Public response to the Independent Living Fund Consultation" (undated, but clearly from October 2012) reported that,

> " **Loss of Support —** Most individual respondents felt that if transferred to the LA their care package would be reduced or that the outcomes that they currently achieve would not be provided for…
>
> **Loss of Current Care Team —** Many ILF users have been supported by the same care team for many years and feared their LA would not enable them to retain them after transfer."

44. The Ministerial submission of 31 October 2012 said,

> "7. …As we expected and given the current challenges facing the care and support system, the majority of ILF users are opposed to closure of the fund, with many doing so on the basis that there could be no guarantee that their current level of funding would be protected into the future. Where users agreed with the principle of closure they felt strongly that funding devolved to local authorities should be ringfenced or their care packages protected…"

Then,

> "We recognise user concerns about potential reductions in their care packages…We do recognise that upon reassessment by LAs, most users are likely to see some reduction in the current funding levels…
>
> While there can be no guarantees on how the devolved funding is used the LGA/ADASS [3] have stated that LAs will consider using discretion to offer a period of protection or a phased move to lower levels of funding on a case by case basis. They have noted that LAs will need to balance any protection they offer with the needs of other disabled people…"

45. It is to be noted that Annex A to that document provided details of the concerns of the ILF trustees and included this passage:

> "Because LAs assess care needs using Fair Access to Care (FACS) criteria, users are unlikely to receive the same level of funding after reassessment. This may undermine care packages and may mean that some users, such as those with particularly high care packages, *may not be able to live independently* in their own home. [sic: homes]" (Italics added).

46. Reference was made to the draft EIA with its indication that "ILF users *may* face reductions or alterations in their care packages…" (emphasis made by Mr Wolfe, who submitted that the reductions were in truth inevitable and the officials should have so stated), which did not have the same force as the trustees reaction quoted immediately above.

47. In a general Impact Assessment of 18 October 2012, it was said that,

> "There may be some reduction or alteration in care packages for some current ILF users because local authorities are not always able to provide the same type or level of support to users that the ILF does…"

48. Mr Wolfe also referred to the final EIA, dated the same day as the Minister's decision, which I have quoted above and the published response to the consultation also dated December 2012. He pointed out fairly that the Minister's foreword in the latter document did say,

> "You told us that the support provided by the ILF had played a really important role in the lives of users and their families, and that there was real concern that the closure of the fund would undermine the ability of users to lead full and independent lives…".

49. Mr Wolfe submitted that the documents presented to the Minister, with very few exceptions, did not give a true flavour of the impact of closure on the ability of users to live independent lives and represented a failure by officials to inform the Minister of the true level of the threat.

50. In contrast, Mr Wolfe referred us to an analysis of the local authority responses to the consultation, contained in the evidence adduced by his instructing solicitor. This analysis showed, he said, that local authority respondents, while mostly in favour of the new arrangements, reported clearly the potential adverse effect on the ability of ILF users to live independent lives in their own accommodation, in employment or in education. In my judgment, Mr Wolfe's point in this respect is correct: several local authorities, on this evidence, did make such reports. It is equally clear that the detail of those responses was not seen by the Minister.

51. In summary, Mr Wolfe argued that there was nothing in the Ministerial papers that showed that the Minister personally had a full appreciation of the real threat to independent living for ILF users, which was posed by the suggested change, and no indication that the Minister specifically considered this threat "through the prism" of the particular provisions of Section 149 .

52. In response to these arguments, Ms Busch for the Respondent submitted that the Appellants' arguments were unrealistic. She recognised that mere assertion in the evidence that the Minister was fully aware of the potential impact of the change upon current users [4] is no substitute for positive evidence to that effect (R (Equality and Human Rights Commission) v Secretary of State for Justice [2010] EWHC 147 (Admin) (Wyn Williams J) at paragraphs [53]). However, she submitted that it is plain from the documentary materials, and from common sense inferences, that the assertion to that effect in the Respondent's witness statement is made out on analysis of the facts of this case.

53. Ms Busch submits that here is a Minister *for Disabled People* who was considering a proposal to close a fund designed to advance independent living for the disabled who was told that the proposal might result in a reduction of care packages for fund users. It is obvious, says Ms Busch, that the Minister must have realised the distinct likelihood that at least some users would be unable to continue independent living or at least would lose some aspects of an independent life; it was, therefore, unnecessary for the Minister to be informed of any more detail beyond what she received from her officials in this case.

