[Home] [Databases] [World Law] [Multidatabase Search] [Help] [Feedback]

# England and Wales High Court (Administrative Court) Decisions

**You are here:** BAILII >> Databases >> England and Wales High Court (Administrative Court) Decisions >> R v Warwick District Council [2018] EWHC 3123 (Admin) (16 November 2018)
URL: *http://www.bailii.org/ew/cases/EWHC/Admin/2018/3123.html*
Cite as: [2018] EWHC 3123 (Admin)

[New search] [View without highlighting] [Printable RTF version] [Help]

**Neutral Citation Number: [2018] EWHC 3123 (Admin)**
Case No: CO/1279/2018

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**ADMINISTRATIVE COURT**

Birmingham Civil Justice Centre
Priory Courts
33 Bull Street
Birmingham B4 6DS
16/11/2018

B e f o r e :

**MR JUSTICE JAY**

---

**Between:**

| | |
|---|---|
| **R (oao DAVID SMITH-RYLAND)** | **Claimant** |
| **-and–** | |
| **WARWICK DISTRICT COUNCIL** | **Defendant** |
| **-and-** | |
| **ALAN MURDOCH** | **Interested Party** |

---

**Paul Cairnes QC and Ms Nina Pindham (instructed by Lanyon Bowdler Solicitors) for the**

**Claimant**
**David Forsdick QC (instructed by Warwickshire County Council, Legal Services) for the Defendant**
**The Interested Party did not appear**

**Hearing date: 8 November 2018**

---

**HTML VERSION OF JUDGMENT APPROVED**

---

Crown Copyright ©

**MR JUSTICE JAY:**

*Introduction and Factual Synopsis*

1. This is an application for judicial review brought by Mr David Smith-Ryland ("the claimant"), with the permission of HHJ David Cooke, against the decision of the Warwick District Council ("the defendant") given on 14 February 2018 to discharge condition 3 imposed on a planning permission granted on 26 April 2016 (ref. W/14/0944) ("the planning permission").

2. The claimant owns Plestowes farm in Barford, Warwick. As he explains in his witness statement, it is a mixed organic farm involving cattle and grain. A plan prepared by Sheldon Bosley, chartered surveyors, shows – insofar as is material – a cattle shed for 120 head of cattle, a grain store and a fan shed. Contiguous with the claimant's land is property owned by Mr Alan Murdoch ("the interested party") which includes – again insofar as is material for present purposes – buildings known as Barn one and Barn two. The Long Barn, also shown on the plan is no longer germane to these proceedings because planning permission has been refused in relation to it on the basis that noise levels from the claimant's farm would be unacceptable for any residential development.

3. Barn two is directly on the boundary line marked in red on the plan, and given its location and size provides some measure of cloaking and shielding from noisy activities carried out on the farm. Barn one is less than 30 m away from the boundary line. Previously, Barn one was used as offices. It is now apparently vacant, but – in circumstances which I am about to explain – the interested party has planning permission to develop Barn one for residential use, subject to condition 3 the discharge of which is the subject matter of this challenge.

4. Barn two is just over 30 m away from the claimant's cattle shed and slightly further away from the grain store. The claimant's farm operates two dryers, one externally, the other internally, for the drying of grain. The internal grain dryer, on occasion described as an "electric blower", operates within the fan shed close to the southern edge of barn two. The external dryer, which is obviously noisier, is driven by a diesel-powered tractor and is located between the cattle shed and the grain store, approximately 40 metres from the boundary. It is marked on the plan as "Static Optic Grain Dryer".

5. The evidence is not altogether clear as to the frequency of use of these dryers. The interested party's expert, Mr Mike Brownstone of Resound Acoustics Ltd, states his understanding that the dryers operate seasonally, typically for a period of two weeks a year, during the daytime only. The claimant's expert, Mr K. J. Gayler formerly of Sharps Redmore Partnerships Ltd but now of Sharps Acoustics LLP, presumably working on the basis of information provided by his client, states that in a typical summer the dryers would be operated for between two and six weeks during the daytime. In the springtime, the dryers could be operated for up to 6 weeks to reduce moisture content to acceptable levels for sale. According to the defendant's environmental health officer ("EHO"), the internal dryer operates all year round. It is disappointing that there should be this lack of consensus in the expert evidence, but the outcome of this application for judicial review cannot turn on an

issue of this sort.

