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Case No: CO/13082/2012

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25th November 2014

Before :

MR JUSTICE DOVE

- -

Between :

Nigel Greaves & Caroline Greaves	**Claimant**
- and -	
Boston Borough Council	**Defendant**
Carol Goodson	**Interested Party**

- -
- -

Mr Richard Buxton (instructed by **Richard Buxton Environmental & Public Law**) for the **Claimant**
Mr Jack Smyth (instructed by **Boston Borough Council**) for the **Defendant**

MR JUSTICE DOVE:

The factual background

1. On the 10th July 2012 the interested party applied for planning permission for development described as follows:

> "Installation of a single micro scale wind turbine (14.97 meters to hub 5.5 meters diameter)"

2. The development was to occur at the interested party's home in Old Leake, Boston, Lincolnshire. The application was supported by plans and an accompanying Design and Access Statement which covered a number of matters associated with planning policy and also contained environmental information. In particular in relation to noise the Design and Access Statement provided as follows:

Site specific noise assessment

> "Under the ETSU-R-97 methodology, the site background noise is measured against wind speed and then compared against the expected noise emission from the energy generating system. This site's specific assessment is based on the assumption that the site is a very quiet rural one with a baseline background noise of 26dB; at 25dB the wind speed is normally too low for the turbine to operate. The distance to the amenable garden boundary of the nearest neighbour, Chilton Lodge is approximately 104 metres to the west south west of the installation; the distance to the façade is 180 meters."

3. The document then went on to undertake some calculations and present in graphic form information which led to a conclusion which was described as follows:

> "At this particular site, a large (paddock) and Midgate Lane are situated between the turbine location and the neighbour. In addition, we have recently carried out a number of noise surveys on sites with similar characteristics. The lowest BS4142 Leq reading we have had is 28dB with an average result of 31dB. As such, the assumed level of 26dB is very conservative and a separate noise site survey is not considered necessary to support this assumption. This leads us to conclude that the neighbouring property of Chiltern Lodge will not be adversely affected. "

4. This information was considered by the defendant's environmental health officer who provided advice to the Planning Officer dealing with the case in an email dated 23rd August 2012. He provided the following opinion:

> "The assessment provided by Windcrop indicates that the noise from the single Evance R9000 turbine is unlikely to generate noise levels at the nearest residence that is unacceptable when compared to the background noise level. This does assume a minimum background level of 25dB (A) however this I would suggest is fairly representative for the location proposed. The report also indicated that the turbine should be located at a minimum distance of 80 meters from an amenity boundary and 100 meters from the façade of any residential property. In this case the distances are 102 meters and 160 meters respectively.
>
> It is extremely unlikely that given the information provided the turbine would be audible within the nearest neighbouring property even with the windows open (a further internal loss of 10-12dB is typical with windows open). Under some wind conditions it may however be just audible within the property boundary. In view of the above I have no objection to the application but I would recommend the following conditions be attached to ensure protection of residential amenities."

5. The Environmental Health Officer went on to recommend two conditions one of which is the subject of these proceedings and set out below.

6. The Planning Officer had delegated authority to deal with the application and the basis of his decision is set out in a Delegated Report. In terms of noise the conclusion which he reached was as follows:

> "Noise Impact
>
> In terms of noise assessment, the LPA utilises the expertise of the Environmental Health Department who are experienced in dealing with issues relating to noise. The EH Officer did not wish to object to the proposed turbine."

7. The officer went on to recommend the grant of planning permission subject to three conditions.

8. On 5th September 2012 in accordance with the Delegated Report planning permission was granted by the defendant to the interested party. Three conditions were imposed and the one at issue in this case is condition 3 which provides as follows:

> "3. Noise arising from the wind turbine shall not exceed LA90, 5min of 35dB(A) or the background level plus 5dB(A), whichever is the greater, at one meter from the façade of the nearest residential property with different ownership from the wind turbine. In the event of audible tones being generated by the wind turbine a 5dB(a) penalty for tonal noise shall be added to the measured noise level."

9. The reason for imposing the condition was given as follows:

> "In the interests of residential amenity and to accord with the objectives of Local Plan Policy G1."

10. Shortly after the grant of planning permission, and at around the same time as the turbine was erected, on 12th September 2012 the claimants became aware of the defendants decision. They had objected to the planning proposal on the grounds of noise nuisance amongst other issues. On 24th September the first claimant wrote to the defendant seeking information about how it could be that planning permission had been granted, in particular bearing in mind the noise issues. The following day the defendant's development control manager responded indicating that he would investigate the matter and return to the claimant within 14 days. In fact it was not until 1st November 2012 that an email was provided to the claimant setting out the matters which I have set out above in respect of the Environmental Health Officer's involvement and the conclusions reached on the application. There were then formal complaints made by the claimants to the defendant on 5th November 2012 and 26th November 2012. On 2nd December 2012 they contacted their solicitors. On the 5th December 2012, very much at the end of the three month period, the claim in these proceedings was filed.

