Easter Term
[2021] UKSC 18
On appeal from: [2019] EWCA Civ 1152

JUDGMENT

R (on the application of Fylde Coast Farms Ltd (formerly Oyston Estates Ltd)) (Appellant) *v* Fylde Borough Council (Respondent)

before

Lord Lloyd-Jones
Lord Briggs
Lady Arden
Lord Sales
Lord Stephens

JUDGMENT GIVEN ON

14 May 2021

Heard on 9 March 2021

Appellant	*Respondent*
Estelle Dehon John Fitzsimons (Instructed by Harrison Drury (Preston))	Jonathan Easton (Instructed by Fylde Borough Council)

LORD BRIGGS AND LORD SALES: (with whom Lord Lloyd-Jones, Lady Arden and Lord Stephens agree)

1. This appeal raises a single short point about the interpretation and effect of section 61N of the Town and Country Planning Act 1990 ("the TCPA"), which is headed "Legal challenges in relation to neighbourhood development orders". Its provisions apply also to legal challenges in relation to neighbourhood development plans, and it was to the making of such a plan that the legal challenge in the present case related.

2. Speaking generally, the making of neighbourhood development orders or plans requires the taking of what may loosely be described as seven consecutive steps, mainly by the relevant local planning authority. They are, in summary:

(1) designating a neighbourhood area;

(2) pre-submission preparation and consultation;

(3) submission of a proposal;

(4) consideration by an independent examiner;

(5) consideration of the examiner's report;

(6) holding a local referendum;

(7) making the order or plan.

3. Section 61N makes separate statutory provision, albeit in very similar terms, about public law challenges to each of steps 5, 6 and 7. It provides as follows:

> "(1) A court may entertain proceedings for questioning a decision to act under section 61E(4) or (8) only if -

> (a) the proceedings are brought by a claim for judicial review, and
>
> (b) the claim form is filed before the end of the period of six weeks beginning with the day after the day on which the decision is published.
>
> (2) A court may entertain proceedings for questioning a decision under paragraph 12 of Schedule 4B (consideration by local planning authority of recommendations made by examiner etc) or paragraph 13B of that Schedule (intervention powers of Secretary of State) only if -
>
> (a) the proceedings are brought by a claim for judicial review, and
>
> (b) the claim form is filed before the end of the period of six weeks beginning with the day after the day on which the decision is published.
>
> (3) A court may entertain proceedings for questioning anything relating to a referendum under paragraph 14 or 15 of Schedule 4B only if -
>
> (a) the proceedings are brought by a claim for judicial review, and
>
> (b) the claim form is filed before the end of the period of six weeks beginning with the day after the day on which the result of the referendum is declared."

4. Pausing there, subsection (2) is about step 5. Subsection (3) is about step 6. Subsection (1) is about the final step 7, namely making the order or plan, because this step is the subject matter of section 61E(4) and (8). The terms of each of the subsections are strikingly similar. Each of them provides that proceedings may be entertained "only if" the following two conditions are satisfied. The first requires the proceedings to be by way of judicial review. The second imposes a six week time limit for the filing of the claim form, running either from the publication of the challenged decision or, in respect of step 6, from the declaration of the result of the impugned referendum. In practice the only respect in which the second condition

adds anything to the time limit which the law would otherwise apply to the bringing of a judicial review challenge of this kind is that the court is given no discretion to extend it.

5. The difficulty of interpretation thrown up by this appeal arises from the fact that a public law challenge to the making of a neighbourhood development order or plan may be based upon a challenge to some earlier step in the prescribed process which is then said to invalidate the making of the order or plan itself. Thus, as will be explained in more detail below, the appellant claims in the present case that the respondent planning authority failed without good reason to accept an amendment to the draft plan recommended by the independent examiner, ie an alleged departure from the lawful performance of step 5, so that it became unlawful to make the plan at step 7, even though approved by the requisite majority during the referendum at step 6. The appellant filed its claim form making that claim within six weeks of the making of the plan, but well outside the six week time limit for a challenge to the lawfulness of the respondent's consideration of the independent examiner's report. To the respondent's objection that the claim form was filed out of time under section 61N(2) the appellant replied that its claim fell squarely within the permission for legal challenge to the making of a plan provided by section 61N(1), which conferred a distinct and separate right, unaffected by subsection (2), and regardless of the particular basis of the claim to invalidate the plan. Both the Planning Court and the Court of Appeal agreed with the respondent's interpretation of section 61N. The appellant seeks the blessing of this court for its rival interpretation.