6. The claimant's concern, in a nutshell, is that any residential occupiers of Barn one could bring noise nuisance claims in relation to the use of these dryers, and that the local planning authority could serve noise abatement notices. Unusually in a case of this sort, therefore, the generator of the noise is not seeking to downplay its level.

7. The claimant's consideration of noise-related issues goes beyond these dryers, and his expert draws attention to other sources of noise, including the organic cattle herd which must be allowed external space. The interested party's expert has only considered the issue of dryer noise. I note that the EHO, rightly in my view, takes the broader approach. Although the fine detail does not matter for the purposes of this application for judicial review, I have considered the evidence from the acoustic experts with some care; and have raised certain matters of clarification with counsel.

8. It has been the interested party's ambition for some time now to develop Barn one and convert it from office space into residential units. In August 2014 he was granted planning permission for this, but on 22 May 2015 the permission was quashed because the defendant agreed that it had failed to consider relevant considerations as per the perfected grounds.

9. Just before then, on 24 March 2015 Sharps Redmore had provided its first report. At the facade to Barn one the background noise level as evaluated in June 2014 was 41 dB on the relevant scale. The rating level, which included the noise generated by the dryers as well as an upward correction for the type of noise, was 63 dB, which was 22 dB over the background level. These findings were broadly in keeping with those ascertained by Resound Acoustics as set forth in its report dated January 2016. Mr Brownstone concluded on the basis of a number of contextual factors that an appropriate standard of residential amenity could be achieved. In reaching that conclusion he took into account the level of use of the dryers, the possibility that a noise barrier could be constructed, the fact that windows could be closed at relevant times, and the fact that nearby occupiers had made no complaints.

10. An addendum report from Sharps Acoustics LLP dated 29 February 2016 is critical of a number of aspects of the report given by Resound Acoustics in January 2016, but the *minutiae* matter not. I note that both experts were of the opinion that the noise generated by these dryers significantly exceeded the threshold of 10 dB over the background noise level. The relevance of this will be explained in due course.

11. On 17 March 2016 the defendant's EHO visited the site, but the dryers were not running on this occasion. I was told by Mr Paul Cairnes QC for the Claimant that when the EHO visited in 2011 only one dryer was operational. Following this visit, on 31 March 2016 various changes to the proposals were made by the interested party, including replacing the existing timber fence to the south of Barn two with a 3.3 m high timber acoustic fence. Planning permission was required for this because it was outside GPDO rights.

12. In early April 2016 the EHO reported to the defendant's planning committee. The EHO raised no objections to the conversion of Barn one to residential use "subject to conditions to protect the amenity of future residents against noise and odour". This latter consideration is not relevant for present purposes. Specifically, the EHO said this:

> "There are two grain dryers within the objector's farm and close to the application site. One is internally situated within a shed and operates all year round. The second grain dryer is external. There is currently a line of sight from the front door of Barn one to the shed housing the internal grain dryer. The EHO considers that the noise from either grain dryer as experienced at Barn one would not amount to a statutory nuisance, although the external grain dryer is more noisy and could have the potential to adversely affect the amenity of residents of Barn one if not mitigated. Furthermore if

the cattle shed and yard were used for cattle there is the potential for the amenity of Barn one to be affected by cattle noise without mitigation measures being implemented.

The EHO therefore recommends a condition to require the applicant to retain Barn two to provide a noise screen and a condition to provide acoustic fencing. The condition proposed will ensure that Barn two is not removed, should this ever become necessary in the future, without consultation with the LPA to ensure a suitable replacement noise screen can be secured. Given the large bulk and massing of existing and former farm buildings it is considered that an appropriate acoustic fence solution can be achieved that will not affect the visual amenity of the locality of the amenities of the adjoining farm."

13. My reading of this report is that the EHO was recognising in terms that the noise generated by the external dryer was unacceptable, unless it was mitigated, and he was also of the view that an appropriate acoustic fence solution could be achieved.

14. In mid-April 2016 the claimant submitted further objections in the light of the EHO's report, stating that in the absence of an updated noise survey it could not be demonstrated that the proposed mitigation measures would work. On 25 April 2016 the EHO addressed this point by stating that he had been on the site, heard the grain dryers running, and "is therefore content that the mitigation measures proposed are appropriate to protect the amenity of future occupiers of Barn one".