11. After the proceedings had been issued, in effect on a protective basis, there was an exchange of correspondence in relation to the question of promptness and raising concerns about condition 3. Following this the claimants' solicitors wrote to the defendant's solicitors in the following terms on 30th January 2013:

> "We refer to your letter dated 24th January 2013. We have now had an opportunity to take instructions from our clients in relation to the above matter. They are minded to withdraw the Judicial Review claim on the understanding that there will be no claim for costs by the Council. Assuming you have not taken the matter forward, the question of costs does not arise. However, please confirm your agreement."

12. The council responded in a letter of the 31st January as follows:

> "I acknowledge receipt of your letter dated [30] January 2013 advising that your clients are prepared to discontinue the Judicial Review proceedings.
>
> I have taken my clients instructions and confirm that it will not seek an order for costs. Therefore I await sight of the copy of the Notice of Discontinuance filed with the court."

13. On the same date the claimants' solicitors wrote continuing to raise concern in relation to the enforceability of condition 3 and airing issues which I will turn to when dealing with the substance of the case. Equally, on the same date the defendant's solicitor wrote in response to that correspondence as follows:

> "Your letter dated 30 January proposed terms of settlement of the above Judicial Review proceedings which my client subsequently accepted, including a concession on costs, by way of my letter dated 31st January 2013.
>
> Therefore, my client is entitled to rely on this correspondence as an agreed settlement and that the proceedings had been concluded."

14. This letter drew a response from the claimants' solicitor stating that the Judicial Review challenge was still alive and reiterating the concerns in relation to the interpretation of condition 3. The claimants' solicitors invited a stay of the proceedings while those matters were investigated. On 13th February 2013 the defendant's solicitors wrote back in the following terms:

> "The settlement agreement in respect of the judicial proceedings had indeed been agreed in terms set out in open correspondence. This is a position from which you, on behalf of your clients are now attempting to resile. This is clearly most unsatisfactory for my client and, also, for the interested party.

> It is not acceptable for you to continue corresponding in this matter without progressing the actual proceedings; I am instructed to advise that the defendant does not agree to any further stay of these proceedings. Please confirm by 4pm on 14th February 2013 whether your client will be continuing with or withdrawing the proceedings. In the event that your client decides to continue with the proceedings my client will apply to the court for a determination as to whether or not the concluded settlement has indeed been reached as a preliminary issue. My client will be seeking the costs of that application on an indemnity basis."

15. In the event no such application was ever made. It is unnecessary for the purposes of my judgment to narrate the steps in proceedings which this case went through prior to coming before me. Suffice to say when the matter came before me the issue of compromise remained to be resolved.

16. At the time when permission was granted for this application for Judicial Review on 22nd January 2014 the claimants were still in ownership and occupation of their property at Chilton Lodge to which reference was made in the course of the application as set out above. However, as a result of the impact upon them of the noise from the wind turbine the claimants sought successfully to sell their property. They exchanged contracts on 2nd June 2014 and moved shortly thereafter. At the time of my decision therefore, the claimants have no legal interest in the title of and do not occupy Chilton Lodge.

17. The new owners of that property have not applied to be joined to these proceedings and indeed at the hearing I made enquiries as to their attitude. It was pointed out by Mr Jack Smyth, who appeared on behalf of the defendants, that there had been no complaints received by the defendants from the new owners of the property. Mr Richard Buxton, who appeared on behalf of the claimants, indicated that the new owners having moved into the property in the full knowledge of the existence of the wind turbine were not particularly exercised by its presence and confirmed they had not complained. As I understood the position they indicated that if there were concerns in relation to the enforceability of condition 3 then they would wish to have them clarified. Nevertheless, no doubt having purchased not only in the light of the wind turbine the subject of these proceedings, and also the existence of this Judicial Review, they have not sought to associate themselves with the case. This change in the factual circumstances since permission was granted led to the defendant raising an argument in relation to standing which again it is necessary for me to resolve.

<u>The issues in brief</u>

18. Whilst the Judicial Review was initially launched on two grounds only one remains live in the case and that relates to the question of whether or not condition 3 on the planning permission is one which is sufficiently certain so

as to be enforceable. It is submitted that the condition as drafted is insufficiently precise or certain as to its terms and requirements so as to enable it to be enforced.

19. In addition to this issue which relates specifically to the merits of the planning permission granted it will be obvious from what has been set out above that there are further subsidiary issues to be resolved. Firstly, the question of standing, secondly, whether or not these proceedings were in fact compromised in late January 2013 and, thirdly, whether if all of these matters are resolved in the claimants' favour discretion should be exercised on the basis that the defendant contends it should not, in the light of the delays in issuing the proceedings, the failure to comply with the pre-action protocol and (even if the claimant has sufficient standing to bring the case) the absence of the claimants' presently having any legal interest in the premises protected by the condition.

