Obar Camden Ltd v Camden LBC: heritage assets - noise impact assessment

Case Comment

Journal of Planning & Environment Law

J.P.L. 2016, 3, 241-261

Subject
Planning

Other related subjects
Local government

Keywords
Change of use; Heritage property; Nightclubs; Noise; Planning authorities' powers and duties; Planning conditions; Planning permission; Procedural impropriety

Cases cited
Obar Camden Ltd v Camden LBC [2015] EWHC 2475 (Admin); [2015] L.L.R. 782 (QBD (Admin))

J.P.L. 241 On 6 January 2015, Camden LBC ("the Council") granted planning permission in respect of the Hope and Anchor public house which authorised a change of use from public house to alternative uses as either retail or estate agent's offices and residential. The claimant sought judicial review of the Council's decision. The claimant operated a nightclub, live music and performance space ("KOKO"). Its premises were a Grade II listed building which immediately abutted and shared a party wall with the application site.

On 21 August 2014, the Council's development control committee ("the committee") resolved to grant permission after considering an officer's report ("OR"). The Camden Local Area Requirements for Planning Applications ("CLARPA") required a heritage statement to accompany an application to assess and justify the proposal by reference to National Planning Policy Framework ("NPPF") s.12. CLARPA also required a noise and vibration impact assessment to accompany an application. Neither of these was submitted with the application for planning permission. No heritage statement was ever submitted but a noise assessment was provided by means of a letter dated 23 June 2014 and a report dated 25 June 2014 by Hann Tucker, Consultants. Pre and post the OR the claimant sent written representations pointing out ***J.P.L. 242*** heritage and noise issues. They also instructed a noise consultant, Mr Vivian, who expressed concerns as to the absence of any published environmental health consultation response.

The OR concluded that the proposed development was considered to be an appropriate land use and that the loss of the public house was not considered to cause harm to the character of the surrounding area or diminish facilities available to the local community. The proposed extensions would be well integrated with the parent building and would not cause harm to the character or appearance of the conservation area nor would the works result in harm to the amenity enjoyed by neighbouring residents. The OR stated that officers considered that with the relevant mitigation measures the proposed residential use would not be inhibited by being adjacent to the late night music venue and would not result in increased noise and complaints which could result in harm to the future operation of the neighbouring businesses. Details of the mitigation measures would be secured by condition to be approved prior to the commencement of the development.

The committee resolved: "That planning permission be granted subject to a s.106 Legal Agreement conditions set out in the report and the following additional conditions and obligations." The conditions the subject of the resolution were the same as the conditions in the OR, save that the penultimate sentence in Condition 8 was new and Condition 12 was entirely new. On 12 September 2014, the Council's Principal Environmental Health Officer wrote to the Council's Senior Planning Officer going through the proposed Conditions 8 and 12 on noise and said that they needed to be changed so as adequately to protect the residential part of the development. In the planning permission, conditions 12 and 13 were new and different from the conditions in the resolution.

Pursuant to a freedom of information request submitted on 3 December 2014, the claimant received internal email correspondence between the Council's environmental health officer, Mr Davies and the Council's Chief Planning Officer. In an email, dated 16 July 2014, Mr Davies stated at point (i), in relation to the Purple Turtle, a local bar, that there had been complaints of noise from residents in the past re music and noise from patrons and that it would be prudent that this noise was taken into account as well as patron noise from KOKO in the noise report. The report would need to be amended to take this into account. Mr Davies also stated at point (iii) that as regards traffic noise an assessment should be made and he then set out a proposed condition.

The claimant challenged the Council's decision on five grounds: (1) failure to assess heritage impact of the proposed development; (2) flawed assessment of noise impact; (3) failure to report the application back to the committee; (4) irrational and unlawful approach to planning conditions. This ground was based on a statement from Mr Vivian saying that the conditions did not secure the mitigation which members had been advised was required so as to protect the future business interests of a person such as the claimant; and (5) breach of procedural requirements.

Held:

1. The OR specifically assessed in the conclusion that the proposal "would not cause harm to the character or appearance of the conservation area". It was a matter for the Council's own planning judgment as to what harm, if any, would be caused. There was nothing to suggest other than that the decision was in accordance with the OR. The OR assessed the harm and commented upon the proposal in this regard in some detail before coming to the conclusion. But there was no finding of harm to the setting of the listed building/conservation area so as to give rise to the strong statutory presumption against planning permission being granted. Therefore the ratio of the case of *Barnwell Manor Wind Energy Ltd v Northamptonshire DC [2014] EWCA Civ 137; [2014] J.P.L. 731* did not come into play.