6. Even where particular words used in a statute appear at first sight to have an apparently clear and unambiguous meaning, it is always necessary to resolve differences of interpretation by setting the particular provision in its context as part of the relevant statutory framework, by having due regard to the historical context in which the relevant enactment came to be made and, to the extent that its purpose can be identified (which may require examination of admissible travaux preparatoires), to arrive at an interpretation which serves, rather than frustrates, that purpose. In *R (Quintavalle) v Secretary of State for Health* [2003] UKHL 13; [2003] 2 AC 687, para 8, Lord Bingham of Cornhill said:

> "Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment."

7. After setting out the relevant facts it will therefore be necessary to set out the statutory scheme for the making of neighbourhood development orders and plans in a little detail, and also to say a little about the general development by the courts of jurisprudence which addresses the question when public law challenges may, and should, be brought in relation to the legality of an administrative process comprising a series of successive steps.

The Facts

8. On 26 May 2017 the respondent, Fylde Borough Council ("the Borough Council"), as local planning authority for its area, decided after the required referendum to make the St Anne's on the Sea Neighbourhood Development Plan, which had been prepared by the interested party, St Anne's on the Sea Town Council. In deciding on the form of plan to put to the referendum, the Borough Council chose not to follow a recommendation by the independent examiner of the draft plan that it should be amended to include within the settlement boundary of St Anne's a site then owned by the appellant, Oyston Estates Ltd ("Oyston"). By a claim for judicial review issued on 6 July 2017, Oyston challenged the decision of the Borough Council to make the neighbourhood development plan.

9. The site is undeveloped land on the edge of St Anne's, at Lytham Moss. To its west is a site known as Queensway, which has planning permission for development for 1,150 dwellings. The site and Queensway are part of land which has been designated a Biological Heritage Site. Land to the north and east has been designated a Farmland Conservation Area and will be managed for over-wintering birds, including the pink-footed goose. Oyston wished to develop the site for housing. With that aim in view, in the neighbourhood plan process Oyston argued for the site to be included within the settlement boundary, but ultimately without success. In what follows we gratefully draw upon the account of the facts given by Lindblom LJ in the Court of Appeal.

10. In July 2013, the Borough Council designated the St Anne's on the Sea Neighbourhood Parish Area for the preparation of a neighbourhood plan. Public consultation took place in April and May 2014, and in June and July 2015. The submission draft of the neighbourhood plan was consulted upon in February and March 2016. The independent examiner, Mr Slater, was appointed in March 2016. The examination hearing took place on 7 June 2016, and the examiner duly submitted a report, dated 10 August 2016.

11. In his conclusions on "Policy GP1: Settlement Boundary" the examiner said he was aware of the "ecological issues affecting Lytham Moss, as the land is used for grazing of overwintering birds …" and is "identified as a Biological Heritage

Site as well as being part of a wider network of linked sites of ecological importance". But in his view this was "not a reason to exclude it from changes to the settlement boundary". The "ecological impact on the site and its protected species" would have to be considered "at any application stage". Given the Borough Council's inability to identify a five-year housing supply, "the incorporation [of] the land identified as Countryside outside the Green Belt … into the settlement boundary would offer the town the flexibility to be able to meet its housing needs over the next 15 years, which are unlikely to diminish, but within the defensible line of the town's Green Belt". Therefore, "the settlement boundary should be amended by the removal of the designation of land as 'open countryside outside Green Belt' on the Proposals Map", and should follow the boundary of the Green Belt. That is what the examiner recommended. In the "Summary" at the end of his report he said that "[as] originally submitted the plan … would not be providing for sustainable development for the whole plan period", but that "if amended by [his] recommendations, [it] would … meet all the statutory requirements, including the basic conditions …". His final recommendation was that the plan, "as modified by [his] recommendations, should now proceed to referendum".

12. In October 2016, after the Borough Council had further consulted Natural England, its ecological consultants, Arcadis Consulting (UK) Ltd, produced an addendum to the screening opinion under the Conservation of Habitats and Species Regulations 2010 (SI 2010/490) ("the Habitats Regulations"), which considered the implications of the change to the settlement boundary for the species in the Ribble and Alt Estuaries Special Protection Area and Ramsar site. Arcadis concluded that it was "possible that birds could be displaced to the new Farmland Conservation Areas … as Queensway is developed"; that "whilst likely significant effects cannot be ruled out", there was "little value in subjecting [the neighbourhood plan] to Appropriate Assessment at this stage"; that "text within the Plan should make it clear that development on this site would only be consented subject to (a) monitoring following the Queensway Development which takes into consideration the potential impact of the Queensway Development on the dynamics of the over-wintering bird populations within the wider area and (b) project-level [Habitats Regulations Assessment] being undertaken"; and therefore that "if the Plan is amended to include this additional text, … further [Habitats Regulations Assessment] at the plan level can be screened out".