The expert evidence

20. Both parties have resorted to expert evidence from noise experts to assist their contentions about the condition. On behalf of the claimant evidence was adduced from Mr Mike Stigwood of MAS Environmental Ltd; the defendant adduced evidence from Dr Andrew McKenzie. Both witnesses are experts in the field of acoustics and both have experience of providing evidence to various forms of tribunal in relation to the issues associated with noise from wind turbines.

21. During the course of proceedings an order was obtained by consent permitting the calling of these witnesses (as opposed to their reports remaining in writing within the trial bundle) for the purposes of providing live evidence and in particular so as to facilitate cross-examination. It is right to point out that this course derived encouragement from observations made by Gloster LJ in her short judgment granting permission to apply for judicial review to the claimants in which she stated that the claimants had raised an argument which deserved "proper consideration by the court, if necessary, on the basis of expert evidence". I can see that at first blush the idea that in a case where there is contentious expert evidence in relation to the interpretation of a condition, permitting the testing of those opinions through oral evidence and cross-examination might seem attractive. What I am about to observe does not amount to any comment upon either the expertise of the witnesses, or the advocates, or the witnesses willingness (which was evident from both of them) to seek to assist the proceedings. In my view it would, however, be helpful to provide my own views on the utility of permitting the calling and cross-examining of expert witnesses in cases of this kind having had direct experience of it in this case.

22. It needs to be kept firmly in mind that the jurisdiction which is being operated in an application for Judicial Review is an error of law jurisdiction. The question which is before me is whether or not there is any public law error in the condition which the council imposed. I have no doubt that Gloster LJ had the nature of the jurisdiction clearly in mind when permission was granted and did not intend to encourage the calling of live evidence accompanied by

formal cross-examination as a result of the remark which she passed. At times the proceedings before me bore a very close resemblance to proceedings before a planning inquiry, scrutinising the planning merits of a development proposal, rather than a court considering an application for Judicial Review. I am bound to say that, notwithstanding as I have observed the expertise and professionalism of the witnesses called on both sides, I derived almost no benefit in reaching the conclusion as to whether or not there was an error of law in this case from the cross-examination of both witnesses. Whilst it was interesting to hear what they had to say it added little or nothing, (and certainly nothing proportionate to the expenditure undoubtedly involved), to my understanding of the issues bearing on whether or not this condition is enforceable.

23. Having had the experience of hearing evidence being called in this case it became clear to me that it would seldom if ever be necessary or appropriate to order cross-examination of experts in cases of this kind. It needs to be borne in mind that the Planning Court is a specialist jurisdiction in which the judges charged with deciding the cases have experience of planning disputes and the nature of the environmental evidence and policy issues which can arise in making planning decisions. For my part, all of the material which was necessary for my decision was amply set out in the written material which was before the court and in particular the final version of the Joint Statement of Experts which crystallised the issues between them to a point which enabled me to understand the legal questions which arose without any further benefit or value being derived from their positions being tested in the giving of formal evidence.

24. Having set out my concerns in relation to the additional procedural step of permitting live evidence in this case, I turn then to set out the issues as identified by the experts in relation to the condition.

25. They both agreed that the condition contains terms which would require further definition to be enforced. In particular they agreed that, as written, condition 3 would be impossible to apply in practice as it is not possible to individually assess each five minute period as defined by the LA90 five minute index. Part of this concern relates to seeking (as the condition) requires a measurement of the noise arising from the wind turbine. The experts agreed that there were various methodologies which could be used to quantify the "noise arising from the wind turbine" as a means of comparing that with the noise limit. Similarly, they agreed that there were various methodologies that could be used to quantify the "background level" to which condition 3 refers.

26. Dr McKenzie considered that the appropriate method of undertaking that exercise would be to carry out a noise survey over a minimum of a one week period obtaining noise measurements with current wind speeds and directions both with and without the turbine operating. The level of background noise (which can vary as a result of the time of day and in response to other factors) should, in his view, be normally measured between 0200 hours and 0400 hours i.e. at the quietest time of the day. It would then be possible, with that data set, to undertake an analysis demonstrating both the relevant background noise (in the early hours of the morning without the turbine operational) and

the operational noise. Armed with that data Dr McKenzie was of the view that compliance with the condition could be determined.

27. By contrast Mr Stigwood was concerned that Dr Mckenzie's solution involved the introduction of new interpretation and the use of meanings which are not to be found in or implied by the wording of the condition. In explaining his position in the Joint Statement he set out that there are many methods that could be used in order to undertake the task of assessing the turbine noise and background noise, with arguments for and against each of them, and with each of them providing different results. He also disputed that it is appropriate to interpret the condition as requiring a comparison between average turbine noise and average background noise over, for instance, a week long period. He concludes is therefore that there are many more problems with seeking to interpret this aspect of the condition than have been identified by Dr McKenzie.