2. Core Strategy Policy CS14 and DP25 were specifically referred to in the OR and it was noted that the Conservation Area Advisory Committee generally approved of the application as being ingenious and making best use of the corner site. It was clear that the Council complied with the ***J.P.L. 243*** Planning (Listed Buildings and Conservation Areas) Act 1990 ("P(LBCA)A 1990") s.72 in that special attention was paid to the desirability of preserving or enhancing the character or appearance of that area. However, although the ratio of the *Barnwell Manor* case did not come into play, the emphasis in that case was that P(LBCA)A 1990 s.66 required the Council to have special regard to the desirability of preserving the building or its setting and therefore giving considerable importance and weight to this. Nothing approaching this was brought to the attention of members in the OR, thereby not drawing to the Council's attention the proper approach required by law and a material consideration. It was not sufficient to say that these were experienced officers in Camden which had a large number of listed buildings.

3. The NPPF para.128 and CLARPA both required the applicant to describe the significance of any heritage assets affected including any contribution made by their setting. Nowhere in the OR was there an assessment of the significance of the heritage assets. Nor were members told that the NPPF s.12 (particularly at para.128) required the applicant to describe the significance of heritage assets affected. These were material considerations which were not considered and therefore the decision was flawed and Ground 1 succeeded.

4. With regard to point (i) and (iii) in Mr Davies' email of 16 July 2014, the Purple Turtle issue was raised in the OR but there was no record of the fact that Mr Davies, as the noise expert, considered that the noise report needed to be amended to take into account noise from the Purple Turtle. This concern was therefore not put before members and it should have been. As regards point (iii), members were not told that an assessment of traffic noise should be made and could be dealt with by condition. They should have been. The members were clearly expressing concerns about noise. The tenor of the OR was that so long as the noise consultant's mitigation measures were implemented (this would require further details of those particular mitigation measures), then the proposed residential use would not result in increased noise and complaints which could result in harm to the future operation of the neighbouring businesses. This was not accurate. Therefore the overall effect of the OR in relation to noise significantly misled

the committee about material matters which were left uncorrected at the meeting before the relevant decision was taken. Ground 2 therefore succeeded.

5. The resolution by the committee was "That planning permission be granted subject to a s.106 Legal Agreement conditions set out in the report and the following additional conditions and obligations". There then followed Conditions 8 and 12. There was nothing in the resolution or any other document which permitted officers to reword the conditions which were specifically added and to which the resolution was expressly made subject. If officers wished to remove/amend those conditions they were under a duty to return to the committee to have that done. Therefore the case succeeded on Ground 3.

6. As to Ground 4, the Council asserted that this was a merits point. Nevertheless Mr Vivian's report in effect stated that the conditions could not possibly fulfil the aims they sought to achieve. There was no evidence from the Council. The court would not expect a detailed technical response and would not become involved in such a merits based argument. However, there was nothing apart from the fact that the conditions were drafted by the Council's officers, to refute any of the points made by Mr Vivian. A brief witness statement setting out in summary form why issue was taken with Mr Vivian's conclusions could well have been sufficient. Nevertheless the court was in effect left with a detailed and systematic witness statement alleging irrationality and nothing of real substance to begin to counteract it. Therefore Ground 4 succeeded.

7. The Town and Country Planning Act 1990 ("TCPA 1990") s.372A required a local planning authority not to entertain an application if it failed to comply with a requirement as to the form or manner in which an application or a document or other matter which accompanied the application ***J.P.L. 244*** had to be made. Pursuant to the TCPA 1990 s.62(3) a local planning authority could require an application for planning permission to include such evidence in support of anything in or relating to the application as they thought necessary. The court accepted the Council's submission that the CLARPA document was not a "provision" made under the TCPA 1990. It was not a document made under a development order which, under the TCPA 1990 s.62(1), could make "provision" as to applications for planning permission. Rather it was a requirement which the local planning authority was empowered to make under s.62(3). Ground 5 failed.