13. In a letter dated 30 November 2016 Natural England opposed that approach. They said it was "not acceptable to refer the issue to the project stage as uncertainty has to [be] resolved and in any case proposals leading to a likely significant effect (or where there is uncertainty) cannot progress in a Neighbourhood Plan". They acknowledged, however, that the site had been considered in the Habitats Regulations assessment for the Queensway development, and it had been concluded that "the mitigation was sufficient to offset this field …". They suggested that this

be noted in the screening opinion addendum, "to explain that this area has been assessed as part of the Queensway development".

14. The Borough Council considered its decision statement at a meeting on 2 March 2017. The officers' report had been published, and the meeting was open to the public. The report and the Borough Council's deliberations on it constituted the consideration of the recommendations in the examiner's report under paragraph 12 of Schedule 4B to the TCPA.

15. The decision statement referred to the screening opinion addendum and the consultation of Natural England. It said Natural England had "considered that it was unacceptable to refer to any issues and uncertainty at planning application stage and that as the land was considered and calculated into the mitigation calculations for the Queensway residential development site then any proposal to extend the settlement boundary would need to be Appropriately Assessed at plan stage"; and "in any case as the [Habitats Regulations Assessment] concludes proposals would lead to a likely effect (or where there is uncertainty) the Plan could not progress in its modified form". It continued:

> "In his report, the Examiner considers that this assessment could be carried out prior to the determination of any future planning application. However, prior to proceeding to Referendum, the [local planning authority] must be satisfied that the Plan itself meets the Basic Conditions tests set out in the [relevant Regulations: see below]. Until the potential implications of including this additional land within the settlement boundary are known, it would not be possible to confirm whether or not there would be any adverse impact on the SPA and so proceeding to Referendum without this information could place the Plan at risk of a potential legal challenge."

16. The officers' view, with the benefit of counsel's advice, was that "[the neighbourhood plan] (with the inclusion of this one modification) did not satisfy the [statutory] 'basic conditions' tests …", and that the Borough Council was therefore "completely within [its] rights not to accept this particular recommendation". Under the heading "Decision and Reasons", the decision statement recorded the view of officers that "accepting the [examiner's] recommendations in full and extending the St Anne's on [the] Sea settlement boundary to include the land in question would mean that the Plan would not meet the statutory Basic Conditions". In a table setting out the examiner's recommended modifications and the Borough Council's intended action on each of those modifications, the reason it gave for rejecting the change to the settlement boundary under Policy GP1 was that it "[disagreed] with this

modification as [it did] not consider it meets with the basic conditions in that it breaches EU obligations". Following the officers' advice, the Borough Council resolved to publish the decision statement and that the neighbourhood plan should proceed to a referendum.

17. On 13 March 2017, Oyston made representations for the examination of the draft Fylde Local Plan. In responding to the inspector's question "Has the requirement for appropriate assessment under [the Habitats Regulations] been met? Is it clear how the [Habitats Regulations Assessment] screening report has influenced the Plan?", Oyston referred to the recommendation made by the examiner in the neighbourhood plan process that its site should be included within the settlement boundary and then said this:

> "1.31 Subsequent correspondence with Fylde Council indicated that they would be updating the Appropriate Assessment in order to review this change. They have failed to do so and have now issued the Decision Notice on the Plan with a view to Referendum in May. This makes the Neighbourhood Plan potentially open to challenge."

18. The neighbourhood plan went to referendum on 4 May 2017. 90% of those who voted were in favour of the plan being made. The decision statement published by the Borough Council when it made the plan on 26 May 2017 said the plan "meets the basic conditions and its promotion process is compliant with legal and procedural requirements".

19. Oyston sent a pre-action protocol letter to the Borough Council on 5 July 2017. The claim for judicial review was issued the next day. This would have been in time, by one day, for a claim under section 61N(1), but it was more than 11 weeks late for a claim under section 61N(2).

20. The claim challenged the Borough Council's decision to make the neighbourhood plan on two grounds: first, it had "failed to act lawfully in refusing to follow the independent examiner's recommendation as to modification of the text of the Neighbourhood Plan, and, in particular, failed to comply with the relevant requirements of paragraph 8(2) of Schedule 4B to [the TCPA]"; and secondly, it had "acted [unreasonably] in determining that the modified plan could not progress without an Appropriate Assessment at plan stage, but then failing to carry out that Appropriate Assessment and making the plan without the modification, despite the [examiner's] finding that the unmodified plan would not meet the basic conditions".