28. It was also agreed by the experts that the condition as drafted does not contain a complete definition of measurement locations. In particular no measurement height is stated nor is the specific façade identified. In explaining his position in the Joint Statement Dr McKenzie considered that a measurement height of 1.2 to 1.5 meters would be adopted in accordance with the British Standards BS745 and BS4142 together with "The Assessment and Rating of Noise from Wind Farms" (referenced and known as ETSU-R-97) which, albeit the relevant guidance in relation to noise for much larger installations than the one presently the subject of consideration, provides guidance for the location of the measurement when assessing those larger wind turbine installations.

29. Whilst acknowledging the existence of these standards, Mr Stigwood's position was that a fixed height range should have been identified in the condition in order to provide certainty as to the position for measurement.

30. In relation to the issue of the façade at which measurement should occur Dr McKenzie explained that his position was that the closest point on any façade to the wind turbine is the intention and meaning of the condition whereas Mr Stigwood contended that the nearest façade would not reflect the worst noise impact under all conditions and moreover is not specified in the condition. He contended therefore that this is a further uncertainty contained within the condition.

31. The experts also agreed that the term "audible tones" contained in the condition may require further definition. Mr Stigwood raised the concern that no location for the identification of audible tones is set out and whilst there are a number of objective methodologies for establishing whether "audible tones" exist (leading to the concomitant noise penalty being applied), the position in relation to enforcing this condition is that a subjective assessment would be required. Dr McKenzie indicated that this aspect of the condition is capable of sensible interpretation on the basis that if tones are audible at the measurement location under any condition of operation then the 5dB penalty should apply. Mr Stigwood raised concerns about this approach and suggested there is uncertainty in relation to requiring a subjective analysis of audible tone in particular on that basis that it might be contended by the operator that the tonal

penalty should only arise if the tone was evident throughout a sufficient proportion of the five minute measurement period or even for the whole of the five minutes. That he contended amounts to uncertainty in relation to how this aspect of the condition is to be enforced.

32. These differences between the experts were in effect adopted by the parties as their respective submissions in relation to whether or not the condition was unlawful. They are, however, opinions which need to be viewed through the prism of the relevant law on the approach to the legality of conditions so as to see whether or not they give rise to a legitimate argument that the condition is unlawful, in particular, for uncertainty and unenforceability.

Is the condition unlawful?

33. It is convenient to deal with the relevant law in relation to each of the issues raised in this case alongside my resolution of that issue. The question of the correct approach to the interpretation of planning conditions was addressed by the Court of Appeal in the case Carter Commercial Developments Ltd v Secretary of State for Transport Local Government and the Regions and Mendip District Council [2002] EWCA Civ 1994 in which, at paragraphs 27 and 28, Arden LJ observed as follows:

> "27. I start from the position that this planning permission is not to be construed like a commercial document, but is to be given the meaning that a reasonable reader would give to it, having available to him only the permission, the variation, the application form and the Lewin Fryer report referred to in condition 4 in the planning permission itself. I start from that approach on the basis of the propositions contained in R v Ashford Borough Council Ex Parte Shepway District Council [1999] PLCR 12 at 19, para (1), (2), (3) and (4). Those paragraphs make it clear that there are very strict limitations on the extrinsic material that can be used in construing an application, including a permission, that none of the documents to which I have referred, in my judgment, constitute extrinsic material which, as Keene J said at proposition (4) in that case, should only be referred to if there is an ambiguity in the wording of the provision.
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> 28. The reasonable reader for this purpose is to be contrasted with, for instance, the testator into whose armchair the court is enjoined to place itself in order to construe a will, or the position of the parties to a commercial contract from whose standpoint the court will construe a commercial contract having regard to all the background information reasonably available to them. This is a public document to which very different principles apply."

34. The approach was further considered in the case Hulme v The Secretary of State for Communities and Local Government [2011] EWCA Civ 638 where,

at paragraph 13 of his judgment, Elias LJ distilled the relevant legal principles as follows:

> "13. Before considering the parties' submissions, I will summarise certain relevant legal principles which are not in dispute and which provide the context in which arguments were advanced:
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> a) the conditions must be construed in the context of the decision letter as a whole
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> b) the condition should be interpreted benevolently and not narrowly or strictly: Carter Commercial Development Ltd v Secretary of State for the Environment [2002] EWHC 2100 (Admin) para 49 per Sullivan J as he then was
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> c) a condition will be void for uncertainty only "if it can be given no meaning or no sensible or ascertainable meaning, and not merely because it is ambiguous or leads to absurd results" per Lord Denning in Fawcett Properties v Buckingham County Council [1961] AC 636, 678. This seems to me to be an application of the benevolent construction principle
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> d) there is no room for an implied condition (although for reasons I discuss more fully below, the scope of this principle needs careful analysis). This principle was annunciated by Widgery LJ as he then was, in trustees of Walton on Thames Charities v Walton and Weybridge District Council [1970] 21 PMCR 411 at 497, in the following terms:
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> > "I have never heard of an implied condition in a planning permission and I believe no such creature exists. Planning permission is not simply a matter of contract between the parties. There is no place, in my judgment, within the law relating to planning permission for an implied condition. Conditions should be expressed, they should be clear, they should be in the document containing the permission."
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> 14. Accordingly, whilst there must be a limit to the extent to which conditions should be rewritten to save them from invalidity if they can be given a sensible and reasonable interpretation when read in context they should be."