8. It was not possible to say that it was highly likely that the outcome for the claimant would not have been substantially different if the conduct complained of had not occurred. The Council's decision to grant planning permission was quashed.

Mr Tom Cosgrove (Berwin Leighton Paisner LLP) for the claimant.
Mr Giles Atkinson (Solicitor for Camden LBC) for the defendant.

The following judgment was given.

Mr Justice Stewart:

Introduction

1. On 6 January 2015, the defendant Council ("D") granted full planning permission subject to a s.106 legal agreement in respect of the Hope and Anchor Public House, No.74 Crowndale Road, London, NW1 1TP. This authorised change of use from public house (class A4) to alternative uses as either retail or estate agent's offices (class A1/A2) at part ground, part basement levels and residential (class C3) to provide 8 flats, enlargement of existing basement with side lightwell, replacement of single storey rear/side addition with three-storey rear/side extension and mansard roof with terrace and associated alterations to windows and doors.

2. The claimant ("C") seeks judicial review, pursuant to permission granted by Collins J, of D's decision. C operates a nightclub, live music and performance space (trading as KOKO). C's premises at No.1A Camden High Street is a landmark Grade II listed building of national importance and special interest. The application site immediately abuts and shares a party wall with C's premises.

3. On 21 August 2014, D's development control committee resolved to grant permission after considering an Officer's Report ("OR").

4. There are five Grounds upon the claim is based, the central issues being those of D's approach to designated heritage assets and the assessment of noise.

- The Camden Local Area Requirements for Planning Applications ("CLARPA") required a Heritage Statement to accompany the application to assess and justify the proposal by reference to NPPF s.12.
- Further, the application being for noise sensitive development as defined by NPPF, CLARPA required a noise and vibration impact assessment to accompany the application.

Neither of these was submitted with the application on 10 April 2014. No Heritage Statement was ever submitted but a noise assessment was provided by the Interested Party who had submitted the application. This noise assessment was provided in June 2014, being a letter of 23 June 2014 and a report dated 25 June 2014 by Hann Tucker, Consultants.

5. Pre and post the OR (but prior to the resolution of 21 August 2014) C sent written representations dated 27 May 2014, 22 July 2014, and 18 August 2014 pointing out the heritage and noise issues. They also instructed a noise consultant, Mr Vivian, who expressed concerns as to the absence of any published environmental health consultation response. ***J.P.L. 245***

Officer reports

6. I remind myself of certain well-known principles in relation to officers' reports. In particular:

- In *R. v Selby DC Ex p. Oxton Farms [1997] E.G. 60 (C.S.)* Pill LJ said: "Clear mindedness and clarity of expression are obviously important. However that is not to say that a report is to be construed as if it were a statute or that defects of presentation can often render a decision made following its submission to the council liable to be quashed. The overall fairness of the report, in the context of the statutory test, must be considered. It has also to be borne in mind that there is usually further opportunity for advice and debate at the relevant council meeting and that the members themselves can be expected to acquire a working knowledge of the statutory test." See also Judge LJ who added: "In my judgment an application for judicial review based on criticisms on the planning officer's report will not normally begin to merit consideration unless the overall effect of the report significantly misleads the committee about material matters which thereafter are left uncorrected at the meeting of the planning committee before the relevant decision is taken."
- In *R. v Mendip DC Ex p. Fabre (2000) 80 P. & C.R. 500; [2000] J.P.L. 810* Sullivan J said about an officer's report: "Its purpose is not to decide the issue, but to inform the members of the relevant considerations relating to the application. It is not addressed to the world at large but to council members who, by virtue of that membership, may be expected to have substantial local and background knowledge. There would be no point in a planning officer's report setting out in great detail background material, for example, in respect of local topography, development planning policies or matters of planning history if the members were only too familiar with that material. Part of a planning officer's expert function in reporting to the committee must be to make an assessment of how much information needs to be included in his or her report in order to avoid burdening a busy committee with excessive and unnecessary detail …"
- In *R. (on the application of Siraj) v Kirklees MBC [2010] EWCA Civ 1286; [2011] J.P.L. 571*, Sullivan LJ said: "It has been repeatedly emphasised that officers' reports such as this should not be construed as though they were enactments. They should be read as a whole and in a commonsense manner, bearing in mind the fact that they are addressed to an informed readership, in this case the respondent's planning subcommittee."
- In *R. (on the application of Maxwell) v Wiltshire CC [2011] EWHC 1840 (Admin)* at [43] Sales J said: "The court should focus on the substance of a report by officers given in the present sort of context, to see whether it has sufficiently drawn councillors' attention to the proper approach required by the law and material considerations, rather than to insist upon an elaborate citation of underlying background materials …"
- In *Coventry (t/a RDC Promotions) v Lawrence [2014] UKSC 13* at [219] Lord Carnwath said: "I have found that a planning officer's report, at least in cases where the officer's recommendation is followed, is likely to be