54. Equally, Ms Busch argues, the Minister must have been aware of the requirements of the Equality Act and that it was to those requirements that the EIAs were directed. The EIAs referred expressly to the Act. Further, Ms Busch pointed out, this was not a case like e.g. *Hurley and Moore* (which concerned university fees), where the "protected characteristics" were of a wide and diverse nature; the focus was more narrow, namely upon the equality of opportunity for disabled people. In addition, while the subject of the impact on fund users may have been shortly dealt with in the documents before the Minister, the relevant considerations for her were not complex and did not need any further elaboration.

55. Ms Busch said the Appellants were seeking to "micro-manage" the affairs of government and were focussing on the potential impact on this group of disabled people. On the other hand the Minister focussed (as she was required to do) upon the position of disabled persons generally and was seeking to produce a long term solution that treated all as favourably as possible.

56. Ms Busch emphasises in particular that, in her submission, the Minister did not adopt a "tick box" approach, simply paying lip service to the statutory requirements. Instead, on reading the reports on the consultation, she realised that care packages might be reduced to individual ILF users and sought strenuously to ensure that suitable transition arrangements were put in place for those currently benefitting from the fund. The Minister urged this point upon her officials and had a meeting with her opposite number in the Department of Health to pursue her concerns. [5] Ms Busch submits that such action demonstrates that the Minister was well aware of the potential impact, identified by the Appellants, and endeavoured to meet it. The result was a Code of Practice , issued by the ILF, the LGA and ADASS entitled "Transfer Review Programme" whose stated purpose is, "…the effective transfer of ILF users to sole local authority support from April 2015".

57. A copy of this document (dated 7 May 2013) (not previously produced in the proceedings) was given to us and to the Appellants' advisers during our hearing. The passage in the Code dealing with post-April 2015 reads as follows:

> "8. Provision from April 2015.
>
> Transitional arrangements need to be in place from 1 April 2015 which enables users to plan for and mange any change in their support. The arrangement of a period of phased transition being provided that supports the protection of independent living outcomes is one of the issues for consideration during this transition period.
>
> We believe that it is essential that before the end of the transfer programme all ILF users and their representatives have a clear understanding of how their eligible support needs will be met immediately following the transfer.
>
> Any change to support arrangements made by the local authority should take into account the impact upon care providers making certain that the user is able to meet legal and contractual obligations where provision is reduced or replaced. In particular this includes redundancy payments and notice periods."

58. Ms Busch submitted that this focus on transitional arrangements was not mere mechanics, as was argued by the Appellants, but a distinct endeavour to meet problems raised in response to the consultation. This was a subject that was, she argued, expressly recognised in the Foreword to the Consultation response, signed by the Minister personally, which included the following passage:

> "Getting the transition process right will be critical. The Department for Work and Pensions (DWP) has been and will continue to work very closely with the representatives of local government and the devolved administrations on how we can support users through the transition. To guide individual local authorities the Government, ILF and social care sector in England will co-produce and publish a Code of Practice which will provide guidance on how ILF users can be supported through transition over to sole local authority care and support.
>
> In early 2013 the ILF will publish a transition plan setting out how users will be supported over the next two years in preparation for the transfer. This will include how a review programme will ensure that the details of the care arrangements are captured and shared with their local authority, and how those users not currently receiving any local authority funding will be supported to engage with the mainstream care system. On-going engagement with users and organisations representing disabled people will be crucial; in early 2013 the ILF will commence an intensive programme of user and stakeholder engagement on the plans for transfer.
>
> I know that users will face the future with a degree of anxiety, but I want to reassure them that Government as a whole is fully committed to making this process work for them, and to ensuring that they can continue to live the lives they want to between now and 2015 and into the future."

59. In the end, drawing together the principles and the rival arguments, it seems to me that the 2010 Act imposes a heavy burden upon public authorities in discharging the PSED and in ensuring that there is evidence available, if necessary, to demonstrate that discharge. It seems to have been the intention of Parliament that these considerations of equality of opportunity (where they arise) are now to be placed at the centre of formulation of policy by all public authorities, side by side with all other pressing circumstances of whatever magnitude.

60. It is for this reason that advance consideration has to be given to these issues and they have to be an integral part of the mechanisms of government, to paraphrase slightly the words of Arden LJ in the Elias case. There is a need for a "conscious approach" and the duty must be exercised "in substance, with rigour and with an open mind" (per Aikens LJ in Brown). In the absence of evidence of a "structured attempt to focus upon the details of equality issues" (per my Lord, Elias LJ in *Hurley & Moore*) a decision maker is likely to be in difficulties if his or her subsequent decision is challenged.