35. What is clear, therefore, from these principles of construction is that the fact that a condition might be better, or more fully, worded is not in and of itself a reason to conclude that it is unlawful. Indeed the approach to interpreting conditions should be, as the authorities observe, benevolent and neither too narrow nor too strict. The question is whether or not, when read in context, a sensible and reasonable interpretation can be reached in relation to the condition. This approach, and my observations which follow, therefore govern the question of whether the condition is sufficiently certain so as to enable it to

be enforced. There are other tests which planning conditions must pass, as is well known, but they are not in point in the present case.

36. It follows from the principles set out above that it is not fatal to the condition that it does not specify every measurement, dimension, or methodology which might be required in order to understand whether or not breach of the condition has occurred. I accept the submission made by Mr Smyth that whilst the condition is to be understood as a reasonable reader would understand it, in this case one is considering a noise condition. A noise condition will very often if not invariably require measurements to be taken to establish whether compliance has been achieved. A noise condition is therefore a condition which will be read, understood, and applied mainly by environmental health officers or acousticians. Most members of the public would not be able to describe what is meant by an LA90 5 minute dB(A) measurement but that does not mean that the condition is unenforceable or unlawful.

37. It is not unusual to find planning conditions which may require persons with specialist knowledge to undertake measurements or administer tests to investigate their application and compliance with them and in doing so they may well need to deploy professional judgment. For instance, reserved matters submitted pursuant to conditions on an outline consent will need the exercise of professional planning judgment to conclude whether or not they accord with the outline. Conditions requiring the provision of fencing to protect retained trees on a development site will require professional arboricultural guidance (assisted by the use of the relevant British Standard) to determine whether the fencing is to be erected in an appropriate location.

38. Measured against this approach, in my view, the criticisms of the claimant cannot be sustained. True it is that, as written, the experts are correct in concluding that it may be impossible in practice to individually assess each five minute period as defined by the LA90 five minute measurement index. However, that observation does not without more render, in my judgment, the condition unintelligible or unenforceable. The condition requires interpretation deploying professional judgment to evaluate compliance and it has within it the necessary information to establish limits against which to test compliance with the condition using that judgment. The approach is as follows.

39. It will require separate evaluation of the background noise and the noise arising from the turbine itself. The fact that there may be a number of different methodologies that could be deployed in order to achieve that objective, or that those methodologies may produce different results, does not detract from the fact that the condition can be interpreted and applied. Its interpretation must occur against the backdrop of the reason for its imposition that is to say to protect residential amenity. It will therefore be a matter of judgment for those seeking to determine compliance with the condition to arrive at the most appropriate methodology to measure the relevant noise levels to achieve that objective. Again, the fact that there may be differences in professional opinion about that matter does not render the condition illegal. It is important to appreciate that in broad terms the claimant does not contend that the condition is unintelligible or incapable of any sensible meaning, rather that because in certain respects it lacks definition it is open to interpretation and might give

rise to more than one answer in relation to whether or not it has been complied with. The fact that whether there has been compliance or not with the condition might be interpreted differently with competing answers as a result of the application of professional judgment does not in my view render the condition unlawful. It is not unusual, as I have set out above, that the question of compliance with conditions will have to be informed by the application of professional judgment, by the local planning authority in the first instance, but then by others if their decision is challenged. I accept that there might be conditions where their terms are so hopelessly vague or adjectival that they are not capable of sensible ascertainable meaning, but this condition is not one of them.

40. To turn to the detail of the arguments "raised concern" was expressed that it would be necessary for the turbine to be stopped in order to ascertain measurements of background noise levels to then derive a measurement for the turbine itself or, expressed alternatively, a measurement of the differential between the noise generated by the turbine and background noise levels. I accept the submissions made on behalf of the defendant that in addition to the common sense of cooperation occurring in relation to necessary noise surveys to ascertain whether there has been compliance with the condition there is also the incentive in the condition itself that if measured noise values are in excess of the 35 dB(A) LA90 five min in the first clause of the condition the interested party, or her successors, will wish to turn off the turbine in order to ascertain the background level to seek, if possible, to take advantage of the alternative limit of 5 dB(A) above background.

41. Concern was also expressed as to the absence of a unit of noise measurement in relation to the "background level plus 5 dB(A)" element of the condition. That is another area where there will obviously need to be professional interpretation but, again, I accept the submissions of the defendant that it is sensible to read this in the context in the earlier units of measurement used by the condition.

42. Similar points arise in relation to the concerns expressed about the measurement height and the appropriate façade at which to measure. In relation to questions of height it is clear that there are various sources of standards or advice in relation to the selection of an appropriate measurement height to which recourse can be had. I do not regard it as legally fatal to the condition that these sources, for instance BS7445 or BS4142, have not been directly referred to in the condition. That is not to say that they could not have been included in the condition and I note that they have been in other such conditions. Their absence leaves it to judgment as to the height from which measurements should be taken and there are clear sources of guidance or standards from which such heights might be derived.