15. On 26 April 2016 the defendant's planning committee resolved that permission be granted for the development of Barn one, the change of use being from office to residential use. Various conditions were imposed:

"2. The development hereby permitted shall be carried out strictly in accordance with the details shown on the site location plan and approved drawings [including drawing 413/3 Rev A], and specification contained therein, submitted on 31/3/16. **REASON**: For the avoidance of doubt and to secure satisfactory form of development in accordance with Policies DP1 and DP2 of the Warwick District Local Plan 1996-2011.

**Pre-Commencement Condition:**

3. Prior to the commencement of development a scheme shall be submitted to and approved in writing by the local planning authority providing full details and specification of the acoustic fencing, the location of which is shown on the approved plans. The approved scheme shall be implemented in full prior to first occupation of the dwelling house hereby approved and retained in perpetuity thereafter. **REASON**: to ensure that an unacceptable disturbance is not created to the detriment of the amenities of the future occupiers of the property in accordance with policy DP2 of the Warwick District local plan 1996-2011.

…

6. Should the office building identified as Barn two … be removed then prior to its removal details of an alternative scheme to mitigate the effects of noise nuisance to occupants of Barn one shall be submitted to and approved in writing by the local planning authority along with timescales for its implementation. The approved scheme shall be implemented in full and in accordance with the approved timetables. **REASON**: Barn two forms a noise screen to Barn one and without alternative noise screen solution there would likely be an adverse impact to the detriment of the amenities of the future occupiers of the property contrary to policy DP2 of the Warwick District local plan 1996-2011.

…

Note 2. In discharging condition 3, it is expected that evidence to demonstrate that the proposed fencing will provide adequate mitigation against noise source will be provided to support the submission."

I interpolate that drawing 413/3 Rev A showed an acoustic fence 3.3 m high and specified that it be made of wood.

16. The claimant then sought to bring judicial proceedings against the grant of planning permission. The defendant provided summary grounds of defence which asserted that the claimant's case wrongly focused on the expert evidence he had adduced, rather than on the expert opinion of the EHO, and that the latter was entitled to reach the conclusion that the noise would be acceptable with the proposed mitigation measures in place. Permission to apply for judicial review was initially refused on the papers, and there was an oral renewal application before Green J sitting at this court on 17 October 2016. The defendant did not appear on that occasion.

17. Green J gave an extempore judgment at the conclusion of the hearing, which is of course standard practice. At paragraph 10 of his judgment Green J provided a helpful analysis of the EHO's April 2016 report which I may incorporate by reference into this judgment. At paragraph 11 Green J referred to condition 3, and then said this:

> "The EHO report makes clear that any plan so submitted will be subject to a fresh approval process and that environmental health would be consulted. It should go without saying that the authority will need to address its mind afresh to the issue when it arises. They cannot go into the process with a fixed predetermined mindset."

18. Then, at paragraph 13, after referring to the claimant's April 2016 submissions as to the lack of efficacy of mitigation measures, Green J added:

> "The authority will unquestionably need to address this issue carefully when the plans for the acoustic fence are submitted to form a considered view of the appropriate height. I recognise and emphasise, of course, that the final decision of the authority may involve an issue of judgment and there may not be a black-and-white cut-off. Nonetheless, on balance, I am clear that the defendant's position and the reasoning in the decision, which includes the imposition of the condition that I have just considered, is a proper conclusion to arrive at. The claimant's present criticisms assume that a fence of 3.3 m will be approved and will not suffice, and they criticise the absence of reasons which underpin that premise. With respect, that criticism is premature; it remains to be seen what will or will not be accepted. As matters stand, I conclude that on this ground the defendant's judgment and reasoning in its decision is entirely lawful."

19. In November 2017, and again in February 2018, the interested party submitted details to the defendant of the acoustic fence he intended to install in compliance with condition 3. It should be noted that on 11 December the EHO expressly asked for information regarding the predicted noise level at Barn one with the proposed fence in place. Further, on 5 January 2018 the defendant's case officer had a telephone conversation with the interested party in which the following is recorded:

> "Required Reduction at Barn one
>
> From comparing difference between noise on and noise off ? is difference above background noise more than 5 dB … can establish this from noise surveys produced for the application."