21. In its acknowledgment of service, the Borough Council maintained that Oyston's claim was unarguable and also that it was out of time, because it was, in reality, a challenge to the Borough Council's consideration on 2 March 2017 of the examiner's report and according to section 61N(2) such a challenge should have been issued by 13 April 2017. Lang J considered Oyston's application for permission to apply for judicial review on the papers and found that Oyston's claim was arguable on the merits, but directed a preliminary hearing on the question whether the claim was brought within time.

22. At that hearing, Kerr J held that the claim had been brought too late and that permission to apply for judicial review must therefore be refused. Although Oyston's claim was framed as a legal challenge to the decision of the Borough Council to make the neighbourhood development plan at the end of the process, the basis for that challenge was alleged unlawfulness affecting the validity of the Borough Council's decision of 2 March 2017 to refer the original, unamended draft of the plan for consideration in a referendum. By virtue of section 61N(2), Oyston was out of time to bring a challenge on such grounds.

23. Oyston appealed to the Court of Appeal, which dismissed the appeal. Oyston now appeals to this court.

Neighbourhood Development Orders and Plans: the Statutory Scheme

24. The statutory provisions governing the making of neighbourhood development orders and plans were introduced into the TCPA and the Planning and Compulsory Purchase Act 2004 ("the 2004 Act") by the Localism Act 2011. The provisions governing the preparation and making of a neighbourhood development plan are in sections 38A, 38B and 38C of the 2004 Act, which make appropriate provision to apply the regime in the TCPA which governs the making of a neighbourhood development order.

25. Under section 38(3)(c) of the 2004 Act a "neighbourhood development plan", once made, becomes part of the development plan for an area. This is significant because of the important role which the development plan plays in relation to decisions about planning matters in the area, including the grant of planning consent for development. Section 38(6) of the 2004 Act provides that "[if] regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise". Apart from planning permission granted pursuant to the ordinary processes set out in the planning Acts, consent for a development may be granted by a neighbourhood development order.

26. The process for making a neighbourhood development order is set out in Schedule 4B to the TCPA ("Schedule 4B"). This process is applicable to the making of neighbourhood development plans by virtue of section 38A(3) of the 2004 Act. Section 38C of the 2004 Act makes appropriate adjustments to Schedule 4B to accommodate the making of neighbourhood development plans by means of the process there set out. The process involves the seven steps we summarised above.

27. Step 1 involves the designation of a "neighbourhood area". Pursuant to regulation 5 in Part 2 of the Neighbourhood Planning (General) Regulations 2012 (SI 2012/637) ("the 2012 Regulations"), the area intended to be covered by a neighbourhood development plan or order must be designated a "neighbourhood area" by the local planning authority ("authority") in England in which the area is located. A "relevant body", ie a parish council or an organisation or body designated as a neighbourhood forum, is entitled to apply to an authority for a neighbourhood area to be designated: section 61G of the TCPA.

28. Step 2 involves pre-submission preparation and consultation regarding a plan or order. Once a neighbourhood area has been designated, a "qualifying body" (ie a parish council or designated neighbourhood forum authorised for this purpose) is entitled to initiate the process to require an authority to make a neighbourhood development plan or order by preparing a draft and notifying the authority: section 61E of the TCPA and paragraph 1 of Schedule 4B. Regulation 14 of the 2012 Regulations requires the qualifying body to publicise the details of the proposed plan or order and make provision for local people and other consultees to make representations before it is submitted to the authority.

29. Step 3 is the submission of a proposal to the authority. Under section 61E(1) of the TCPA, a qualifying body begins the process of making a plan or order by submitting a draft to the authority, which may only consider the proposal if certain procedural requirements are met, including that the qualifying body is properly authorised to propose the plan or order, it has been made in the correct form and it includes specified information as set out in paragraph 1 of Schedule 4B. Under paragraph 5 of Schedule 4B, the authority "may decline to consider a proposal submitted to them if they consider that it is a repeat proposal" which satisfies certain conditions.

30. Step 4 is the consideration of the proposed plan or order by an independent examiner. Upon receiving the proposal, the authority must appoint an independent examiner and make arrangements for the holding of an examination: paragraph 7 of Schedule 4B. The examiner must examine a range of matters, including whether the draft plan or order meets the "basic conditions" set out in paragraph 8(2) of Schedule 4B. These include consideration of national planning policy and guidance, sustainable development objectives, conformity with strategic policies contained in

the development plan for the area and a check that the making of the plan or order "does not breach, and is otherwise compatible with, EU obligations". Paragraph 10 of Schedule 4B requires the examiner to make a report on the draft plan or order, recommending whether it be submitted to a referendum (as drafted or with modifications) or refused.