43. Similarly, in relation to the question of the façade, whilst the particular façade at which measurement is to be taken is not identified directly in the condition, bearing in mind the reason for imposing the condition it is perfectly sensible when seeking to ascertain whether there has been compliance to measure at the façade most likely to have experienced an impact disturbing residential amenities. I see nothing wrong, legally, in leaving that to the good sense and

professional judgment of those seeking to determine whether there has been compliance with the condition or not.

44. Lastly, as to the question of "audible tones" it does not, in my view, render the condition meaningless or incapable of any, (or any sensible), ascertainable meaning for the issue of audible tones to be determined subjectively. Again, whilst there are objective methodologies which enable discovery of whether or not there is a tonal effect which justifies the imposition of a penalty on the measured values for noise equally, for instance in BS4142, the method of evaluation is essentially subjective. That does not render BS4142 uncertain or unusable any more than the similar approach in the condition. I accept that there will be issues to be resolved in respect of these matters in determining whether or not there has been compliance with the condition; that is not unusual and does not render the condition unenforceable.

45. In the material prepared for the hearing there are a very large number of examples of other noise conditions imposed on wind energy developments but, as I explained in the course of argument, whilst they might be context for my decision they are in substance no more than that. I have no doubt that the condition could have been worded (as some of the examples were) incorporating cross-references to sources of guidance on the various issues raised above, for instance the guidance contained in ETSU-R-97. Whilst I have no difficulty in accepting that it can be appropriate to include such a cross-reference, the absence of a cross-reference to this or indeed any of the other documents referred to does not render the condition unlawful.

46. Finally, concern was expressed that there had been no noise survey to identify background noise levels prior to the granting of planning permission. The fact that they were not taken prior to the application or before its determination is clear. However, the imposition of the condition was not, in my view, rendered unlawful as a result of the absence of ascertained background noise values. There is no dispute but that this is a quiet, rural area and therefore the assumption as to probable background noise levels made both in the application and by the environmental health officer were a reliable basis for decision making. This evidence also supported the imposition of the condition.

Standing

47. The law in relation to the issue of standing derives, in the first instance, from Section 31 of the Senior Courts Act 1981. Section 31(3) provides as follows:

> "31(3) No application for Judicial Review shall be made unless the leave of the High Court has been obtained in accordance with rules of court; and the court shall not grant leave to make such an application unless it considers that the applicant has a sufficient interest in the matter to which the application relates."

48. The requirements of standing were recently considered in the case of Walton v The Scottish Ministers [2012] UKFC 44. Albeit, Scottish the case is a

definitive statement of the principles arising in an English context as well. In his judgment Lord Reid distilled the principles as follows:

> "90. In AXA General Insurance ltd and others v HM Advocate and others [2011] UKFC 46 this court clarified the approach which should be adopted to the question of standing to bring an application to the supervisory jurisdiction. In doing so, it intended to put an end to an unduly restrictive approach which had too often obstructed the proper administration of justice: an approach with presupposed that the only function of the court supervisory jurisdiction was to redress individual grievances and ignored its constitutional function of maintaining rule of law.
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> 91. As was said by Lord Hope and myself at paras 62 and 170 respectively, an applicant has to have sufficient interest: that is to say, an interest which is sufficient to justify his bringing the application before the court. In further explanation of that concept Lord Hope said (para 63):
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> "I would not like to risk a definition of what constitutes standing in the public law context. But I would hold that the words "directly affected" which appear in rule 58.8(2) capture the essence of what is to be looked for. One must, of course, distinguish between the mere busybody, to whom Lord Fraser of Tullybelton referred in R v Inland Revenue Commissioners Ex Parte National Federation of self-employed and small businesses ltd [1982] AC 617, 646 and the interest of the person affected by or having a reasonable concern in the matter to which the application related. The inclusion of the word "directly" provides the necessary qualification to the word "affected" to enable the court to draw that distinction. A personal interest need not be shown if the individual is acting in the public interest and can genuinely say that issue directly affects the section of the public that he seeks to represent."
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> 92. As is clear from that passage, a distinction must be drawn between the mere busybody and the person affected by or having a reasonable concern in the matter to which the application relates. The words "directly affected", upon which the Extra Division focused, were intended to enable the court to draw that distinction. A busybody is someone who interferes in something with which he has legitimate concern. The circumstances which justify conclusion that a person is affected by the matter to which an application relates, or has a reasonable concern in it, or is on the other hand interfering in a matter with which he has no legitimate concern, will plainly differ from one case to another depending upon the particular context and the grounds of the application. As Lord Hope made plain in the final sentence, there are circumstances in which a personal interest need not be shown.