20. On 2 February 2018 Resound Acoustics wrote to the interested party with further information

regarding the probable impact of the acoustic fence his client intended to fit. The following conclusion appears:

> "It has been calculated that the sound levels of Barn one with the barriers in place are up to 4 dB lower than those without the barriers in place, with free-field sound levels at the building facade ranging from 50–54 dB depending on the exact receptor locations." [NB. no information as to the background level was provided at this stage. I do not think that one may infer that it was 35 dB, which was Resound Acoustics' measurement in 2015]

21. On 6 February 2018 the defendant's EHO emailed his colleagues concurring, as he put it, with the comments expressed in Resound Acoustics letter. He added:

> "I note that the fence will reduce the noise from the grain dryer reaching Barn one but it will not render it inaudible. Nor will it guard against any disturbance from new activities. The potential for annoyance will be a function of the background sound levels by day and night, the characteristics of the sound, the pattern of operation of the equipment, its maintenance and any insulation at the source (for example opening or closing of the shed door and hours of operation of external equipment).
>
> That is to say, the avoidance of statutory nuisance will still depend on the operators of the farmyard following best practicable means to prevent nuisance. The determination of statutory nuisance will take into account the factors listed above and the character of the area.
>
> With regard to amenity, the noise levels at facade of Barn one with the fence proposed in place and the current farmyard activities would be no worse than living next to a main road. I feel that an acceptable acoustic environment can be achieved for occupiers of the development."

22. On 14 February 2018 the defendant discharged condition 3, giving the following reason, expressed as the assessment of the case officer:

> "The email to [the interested party] from Resound Acoustics dated 2 February 2018 demonstrates how an acceptable acoustic environment will be achieved through the use of an acoustic fence, with the approval of a senior environmental health expert, thus enabling the condition to be discharged, to ensure that an unacceptable disturbance is not created to the detriment of the amenities of the future occupiers of the property in accordance with policy DP2 …"

*The Legal and Policy Framework*

23. It is trite law and not in dispute that the defendant's decision to grant planning permission had to be made in accordance with the development plan, unless material considerations indicated otherwise. The defendant does not suggest that they did. The defendant was also required to take relevant policies into account. The relevant development plan is the Warwick District Local Plan 1996–2011, and the relevant policy within it is (or rather was at the material time) DP2. This provides:

> "Development will not be permitted which has an unacceptable adverse impact on the amenity of nearby users and residents and/or does not provide acceptable standards of amenity for future users/occupiers of the development."

It is to be noted that DP2 makes no express reference to noise standards or particular noise levels.

24. Paragraph 123 of the NPPF provides:

"Planning policies and decisions should aim to:

> (a) avoid noise from giving rise to significant adverse impacts on health and quality of life as a result of new development."

25. The Noise Policy Statement for England (DEFRA, March 2010) ("the NPSE") provides insofar as is material as follows:

> "2.21 [the "significant observed adverse effect level", the "SOAEL" is] the level above which significant adverse effects on health and quality of life occur.
>
> …
>
> 2.23 [the first aim is] that significant adverse effects on health and quality of life should be avoided while also taking into account the guiding principles of sustainable development.
>
> 2.24 The … NPSE … requires that all reasonable steps should be taken to minimise adverse effects on health and quality of life while also taking into account the guiding principles of sustainable development … This does not mean that adverse effects cannot occur."

26. By British Standard 4142:2014 the SOAEL is stated as being 10 dB above background levels.

27. The Community Noise Guidelines published by the WHO confirm that a level of noise of below LOAEL (slightly different from the concept of the SOAEL, but these differences need not be examined here) occurs when there is continuous outdoors noise above 50 dB. Further, these guidelines provide that anything above 55 dB outside equates to "serious annoyance" both daytime and evening.

28. It will be recalled that the expert evidence of the claimant and the interested party was largely in agreement that the SOAEL would be exceeded when both dryers were running and without mitigation measures in place. A range of 50-54 dB with the acoustic fence in place would still exceed the SOAEL but would be below the WHO yardstick for "serious annoyance".

*The Claim*

29. The judicial review grounds are threefold. First, it is said that the defendant failed to have regard to relevant considerations, namely that applicable objective noise standards would be breached even with the acoustic fence in place. Secondly, it is contended that the defendant failed to consider relevant policy, in particular DP2, the NPPF and the NPSE, and in addition wrongly had regard to the fact that noise levels would be no worse than for those living next to a main road. Thirdly, it is complained that the defendant's decision is inadequately reasoned. As I pointed out during oral argument, and I think was accepted, ground 3 adds nothing to the strength of the claimant's case.