61. In this case, I have come to the conclusion (admittedly with some reluctance) that too much of the Respondent's case depends upon the inferences that Ms Busch invites us to draw from the facts as a whole rather than upon hard evidence. In my view, there is simply not the evidence, merely in the circumstance of the Minister's position as a Minister *for Disabled People* and the sketchy references to the impact on ILF fund users by way of possible cuts in the care packages in some cases, to demonstrate to the court that a focussed regard was had to the potentially very grave impact upon individuals in this group of disabled persons, within the context of a consideration of the statutory requirements for disabled people as a whole.

62. It seems to me that what was put before the Minister did not give to her an adequate flavour of the responses received indicating that independent living might well be put seriously in peril for a large number of people.

63. For example (and merely as an example), does one (a) "have due regard to the need to advance…equality of opportunity between" disabled people and the able or (b) have "due regard to the need to… take steps to meet the needs of" the disabled that are different from those of the able or (c) "…encourage [them]… to participate in public life or any other activity in which participation by [them], is disproportionately low", when one is not told in clear terms that independent living may be put in peril to this extent? It may be possible that the statutory objectives would be furthered by enhanced assistance to those in the position of ILF users. If not, a substantial cohort of disabled persons may be taken out of participation in an active way alongside the less disadvantaged.

64. I can well see that if such questions were posed, a Minister may well still decide that it is a better way to advance the statutory objectives, if one simply opts for equal statutory rights for all disabled people. Indeed, that has an obvious attraction of overall objective fairness. Alternatively she might conclude that there are special reasons why the policy needs to be adopted notwithstanding that it does not advance the statutory objectives at all. However, it is not the ultimate decision of the Minister that is under challenge on rationality grounds in this case; it is a failure to have "due regard" to the specific requirements of the Act in reaching the decision that is under attack.

65. There is one reference in the EIA to the Act and there is one short passage in the evidence of Mr Given for the Respondent dealing with the issue. The passage in the witness statement is this:

> "However, in order to comply with our public sector equality duty any decision you take must be informed by an Equality Impact Assessment. To ensure we do not increase the likelihood of a successful claim it is important that you consider the Equality Impact Assessment and the Impact Assessment before making a decision on the future of the ILF. These have been put to you alongside this submission. "

66. Beyond this there is nothing to identify a focus upon the precise provisions of the Act that seemed to the Minister and her officials to be engaged, what precise impact was envisaged to persons potentially affected and what conclusion was reached in the light of those matters. Such focus Ms Busch invites us largely to infer from those features of the case to which I have referred above. For my part, therefore, I have reached the conclusion that this was not enough and that we should allow this appeal accordingly.

(E) Relief

67. The Judge decided that even had he reached the conclusion that the PSED had not been discharged, he would have confined the relief to an appropriate declaration. He took that view because (as he put it) "A number of significant developments remain outstanding" (paragraph 56 of the judgment). It is probably my fault, but I am not clear what he meant by this. It seems to me that if a decision is reached without due regard to the PSED then it is an unlawful decision and, subject to any overarching discretionary features, the decision should be quashed. That is the course that I would adopt in this case and, if my Lords agree, I would allow the appeal and quash the decision now under challenge.

Kitchin LJ

68. I have had the benefit of reading the judgments of McCombe and Elias LJJ. On the substantive point of difference between them, I am not prepared to infer that the Minister properly appreciated the impact of the proposals on the substantial group of disabled persons currently benefiting from ILF funding. McCombe LJ has referred to a number of documents presented to the Minister which show that she was told in general terms of concerns that ILF users would face reductions or alterations in their care packages and that their ability to lead full and independent lives would be undermined. However, for the reasons given by McCombe LJ, I do not consider that the Minister was given adequate information to enable her properly to assess the practical effect of the proposals on the particular needs of these persons and their ability to live independently. In my judgment this was an essential foundation for the discharge by the Minister of the public sector equality duty.

69. Further, I am in full agreement with McCombe and Elias LJJ that, for reasons they have both given, it is simply not possible to infer that the Minister ever considered the proposals with a proper focus on the particular matters to which she was required to have due regard. There is no evidence she directed her mind to the need to advance equality of opportunity. Nor is there evidence she considered the proposals having due regard to the need to minimise the particular disadvantages from which ILF users and other disabled persons suffer or the need to encourage such persons to live independently and to participate in public life and other activities.

70. For all these reasons I too have reached the conclusion that this appeal must be allowed and the decision quashed.

Elias LJ

71. I agree with McCombe LJ that the appeal should succeed on the grounds that there was a breach of the PSED in this case. I will briefly summarise my reasons for reaching that conclusion.