31. Step 5 is the consideration of the examiner's report by the authority. The authority must decide what action to take in relation to each recommendation made by the examiner: paragraph 12(2) of Schedule 4B. A referendum must be held on the making of a plan or order if the authority is satisfied that the draft meets the "basic conditions" and certain other requirements are satisfied: paragraph 12(4) of Schedule 4B. The authority must publish its decision and the reasons for it: paragraph 12(11) of Schedule 4B. In certain circumstances, it may be required to invite further representations.

32. Step 6 is the holding of a referendum on the proposed plan or order: see paragraphs 14 and 15 of Schedule 4B, which govern the definition of the electorate and the management of the referendum.

33. Step 7 is the making of the plan or order. If the authority is satisfied that a majority voted in favour of the proposed plan or order in the referendum, then it must make the plan or order unless it considers that doing so would violate one of the Convention rights set out in the Human Rights Act 1998 or an obligation under EU law: section 38A of the 2004 Act and section 61E of the TCPA. The authority is required to publish its decision whether or not to make a neighbourhood development plan or order following a referendum: section 38A(9) of the 2004 Act and section 61E(11) of the TCPA. As soon as possible after deciding to make such a plan or order, the authority must publish a statement setting out that decision and the reasons for it: regulations 19 and 26 of the 2012 Regulations.

34. It is possible to imagine potential legal challenges which could be brought in relation to each of these steps according to ordinary public law principles. If nothing was said in the planning legislation, the means by which a challenge could be brought would be by way of an application for judicial review in the ordinary way, following the procedure in CPR Part 54 and subject to the time limits set out in Part 54.5. Judicial review is the general form of procedure for challenging the lawfulness of actions of public authorities in respect of their functions governed by public law. Each step in the neighbourhood development plan and order process is contingent on the proper and lawful completion of the previous step so, subject to procedural limitations, the lawfulness of such a plan or order may be impugned on the basis of unlawfulness in relation to any step in the process.

35. Sections 287 and 288 of the TCPA and section 113 of 2004 Act provide for distinct statutory procedures for proceedings to question the validity of development plans and certain schemes, orders and decisions made pursuant to those Acts. However, section 61N makes it clear that these do not apply in relation to a challenge to a neighbourhood development plan or order, since it requires such a challenge to be brought by way of judicial review.

Challenging Multi-step Administrative Action

36. The act of a public authority is taken to be valid and effective unless it is challenged and quashed by legal action taken in proper time. However, where a public law measure is taken at the end of and on the basis of a series of steps and its lawfulness is contingent on the lawfulness of each of the steps leading up to it, a question may arise whether the lawfulness of the final measure (in this case, the making of the neighbourhood development plan) can be impugned by a claim brought within time assessed by reference to that measure by showing that an earlier step was affected by unlawfulness, even though the claimant would by then be out of time to challenge the lawfulness of the earlier step if taken by itself.

37. This has been a longstanding point of contention in planning law. Decision-making in the planning field is characterised by the need to take into account in a structured way a multitude of disparate factors. In various contexts, this need is met by a staged approach to decision-making, proceeding step by step to allow for different inputs at distinct stages in the procedure. The courts have had to consider whether a person aggrieved by a decision taken at the end of the process (for instance, the grant of planning permission for a development to which they object) who seeks to challenge that decision on the grounds that a step along the way to that decision (for instance, in relation to environmental impact assessment in relation to the proposed development) was affected by unlawfulness is entitled to wait until the final decision and then challenge that, or is required to challenge the alleged unlawful step along the way, on pain of being unable to challenge the final decision if they fail to do so.

38. There is an obvious tension between different considerations. On the one hand, requiring a claimant to take action in relation to the step along the way could be perceived to be premature and potentially wasteful (in that, if one waited, it could transpire that for various reasons the final decision might not be taken, so that there would in fact have been no need for any challenge); it could also be perceived as placing the claimant under a heavy burden of trying to assess the future impact of an administrative process on him and then taking prompt action at a stage when the outcome of that process is not clear. On the other hand, if a claimant is allowed to wait until the final decision before bringing proceedings, that could be perceived as being dilatory, unduly disruptive of good administration and potentially wasteful in

a different way, in that all the administrative steps after the unlawful one would be rendered nugatory and that in circumstances where it might have been possible, had the unlawfulness been addressed promptly when it occurred, to salvage matters at that stage and proceed with a completely lawful decision-making process to advance the public good without unnecessary loss of time. Particularly where the applicable law is complex, it may be relatively easy to find that a public authority has innocently slipped into some unlawfulness along the way to taking a final decision.