30. These points were developed with effective skill and aplomb by Mr Cairnes during oral argument. As he developed his points, it became clear that the essential focus of the argument was narrow. Whereas both parties in their written submissions had taken the time to take me through the history as providing relevant context (I would add that both parties also wanted to impress on me the broader merits of their respective positions), the discourse at the Bar became more directly focused on the meaning and mode of fulfilment of the conditions applied to the April 2016 planning permission, in particular condition 3.

31. Mr Cairnes did adhere to a submission that the EHO in April 2016, and thereafter the defendant's planning committee, made no finding that an acoustic fence 3.3m high would probably work.

Indeed, he added that the EHO had specifically rejected the claimant's contention advanced at that stage that further noise surveys were necessary. However, what Mr Cairnes was really concerned to impress on me was the true construction of the planning permission and the conditions attached to it, in particular condition 3 and note 2.

32. He submitted, in line with the view of Green J as well as the case officer in January 2018, that it was incumbent on the interested party to submit a scheme for acoustic fencing which would meet the rubric of or at least the standards inherent in condition 3, namely that an unacceptable disturbance would not be created; and that, furthermore, the attainment or violation of objective noise standards were a relevant consideration in assessing the proposal advanced in January 2018. If noise standards were relevant matters in April 2016, they were equally relevant in February 2018 when the critical assessment fell to be made. I have already pointed out that the acoustic fence proposed by the interested party would exceed the SOAEL and achieve only a reduction in noise of 4 dB.

33. It followed, submitted Mr Cairnes, that the proposal could not satisfy the stated reason for condition 3, and failed to meet the defendant's expectation as set out in note 2.

34. As for the second judicial review ground, Mr Cairnes submitted that the defendant failed to consider relevant policy, included the NPPF and the NPSE (I have not set out all the relevant policies in this judgment, and have kept to the most important). However, on this aspect of the matter I tend to agree with Mr David Forsdick QC for the defendant that ground 2 is ground 1 in another guise.

*The Defence*

35. Sensing at the start of his oral submissions to me that I was warming to the claimant's case, Mr Forsdick mounted a sustained, spirited defence of his client's position.

36. Mr Forsdick submitted that conditions 2, 3 and 6 needed to be read holistically, and that condition 2 was undoubtedly the starting point. This condition was imposed to ensure "a satisfactory form of development" in line with the development plan, in particular DP1 (the text of this was not made available) and DP2. The development had to be carried out strictly in accordance with the relevant plans, and we have seen how that relates to the acoustic fence: it had to be constructed in wood, and it had to be 3.3m high. Insofar as paragraph 13 of Green J's judgment may be understood as suggesting that the fence could be higher than 3.3m, he was incorrect. (I would add that if the interested party wanted or needed to build a higher fence, section 73 of the Town and Country Planning Act 1990 would require him to apply in the first instance to vary condition 2). Mr Forsdick's headline submission was that the reason for the construction of a 3.3m wooden acoustic fence was to secure compliance with the demands of DP2. It followed, he said, that condition 2 was the principal condition which governed the present case.

37. Given that the purpose of condition 2 is to secure an acceptable environment for DP2 purposes, Mr Forsdick went on to submit that the premise must be that such a fence will achieve this result. Although he did not need this further submission for this purpose, Mr Forsdick also pointed out that the EHO had concluded in April 2016 that a fence would be an appropriate and efficacious mitigation measure, and that the planning committee had clearly accepted his advice. In reaching that conclusion, the EHO was well aware that noise levels would be exceeded, but he no doubt had in mind the sort of contextual approach pressed by the interested party's expert. The claimant's challenge to the April 2016 planning permission failed, and it must therefore to be deemed to be lawful. It followed from all of the above, submitted Mr Forsdick, that the purpose of condition 3 was limited: namely, it was merely to ensure that the precise specification, in terms of materials and mode of construction/installation, was appropriate. He added that note 2 is not part of condition 3.

38. What condition 3 does not and cannot permit or require, submitted Mr Forsdick, is that the whole

question of the suitability of an acoustic fence in principle should be revisited through the portal of condition 3 in the context of an application to discharge. Mr Forsdick drew my attention to a line of authority which, he said, supported this proposition. For good measure, but I am not sure with any proper evidential underpinning, Mr Forsdick added that the acoustic fence proposed in February 2018 was state of the art and top of the range. He said that such fencing is used in connection with motorways. That may be so, but neither the EHO nor the planning committee has said as much.