> 93. I also sought to emphasise that what constitutes sufficient interest has to be considered in the context of the issues raised. I stated (paragraph 170):
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> "A requirement that the applicant demonstrate an interest in the matter complained of will not however operate satisfactorily if it is applied in the same way in all contexts. In some contexts, it is appropriate to require an applicant for Judicial Review to demonstrate that he has particular interest in the matter complained of: the type of interest which is relevant, and therefore required in order to have standing, will depend upon the particular context. In other situations, such as where the excess or misuse of power affects the public generally, insistence upon a particular interest could prevent the matter being brought before the court, and that in turn might disable the court from performing its function to protect the rule of law … what is to be regarded as sufficient interest to justify a particular applicant's bringing a particular application before the court, and thus as conferring standing, depends therefore upon the context, and in particular upon what will best serve the purposes of Judicial Review in that context."
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> 94. In many contexts it will be necessary for a person to demonstrate some particular interest in order to demonstrate he is not a mere busybody. Not every member of the public can complain of every potential breach of duty by a public body. But there may also be cases in which any individual, simply as a citizen, will have sufficient interest to bring a public authority's violation of the law to the attention of the court, without having to demonstrate any greater impact on himself than upon other members of the public. The rule of law would not be maintained if, because everyone was equally affected by an unlawful act, no one was able to bring proceedings to challenge him.
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> 95. At the same time, the interest of the particular applicant is not merely a threshold issue, which ceases to be material once the requirement of standing has been satisfied: it may also bear upon the court's exercise of its discretion as to the remedy, if any, which it should grant in the event that the challenge is well founded."

49. In the course of argument my attention was drawn to a case which has certain factual parallels to the present, namely the case of R v North West Leicestershire District Council Ex Parte Moses (CO/1684/99; 14th September 1999). Mrs Moses brought an action for Judicial Review against the planning permission to extend the runway at East Midlands Airport. At the time when proceedings were commenced she lived close to the end of the runway. However, after proceedings had been commenced but before permission was granted she moved to Loughborough. Scott Baker J, at first instance, refused the application for permission on the basis that as a result of her moving to

Loughborough Mrs Moses no longer had a sufficient interest in the proceedings. The matter proceeded to the Court of Appeal and is reported at [2000] ENV LR 443. The Court of Appeal dismissed the application on the basis of delay; having done so Simon Brown LJ (as he then was) made the following observations about the applicant's standing:

> "As stated, Scott Baker J refused this application on the basis that, once the applicant moved to Loughborough, some six miles from Kegworth, she no longer had a sufficient interest in the matter to give her standing. I have preferred to deal with the case on the assumption that standing presents no insuperable problem. After all, had the challenge from every other stand point been soundly based, it would be unfortunate to have to reject it – rather, say, than substitute for Mrs Moses another applicant who, as a resident of Kegworth, was equally concerned about the airport's extension – merely because of Mrs Moses' move. That said, however, I should not be taken to be accepting that the applicant here retained a sufficient interest once she moved, still less that she would have had standing had she not at the outset lived in Kegworth."

50. Mr Buxton submitted that the case of ex parte Moses could be distinguished from the present circumstances in that in the present case permission had been granted to the claimants, and that at the time when it was granted it was beyond argument that the claimants had standing. In response Mr Smyth submitted that the requirement for standing to bring the claim must be established and retained throughout the course of the proceedings. In support of that submission he quoted a remark of Ms Claire Montgomery QC sitting as a Deputy Judge of the High Court in the case R (on the application of Developing Retail Ltd) v East Hampshire Magistrates Court [2011] EWHC 618 (Admin) in which at paragraph 5 she observed that a claimant for Judicial Review "must have and retain" a sufficient interest in the subject matter of the claim. In my view, whilst this remark may not have been central to the decision in that case it was nonetheless accurately made. I consider it clear as a matter of principle that an applicant for Judicial Review must not simply be able to demonstrate standing at the time when permission is granted for the claim but throughout the proceedings. If there is a significant and material change in circumstances justifying a review of the issue of standing then the court should examine that issue.

51. It is not, in my view, an answer to Mr Smyth's submissions to simply observe that at the time when the Court of Appeal granted permission the claimants were still the owners of the property. Having divested themselves of ownership of the property that fact in and of itself gives rise to a need to re-examine whether or not the requirements of standing are still met. It may very well be that after permission has been granted the more practical analysis of the issue is that it arises in the context of discretion rather than as a free-standing issue. As Mr Buxton pointed out in his submissions there is support for that approach in the case of R v Department of Transport Ex Parte Presvac

Engineering Ltd The Times 10th July 1991. In the course of his judgment Purchas LJ observed as follows:

> "Personally I would prefer to restrict the use of the expression locis standi to the threshold exercise and to describe the decision at the ultimate stage as an exercise of discretion not to grant relief because the applicant has not established that he had been or was sufficiently affected. With respect to the divisional court this is what in effect they did when they deferred their determination of locis standi until after they had considered the whole of the merits."

52. Whether it is necessary to examine the question of standing after permission has been granted as a free-standing issue, or whether it features in the consideration of whether or not to grant relief as a matter of discretion if a meritorious case has been made out, the way in which the test would be applied would, in my judgment, be similar and as described in the case of Walton as set out above.