39. Sometimes, Parliament resolves this tension by explicitly providing that a challenge may be brought at the end of the decision-making process. For example, section 113 of the 2004 Act stipulates that local development plans (which, like neighbourhood development plans, form part of the development plan for an area) must not be questioned in any legal proceedings except as provided in that section, which includes a time limit of six weeks after the making of the plan or document. This has the effect that the majority of challenges to a local plan must be brought after the final version is adopted: see *Manydown Co Ltd v Basingstoke and Deane Borough Council* [2012] EWHC 977 (Admin); [2012] JPL 1188 and *R (CK Properties (Theydon Bois) Ltd) v Epping Forest District Council* [2018] EWHC 1649 (Admin); [2019] PTSR 183. In our case, however, section 61N makes different provision to address the issue in relation to the making of a neighbourhood development plan.

40. The tension between these different approaches has been reflected in the case law on the application of the time limit for judicial review in what is now CPR Part 54.5 (previously RSC Order 53 rule 4). Laws J in *R v Secretary of State for Trade and Industry, Ex p Greenpeace Ltd* [1998] Env LR 415 gave emphasis to the need for prompt action on the part of a claimant to challenge an administrative process at the stage the alleged unlawfulness arose. But the House of Lords in *R (Burkett) v Hammersmith and Fulham London Borough Council* [2002] UKHL 23; [2002] 1 WLR 1593, a case concerning a challenge to the grant of full planning permission on the grounds of unlawfulness regarding the environmental impact assessment on which a prior resolution to grant permission had been based, overruled that decision, holding that it was open to the claimant to wait until the end of the decision-making process to see if they needed to take any action: paras 36-51 per Lord Steyn. *Burkett* was followed in *R (Catt) v Brighton and Hove City Council* [2007] EWCA Civ 298; [2007] 2 P & CR 11, another case concerned with a challenge to a grant of planning permission on the grounds of deficiency in the environmental impact assessment at an earlier stage. But more recently in this court, Lord Carnwath (with the agreement of the other members of the court) reserved his position on whether *Catt* was rightly decided and suggested that this "wait to the end" approach might have to be revisited, in view of the administrative disruption it can produce: *R (Champion) v North Norfolk District Council* [2015] UKSC 52; [2015] 1 WLR 3710, para 63.

41. What can be derived from consideration of this case law is that there is no clear or obvious resolution of the tension to which we have referred. Ultimately, a choice has to be made between competing interests of different kinds. It is to be expected that the choice made will reflect the particular balance of considerations as they happen to arise in a specific context. There is no clear presumption how the balance should be struck in the context of the statutory regime under consideration here which could offer any guidance regarding the interpretation of section 61N. Parliament was entitled to strike the balance in this particular context as it thought fit and the words of the provision itself provide a clear answer as to how it intended that should be achieved.

Section 61N: Permissive or Restrictive?

42. In our view the answer to the question of interpretation posed by this appeal really turns upon whether section 61N is permissive or merely restrictive in its purpose and effect: ie whether it creates new or replacement rights of public law challenge (subject to procedural conditions) or whether it simply imposes new restrictions as conditions for the exercise of rights which arise anyway from the general law. If it is permissive in that sense then there is real force in the appellant's submission that section 61N(1) creates a right of challenge to the making of a plan which should not be treated as cut down by implication by subsection (2) or (3) merely because a challenge to administrative action of the type to which they each refer forms the real ground for the challenge to the making (or validity) of the plan. But if section 61N is merely restrictive of pre-existing rights then, on the facts of this case, subsection (2) must be an impassable barrier to any claim in which, as a matter of substance, the challenge is to the legality of something which that subsection describes, namely something done or omitted to be done during stage 5, the planning authority's consideration of the independent examiner's report.

43. Contrary to the submissions of the appellant, this is not a case where the court can choose between rival interpretations on the basis that one of them serves the court's own perception of promoting efficient administration and proportionate or timely litigation better than the other. Nor is it legitimate to argue from a perception that one interpretation more closely aligns either with judge-made rules or other statutory provisions regulating legal challenges to analogous administrative action, such as the making of local (rather than neighbourhood) plans. There are two reasons for this.