39. By way of alternative argument, Mr Forsdick submitted that the claimant has not mounted an irrationality challenge to the February 2018 decision, and that noise levels were not a material consideration in the sense of being matters which the decision-maker was bound to take into account. The EHO was clearly of the opinion that the acoustic fence as proposed would not lead to unacceptable disturbance within the meaning of DP2, and clearly had in mind the data provided by the interested party's expert. The defendant was entitled to rely on that advice: see *R(Akester) v DEFRA* [2010] EWHC 232 (Admin), at paragraph 112.

*Discussion*

40. The correct foci of this case are (1) the true construction of conditions 2, 3, and 6, together with note 2, forming part of the April 2016 grant of planning permission to the interested party, and (2) whether the decision to discharge condition 3 in February 2018 was unlawful in public law terms. Although the context is important in terms of setting the scene, this case is not about the merits or otherwise of the decision to grant planning permission in April 2016, or the legal sustainability of the EHO's advice to the planning committee given on that occasion. An analysis of the conditions is, as Mr Cairnes correctly observed, forward-looking only. If he will forgive me for saying so, this represents something of a departure from the broader line taken in the Statement of Facts and Grounds.

41. There is a link between my points (1) and (2) which I will need to explain in due course.

42. Nor is this case about Green J's decision given on a renewed permission application in the context of the April 2016 grant of planning permission. Save for the error in relation to the height of the fence, what Green J says is clearly of assistance to the claimant inasmuch as he was expecting full consideration to be given to the issue of unacceptable disturbance in the context of any application to discharge condition 3. On that occasion he did not have the benefit of Mr Forsdick's cogent oral submissions, and I say no more about Green J's judgment.

43. The judicial approach to the interpretation of planning conditions has been authoritatively explained by Lord Hodge in paragraphs 34 and 35 of his judgment in *Trump International Golf Club Scotland Ltd v Scottish Ministers* [2016] 1 WLR 85:

> "34. When the court is concerned with the interpretation of words in a condition in a public document such as a section 36 consent, it asks itself what a reasonable reader would understand the words to mean when reading the condition in the context of the other conditions and of the consent as a whole. This is an objective exercise in which the court will have regard to the natural and ordinary meaning of the relevant words, the overall purpose of the consent, any other conditions which cast light on the purpose of the relevant words, and common sense. Whether the court may also look at other documents that are connected with the application for the consent or are referred to in the consent will depend on the circumstances of the case, in particular the wording of the document that it is interpreting. Other documents may be relevant if they are incorporated into the consent by reference (as in condition 7 set out in para 38 below) or there is an ambiguity in the consent, which can be resolved, for example, by considering the application for consent.
>
> 35. Interpretation is not the same as the implication of terms. Interpretation of

> the words of a document is the precursor of implication. It forms the context in which the law may have to imply terms into a document, where the court concludes from its interpretation of the words used in the document that it must have been intended that the document would have a certain effect, although the words to give it that effect are absent. See the decision of the Privy Council in *Attorney General of Belize v Belize Telecom Ltd* [2009] 1 WLR 1988 per Lord Hoffmann at paras 16 to 24 as explained by this court in *Marks & Spencer plc v BNP Paribas Securities Trust Company (Jersey) Ltd* [2015] UKSC 71, per Lord Neuberger at paras 22 to 30. While the court will, understandably, exercise great restraint in implying terms into public documents which have criminal sanctions, I see no principled reason for excluding implication altogether."

44. It was not Mr Forsdick's submission that words should be implied into condition 3.

45. Reference was also made by Mr Forsdick to the cases of *London Borough of Camden v SSE* [1993] JPL 466 and *Medina BC v Proberun Ltd* [1990] 61 P & CR 77. These are well-known authorities which make clear that, in cases where outline planning permission has been granted, the local planning authority at the subsequent approval stage must be strictly loyal to the terms of the parent permission. I do not think that they help me in construing how conditions 2 and 3 are intended to operate in the particular circumstances of this somewhat unusual case. This is because condition 3 in particular entails a further exercise of further planning judgment by the defendant.

46. It seems to me that I should be interpreting and understanding conditions 2 and 3 in the light of the guidance proffered by Lord Hodge. It is an objective, purposive approach which cannot ignore the application of basic common sense.