53. The starting point for considering this issue is the context of the decision. This is a planning decision related to a condition which was designed to avoid adverse impact on residential amenity. Whilst in the claimants' evidence and Mr Buxton's submissions reference was made to other properties further away from the wind turbine than the claimants' previous residence, there is in my view no material evidence which demonstrates that any property other than the claimants' former home was relevant to the imposition of the condition. It follows therefore, that this condition was imposed solely to protect one property, namely that which was formerly owned by the claimants.

54. The claimants, as set out above, have now sold the property. It does not appear that they have retained any interest, even a contingent interest dependent on the outcome of this litigation, in that property. The present owners of the property have taken no steps to become involved in this litigation. This is not a case which, in my judgment, engages any considerations of the wider public interest beyond the interests of the claimants' former home. Mr Buxton sought to contend that the claimants, notwithstanding that they had to move away from their home because of the problems created by the wind turbine, had retained a keen interest in the litigation. Moreover, they had a financial interest in the litigation in terms of the costs involved. Those submissions did not persuade me at all that the claimant had, after selling the property, a sufficient interest in the essentially narrow issue in which this litigation is engaged. Other than their financial interest in the costs incurred in the case, which in my view are wholly inadequate as a basis to engage standing since in that respect the claimants are no different from most litigants, the reality is that the claimants will not derive any substantive benefit from the case which as I have stated above does not in any event engage any wider public interest beyond the protection of the amenity of their former home.

55. Thus it follows that had this change of circumstances occurred prior to the grant of permission and were I deciding the point I would have concluded that the claimants no longer had standing to bring the claim. The point arising at

this stage leads me to the conclusion that even had I found that there was merit in the claimants' case I would have refused relief on the basis that the claimants no longer retained a sufficient interest in the proceedings. In my view that would be a more procedurally satisfactory way of addressing my concerns in respect of this aspect of the case rather than seeking to revoke the claimants' permission or taking some other procedural course so as to give effect to them.

Compromise

56. The law in relation to this question is very straightforward. The issue is whether or not the claimants made an offer to settle the claim which was accepted and for which there was consideration. It is simple question related to the formation of contract.

57. In my view, having examined the correspondence in this case, it is clear that an offer was made to settle the claim by the letter of 30th January 2013 on a basis which gave rise to consideration for that contract, namely that the defendant would not claim any costs arising from the claimants' withdrawal from the proceedings. That offer was accepted on behalf of the defendant in the letter dated 31st January 2013. In those circumstances a contract was concluded at that time.

58. There were no submissions made in relation to any basis upon which, if a contract crystallised at that time, it could not be held to be binding at this stage of the litigation. Submissions were made on the basis, firstly, that no application was made by the defendants as they suggested they would in February 2013 to seek to bring the proceedings to a close and, secondly, that these were public law proceedings in which there was a public interest in ensuring that the local authority was held to account in respect of any failings in its public law duties.

59. The difficulty with these submissions is that neither of them in reality goes behind the simple point in relation to the formation of a contract to settle. I see no reason why the fact that this is a public law case, in particular in the circumstances of this case where the argument relates to the legality of a condition which protects the amenity of a single property, which gives rise to any prohibition on the case being settled as it appears to have been envisaged it would as a result of the contract. Although the interested party was not consulted it is difficult to conceive that she would have had any objection whatsoever to the matter being compromised in the terms set out in the correspondence. It seems to me there is obvious good sense in seeking to enforce contracts of settlement of this kind where a claimant who has brought Judicial Review proceedings on reflection no longer wishes to pursue them and would wish to compromise them on a basis which would not lead to a costs exposure. I cannot therefore conceive in the particular circumstances of this case of any public policy basis upon which the contract ought not to be enforced.

60. True it is, as Mr Buxton observes, that the defendants in this case did not issue any application as they had threatened to do. That does not undermine the

question of whether or not they were correct, as in my judgment they were, to conclude that an enforceable settlement contract had been reached. I would, however, observe that it is unfortunate that these proceedings have been allowed to continue on to a final hearing without such an application having been made. Although Mr Smyth indicated that an application based on the settling of the case had not been made because it was not considered a proportionate use of costs in my view quite the contrary was the case in this instance. A relatively inexpensive application based upon the compromise of the case could have been issued which, on the basis of the findings I have made, would have brought this case to a conclusion long prior to the final hearing.

Conclusions

61. It follows that, for the reasons I have set out above, the claimants have failed to make out a case on the merits and even were they to have done so I would have dismissed the application on the basis of discretion as a result of their lack of any retained standing to bring the case. For the sake of completeness I should say that had all other points been found in the claimants' favour I would not have refused relief on the grounds of the delay in bring proceedings in this case. Furthermore, it is clear to me from the correspondence that an enforceable contract of settlement was reached in this case as long ago as January 2013 and that is a further basis upon which the claimants claim must fail.