44. First, there is simply no sufficiently clear general answer to the issue as to the preferable route (either challenge when the unlawful step occurs or wait until the end of the process) to enable the court to say with confidence that only one of them could serve the statutory purpose in this particular context. It may be for example that the preponderance of judicial authority (encapsulated in the *Burkett* case) tends

to favour the "wait to the end" approach, but the reported cases are not unanimous, and it by no means follows that the same approach to the timing of a public law challenge should apply to every different type of multi-stage administrative action. Similarly it may be that, because of section 113 of the 2004 Act, challenges to the lawfulness of the process for making local (rather than neighbourhood) plans ought usually to await the end of the process. But the links and similarities between the two processes are not so great as to render a "challenge early" principle incapable of being rationally applied to the neighbourhood processes. They are the product of separate legislation with the promotion of local democracy primarily in mind, and critically involve the holding of a referendum. We think it readily understandable that Parliament should have decided to avoid the too-frequent overturning of a referendum result by public law challenges made after the event based upon allegedly unlawful acts or omissions occurring at an earlier stage in the process.

45. Secondly, and conclusively in our view, the choice between a "challenge early" or "wait to the end" approach to this particular multi-stage process of public administration was a matter for Parliament to decide, if it wished to do so. Provided only that the choice has been made with sufficient clarity, then it must be respected, even were it the case that some participants, or the courts, might take a different view of the merits.

46. The starting point is to appreciate that section 61N cannot satisfactorily be read as supplying a complete and exclusive code for all public law challenges which might be made to the process leading to the making of a neighbourhood development plan or order. If the Court of Appeal thought otherwise, we respectfully disagree. Section 61N only deals with stages 5, 6 and 7 of a seven stage process. Apart from section 61N, the general law would in principle have permitted a public law challenge to acts or omissions said to be unlawful at any stage of the process. For example the planning authority might unreasonably refuse to designate a neighbourhood area at stage 1, or fail to prepare a draft plan at stage 2, or the planning authority or the Secretary of State might fail to appoint an independent examiner at stage 4. More to the point for present purposes, as noted above, under paragraph 5 of Schedule 4B the planning authority has a discretion to decline to proceed with a proposal made to it if the proposal repeats a previous proposal: in theory a case could arise in which a planning authority might act unlawfully at this stage by deciding to proceed with a proposal if it acted irrationally in doing so or failed lawfully to consider the due exercise of that discretion.

47. It would be a strong thing to conclude that Parliament had, by section 61N, which is silent about anything prior to stage 5, abrogated all those rights arising under the general law. If an existing right is to be taken away by statute, then this requires clear language: see *Islington London Borough Council v Uckac* [2006] EWCA Civ 340; [2006] 1 WLR 1303, para 28 per Dyson LJ, relying on *Coke's Institutes*; and (in relation to common law rules rather than rights) *R (Rottman) v*

Comr of Police of the Metropolis [2002] UKHL 20; [2002] 2 AC 692, para 75 per Lord Hutton:

> "It is a well-established principle that a rule of the common law is not extinguished by a statute unless the statute makes this clear by express provision or by clear implication."

48. The express recognition in section 61N that there may be public law challenges to acts or omissions during stages 5, 6 and 7 of the process does not amount to the fresh creation of those rights. The only purpose ascertainable from section 61N is to subject those particular existing rights of challenge to the twin conditions in each of the subsections, namely that they be brought by way of judicial review and commenced within a rigid, non-extendable six week time-limit. That is the plain meaning of "only if" in each subsection. Section 61N is therefore entirely restrictive, not permissive, in its effect.

49. In the Court of Appeal, Lindblom LJ said (para 33) that the three subsections in section 61N "are not expressed in merely permissive terms, but both permissively and restrictively". With respect, reading the subsections against the background of the general law and in the context of the section as a whole, we do not think that is right. The words at the start of each subsection ("[a] court may entertain proceedings … only if") are not permissive in effect. Rather, they recognise that general public law means that legal proceedings are capable of being brought if there is unlawfulness at any stage and they introduce a series of limitations.

50. That being so, the questions which may be said to be posed by section 61N, in relation to any public law challenge which has actually been made to an act or omission during the process leading to the making of a neighbourhood development order or plan are:

i) Does the challenge question a decision (or something relating to a referendum) within stages 5, 6 or 7 of the process?

ii) If so has the claim been made by way of judicial review?

iii) If so has the claim form been filed within the specified time limit?