47. I cannot accept that condition 2 bears the weight impressed on it by Mr Forsdick. This is a condition of general application which relates to the whole of the development. It makes clear that the development must be carried out strictly in accordance with the plans etc., including the installation of a wooden acoustic fence which is 3.3m high. This is to secure "a satisfactory form of development" in line with the purposes of both DP1 and DP2. However, condition 2 says nothing about unacceptable disturbance and is limited to adherence to the normatively weaker concept of satisfactory form. Moreover, condition 2 clearly yields to condition 3 in this sense: the whole project cannot be started, and the fence cannot be constructed, until the latter has been approved by the defendant. Condition 3 does not authorise the construction of a 3.3m wooden fence as per condition 2 unless and until that has happened.

48. So, condition 3 is clearly far more specific than condition 2, and in my judgment is the governing provision for the purposes of the present case. Furthermore, condition 3 must clearly be read in conjunction with note 2 which is there for a good reason.

49. The requirement of condition 3 is the submission of a "scheme" (i.e. full details plus specification of the acoustic fence) which must then be examined by the defendant. I do not consider that anything turns on the terminology of a "scheme". The real issue between the parties is whether, as Mr Forsdick submitted, the premise, assumption or working hypothesis must be that the scheme will be DP2 compliant, because all that condition 3 is contemplating is ancillary or adjectival matters of detail regarding the specification; or whether, as Mr Cairnes submitted, the inquiry is necessarily more wide-ranging.

50. I cannot read condition 3 as bearing the limited meaning or purpose suggested by Mr Forsdick. This is not what it says. I would exclude from account the evidence bearing on the evolution of the EHO's thinking back in April 2016 because that cannot be relevant to the proper construction of this condition, and in any case we cannot know whether the planning committee accepted all aspects of the EHO's advice. More importantly, the stated reason for the condition is to ensure that unacceptable disturbance is avoided and a consequent breach of policy DP2.

51. This approach is fortified by bringing the terms of note 2 into play, which in my opinion should be done. Note 2 is concerned with what should happen at the time discharge of condition 3 is considered, but it undoubtedly illuminates the correct approach to that condition. It is clearly stated that the evidence submitted must demonstrate that the proposed fence achieves adequate mitigation. This is adequacy calibrated in terms of DP2.

52. Mr Forsdick submitted that the foregoing cannot be the correct approach to condition 3 because, first, it would come close to rendering this provision nugatory; and, secondly, it undermines the logic behind granting planning permission in the first place. I am unconvinced by these objections. It cannot be assumed that all possible 3.3m high wooden fences will fail to avoid unacceptable disturbance; indeed, the assumption must be, on the natural and ordinary meaning of condition 3, that it would be possible to specify such a fence that ensured the achievement of the objectives of DP2. In any case, even if it should transpire that no DP2-compliant fence could in practice be specified, that would flow from the wording of the condition, and the interested party would have to take the consequences. As for the second objection, the logic of granting conditional planning permission was simply that on the EHO's estimation at the time a DP2-compliant fence was capable of being specified. The other inexorable piece of logic underlying what happened in April 2016 was that, without adequate mitigation measures, the noise would be unacceptable. My approach to the condition does not serve to undermine either aspect of this logic.

53. I therefore conclude, on this first point of principle, that Mr Cairnes' submissions are to be preferred, and that it was incumbent on the defendant in February 2018 to consider the merits of the proposed acoustic fence in the context of DP2 on what I would call an untrammelled basis. The decision-making process should be (or should have been) undertaken with an open mind and not by applying any assumption to the effect that the fence should be effective subject only to matters of detail. I have noted that condition 6 operates in a very similar way.

54. This forensic victory takes Mr Cairnes' argument to first base but not necessarily to complete vindication. I need to move this on to the next stage.

55. Mr Cairnes' straightforward submission under the umbrella of ground 1 is that in February 2018 the defendant ignored a relevant consideration, namely the fact that even as mitigated various noise thresholds were clearly exceeded. He also submitted, but I am not quite sure how or why this supplements his principal submission, that the proposal as submitted by the interested party simply did not comply with condition 3.

56. It is true, as Mr Forsdick pointed out, that condition 3 does not specify any particular noise limits; but then neither does DP2 nor paragraph 123 of the NPPF. The latter sets a target in any event. I should make clear that it would have been open to a local planning authority to grant planning permission even in the face of exceedances. The issue of unacceptability is a contextual one involving the application of a planning judgment which cannot be conceptualised in purely mechanistic or numerical terms.

57. The issue between counsel was whether noise levels are a relevant consideration at the discharge stage. On my understanding, Mr Forsdick did not dispute that noise levels were relevant at the grant of planning permission stage, because they feed into the overall evaluation required by section 38(6), relevant policy and DP2. He did however submit, relying on the decision of Carnwath LJ in *Derbyshire Dales DC and another v SSCLG and another* [2009] EWHC 1729 (Admin), that at the discharge stage the raw data could be taken into account but did not have to be.