72. Any government, particularly in a time of austerity, is obliged to take invidious decisions which may exceptionally bear harshly on some of the most disadvantaged in society. The PSED does not curb government's powers to take such decisions, but it does require government to confront the anticipated consequences in a conscientious and deliberate way in so far as they impact upon the equality objectives for those with the characteristics identified in section 149(7) of the Equality Act 2010 .

73. In this case there were two facets of the decision making process where there is serious doubt whether the PSED was properly addressed. First, Mr Wolfe QC contended that the documents placed before the Minister painted what he characterised as a Panglossian view as to the effects of the proposed decision on those who would cease to receive payments from the fund. There is in my view considerable force in that submission, for reasons given by my Lord, McCombe LJ in his judgment. In my opinion neither the EIA nor the document setting out the response to the consultations, both published on the same day as the decision was made, identifies in sufficiently unambiguous terms the inevitable and considerable adverse effect which the closure of the fund will have, particularly on those who will as a consequence lose the ability to live independently. It may be that this is because of a tendency for officials to tell the Minister what they thought she would want to hear — a tendency which, as Sedley LJ pointed out in *R (Domb) v Hammersmith & Fulham LBC [2009] EWCA Civ 941* , para.79, must be strenuously resisted. I suspect also that part of the problem may be that these documents are for public consumption and give the impression that they have been drafted with at least half an eye to sending an up-beat message about the merits of the policy. This necessarily involves down-playing the adverse effects of the decision and exaggerating its benefits. As understandable as that may be from a political perspective, forensically it inevitably creates doubt whether the true impact of the decision has been properly appreciated. The Minister cannot then complain if the documents are taken at face value.

74. However, notwithstanding that I accept that the documents tend to present a somewhat anodyne analysis of the adverse consequences, had the only issue been whether the Minister had properly appreciated the full impact of the decision on those most adversely affected, I would have been prepared to accept that she did. I think that there is just sufficient evidence legitimately to draw that inference. As Minister for Disabled People she would have known and understood the objectives of the fund which, as its name indicates, was to foster independent living. Losing the fund would be bound to have an impact on that objective. Further, there was evidence that she consulted personally with many affected groups and I have no doubt that evidence of hard cases would have been forcefully drawn to her attention. Reading all the material in context, therefore, I would be prepared to accept that the Minister was sufficiently aware of the very real adverse consequences which closing the fund would have on the lives of many of the more severely disabled; she was not in ignorance of the material facts.

75. However, the second and related issue is whether the Minister properly appreciated and addressed the full scope and import of the matters which she is obliged to consider pursuant to the PSED. There is simply no material from which one can properly infer that she did. A vague awareness that she owed legal duties to the disabled would not suffice; nor in my view was it enough simply to alert her to the obligation to have regard to the matters identified in the EIA and the IA. They did not identify her legal obligations. For example, there is no evidence that she had her attention drawn to the positive obligation to advance equality of opportunity, nor indeed (although it was not suggested that this was of itself directly a breach of the PSED) to the more specific obligations which the UK has undertaken with respect to the disabled in the United Nations Covention on the Rights of Persons with Disabilities and which ought to inform the scope of the PSED with respect to the disabled. I have in mind in particular Article 19 which requires states to take effective and appropriate measures to facilitate the right for the disabled to live in the community, a duty which would require where appropriate the promotion of independent living. There was no evidence that any of these consideration were in the mind of the Minister. Indeed, the primary focus of concern appears to have been on achieving fairness as between those who benefit from the fund and those who do not.

76. In my view Ms Busch's argument on this point essentially came down to a submission that the court should assume that the Minister for Disabled People must be taken to be fully aware of her legal duties and to have complied with them. Whilst it may be reasonable to assume that she would be well briefed on the purpose and operation of the fund, it is in my opinion far from obvious that she would have had a clear understanding of her legal duties under the Equality Act . In my judgment if the court were to accede to Ms Busch's submission, it would undermine the important role which this duty should play in governmental decision-making and would conflict with the jurisprudence summarised by McCombe LJ.

77. Accordingly, I too would quash the decision.

Footnotes

1 We were also taken to Articles 1, 3, 4 (c) and (d), 20, 24, 27, 29, 30 (and in particular Article 30.2 and 30.5).

2 See also *Burnip v Birmingham CC [2012] EWCA Civ 629* at [19 – 23] per Maurice Kay LJ in the context of the construction of Article 14 of the European Convention on Human Rights .

3 Local Government Association/Association of Directors of Adult Social Services

4 As appears in Paragraph 7 of the first witness statement of Mr Given for the Respondent, paragraph 14 – Appeal Bundle AB176.

5 We have seen the agenda for this meeting, but no minutes or conclusions.