51. Applying that analysis to the claim in the present proceedings, the challenge does question a decision within stage 5, namely the respondent Borough Council's decision not to include the appellant's land within the settlement boundary, contrary

to the independent examiner's recommendation. Subsection (2) therefore applies, and that challenge was made out of time. It is nothing to the point that the same claim questioned the making of the plan, within the meaning of subsection (1) or that it was brought within time for that purpose. This is because subsection (2) prohibits a questioning (out of time) of the decision not to include the appellant's land within the settlement boundary, so that such a challenge or "questioning" cannot be included within the claim. If it is excluded from the claim then the challenge to the making of the plan loses its only substantial foundation.

52. It was suggested by the appellant that section 61N(1) ought to be treated as having an elevated or "umbrella" status within section 61N as a whole, so as to explain its non-chronological positioning at the beginning of the section, in the sense that it applied to the last of the three steps to which section 61N applies. We would acknowledge that the ordering of the three subsections appears a little odd at first sight. But it may simply be that subsection (1) relates to a step prescribed by a main section within the TCPA (and in the 2004 Act, as the case may be) whereas subsections (2) and (3) relate only to steps prescribed by Schedule 4B. Whatever may be the explanation, the ordering of the subsections will not bear the weight which the appellant seeks to place upon it.

53. Ms Dehon for the appellant submitted that the restrictive construction would call for an unwelcome detailed dissection of a claim for judicial review at an early stage in the proceedings, simply to find out whether it (or part of it) was or was not time-barred. But claims for judicial review have to pass through a screening process in any event. Permission is required to apply for judicial review and detailed grounds of challenge have to be set out at that initial stage so that the court may decide whether or not to give permission for the claim, or some part of it, to proceed. This screening process allows the parties and the court to ascertain whether the claim or some part of it falls within one or more of the separate subsections of section 61N.

54. It was also submitted that to treat section 61N as requiring challenges to steps 5 and 6 to be made (if necessary to comply with the time limits) prior to the making of a plan or order would encourage undesirable multiplicity of suit, such that, for example, a multi-headed challenge to the lawfulness of action or inaction at each of those stages would have to be brought by three sets of proceedings about the lawfulness of the same overall process. We would acknowledge that in those (perhaps unusual) circumstances more than one claim might have to be filed; alternatively, and more realistically, an existing claim in relation to one stage might be amended to introduce an additional claim in relation to a later stage (we should make it clear that we consider that the condition in sub-paragraph (b) of each of the subsections of section 61N should be read so as to cover the amendment of an existing claim form in this way, so long as the application to amend is filed within the time limit). This feature of the operation of section 61N is by no means a sufficient consideration to displace the clear restrictive meaning of each subsection.

Even if there were separate proceedings, appropriate case management thereafter should ensure that they were dealt with together, and save most of the cost of duplication. Appropriate provision can be made in relation to costs under CPR Part 45.41-45 to ensure that the principles in the Aarhus Convention (Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (1998)) are respected in such a case, to make due allowance for the additional complexity of the procedure: see CPR Part 45.44(3)(b)(v) and *R* (*Edwards) v Environment Agency (No 2)* [2013] UKSC 78; [2014] 1 WLR 55, para 28(iv) (Lord Carnwath).

55. Finally Ms Dehon submitted that the restrictive rather than permissive interpretation of section 61N would risk causing serious injustice to ordinary residents (rather than sophisticated developers) in a relevant neighbourhood area, because it would start a tight time period running for judicial review before the process actually impacted upon their private rights by the making of a plan or order, so that time might run out before they could be expected to seek legal advice. That may fairly be said to be one of the potential disadvantages of the adoption of a "challenge early" approach to a multi-stage process. On the other hand, there will be significant publicity attaching to the stages referred to in each subsection of section 61N so anyone with an interest in their neighbourhood affairs will have a reasonable opportunity to take action to mount any challenge at the proper time. The inference is that in enacting section 61N Parliament has balanced the potential competition between different public and private interests in connection with a process that is in its essentials an aspect of public administration, involving development policy for a whole neighbourhood and the exercise of referendum rights with regard to its outcome. As has been observed in the case law, there are arguments on both sides of the debate regarding the alternative approaches to the timing of public law challenges. In section 61N Parliament has clearly adopted a particular solution which it considered appropriate in this particular context. It is plausible to expect that in a new procedure introduced into the TCPA and the 2004 Act by the Localism Act 2011 with the aim of promoting public participation in certain decisions by holding referendums, Parliament would not wish to allow the outcome of a referendum to be set at nought by reason of technical legal arguments which could have been sorted out before the referendum was held. That would risk creating scepticism and disaffection with the new procedure which could undermine rather than promote public engagement.

56. For those reasons, although differing to a limited extent from the reasoning of the courts below, we would dismiss this appeal.