58. This distinction has been fully analysed and explained by Carnwath LJ in a well-known passage in *Derbyshire Dales* beginning at paragraph 17. The difference between that which is potentially and necessarily relevant is well understood in the abstract, although it gives rise to difficult questions of application in individual cases. In my judgment, the issue is very much context-specific. Even if I have misunderstood Mr Forsdick's apparent concession, I would unhesitatingly come to the same

result by my own analysis. Moreover, if relevant at the grant of planning permission stage, I fail to see how noise levels are not relevant at the discharge stage – on my approach, that is, to the first issue of principle I have already addressed. It follows that I am resolving this second issue of principle in Mr Cairnes' favour. I must now proceed to consider whether the defendant did ignore relevant considerations at the discharge stage.

59. It is clear law that a decision-maker must have regard to relevant considerations. The weight to be given to such considerations is for the local planning authority. The concept of having regard to requires, no more and no less, than consideration with an open mind and without making any assumptions.

60. In my judgment, the EHO in February 2018 clearly did have regard to noise levels. He called for evidence about this in December 2017, and the 4 dB figure is expressly mentioned in his email dated 6 February 2018. He must have had in mind the 50-54 dB figure, which Mr Forsdick points out is lower than the WHO guideline for severe annoyance. The exceedance over background noise was, of course, greater than 10 dB but it is inconceivable that the EHO did not have that well in mind.

61. At this point, I must remind myself both that this is an application for judicial review and that it is not a *Wednesbury* challenge in the sense of being a pure irrationality challenge (a re-examination of Lord Greene MR's classic formulation in the *Wednesbury* case itself reminds the reader that "material considerations" is part of the *Wednesbury* test). I confess that I have been troubled by the point that 4 dB is fairly modest, even making allowances for the logarithmic scale. However, in his email dated 6 February the EHO explains the basis of his composite conclusion that the construction of an acoustic fence to this specification would avoid unacceptable disturbance for the purposes of DP2. *En route* to that conclusion, and this is the critical point, the EHO took into account the hard data that Mr Cairnes submits he ignored.

62. I think that there is a further point which I feel should be addressed, although it did not come from Mr Cairnes. Might it be said that the EHO applied the same presumptive approach that underscored Mr Forsdick's submissions, and which I have rejected under paragraph 53 above? If so, is the defendant's February 2018 decision bad for that separate reason?

63. There is some superficial merit in the observation that the analysis of leading counsel before me might have been the self-same analysis of his client in February 2018, but this cannot be clearly inferred. I cannot proceed on the basis that Mr Forsdick's submissions were advanced on express instructions to the effect that this was the very approach that the EHO and/or the defendant followed. Moreover, the defendant is not facing a case advanced on this explicit basis; and, had it been, evidence could well have been filed to deal with it. In my judgment, I need take this point no further.

64. This brings me back to Mr Cairnes' submission that the interested party's proposed scheme was not condition 3 compliant, because it was not a scheme which satisfied the requirements of DP2. I have already said that this submission is a repetition of his primary submission under ground 1 (and, I might add, ground 2) but advanced in slightly different terms. If the submission were to be interpreted any more ambitiously, it would be an impermissible attempt to remove the decision from the realm of the defendant's sovereign judgment and place it in the hands of this court. I have already mentioned the limits of this judicial review jurisdiction, and the absence of a pure *Wednesbury* challenge.

65. The final point concerns the reference to a main road and traffic noise. In my view, this reference is unfortunate, not least because the contextual evaluation which is required must take into account the particular location. However, and fortunately for the defendant, it is not central to its decision-making. To the extent that it was featuring at all, the only point being made is that noise in the range of 50-54 dB is the sort of noise level one would experience when living in proximity to a main road.

If the claimant's case cannot succeed elsewhere, it cannot in my opinion succeed on this particular issue.

*Conclusion*

66. This application for judicial review must be dismissed.

67. For the claimant's benefit, I must add that I should not be interpreted as saying that he should have appealed Green J's decision to the Court of Appeal, or that a *Wednesbury* challenge before me might have succeeded.

---

**BAILII:** Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII
URL: *http://www.bailii.org/ew/cases/EWHC/Admin/2018/3123.html*