a very good indication of the council's consideration ***J.P.L. 246*** of the matter, particularly on such issues as public interest and the effect on the local environment. The fact that not all the members will have shared the same views on all the issues does not detract from the utility of the report as an indication of the general thrust of the council's thinking." See also *R. (on the application of Richardson) v North Yorkshire DC [2003] EWCA Civ 1860; [2004] J.P.L. 911* at [35].

The Officer's Report: Heritage issues

7. The following sections are relied upon by D:

1.2 "Immediately on its west side it abuts KOKO, a club/music venue, which is listed Grade II. It is 4 storeys high where it abuts the application site and it is this which would form the backdrop for the proposed development.

1.3 There is a Grade II listed terrace of 12 houses … directly opposite on the south side of Crowndale Road. This terrace dates from the early-mid C19. It is faced in yellow stock brick with rusticated stucco ground floors, it is three storeys high with a basement level. The houses are two windows wide each, they feature square - headed doorways with pilaster-jambs carrying cornice-heads; fanlights and panelled doors. The terrace has a strongly defined stuccoed cornice and parapet line.

1.4 There is also significant terrace at No 48–72 Crowndale Road which dates from the mid-C19, opposite on the east side of the street from the site …

1.5 Both of these terraces Nos 31 to 53 and Nos 48–72 Crowndale Road are crucial in defining the scale, rhythm and character of the street. The site lies within Camden Town Conservation Are and the Camden Town Centre …

4. Consultations …

4.2 **Conservation Area Advisory Committee** Camden Town CAAC—comment: We generally approve of this application which is ingenious and makes the best of the corner site …

4.4 Two objections have been received from local bars, KOKO and the Purple Turtle, which neighbour the site, a summary of which is provided below (There are then 14 bullet points summarising C's heritage and noise concerns). …

5. Policies

5.1 **National Planning Policy Framework 2012** …

5.3 **LDF Core Strategy and Development Policies 2010** … CS14 Promoting high Quality Places and Conserving Our Heritage … DP25 *Conserving Camden's Heritage* …

6. Assessment

6.1 The principle (*sic*) considerations to the determination of this application are summarised as follows: … ***J.P.L. 247*** *Conservation and Design … Impact on neighbour amenity: … Conservation and Design* [paras 6.21–6.28 deal in some detail with the appearance of the proposal in its conservation area and landscape setting] …

6.28 In summary it is considered, the proposed development is both in scale and character with the street, and the additional accommodation provided by the infill and mansard would allow the terrace to be read as one as oppose (sic) to its convoluted appearance at present. …

7. Conclusion

> 7.1 The proposed development is considered to be an appropriate land use and in this instance the loss of the public house is not considered to cause harm to the character of the surrounding area or diminish facilities available to the local community. The proposed extensions would be well integrated with the parent building and would not cause harm to the character or appearance of the conservation area nor would the works result in harm to the amenity enjoyed by neighbouring residents …
>
> 7.3 Planning permission is recommended subject to a S106 Legal Agreement."

Relevant statutory materials/policies

8. These are set out in Appendix 1 to this judgment.

Ground 1: Failure to assess heritage impact of the proposed development

9. C contends that the OR was substantially lacking in relation to the assessment of heritage issues. They make five specific points, namely that D failed:

- To assess or indentify the "significance" of relevant designated heritage assets, or even to undertake any assessment of whether any "harm" to the significance of the Grade II premises, conservation area and other designated and undesignated heritage assets would result.
- To consider (or require the Interested Party to consider) relevant and material National Heritage Policy, being the NPPF s.12, particularly para.128.
- To undertake an assessment against key development plan policies relating to the heritage issues (CS14 and DP25).
- To consider and/or assess the proposal against the statutory provisions of the Planning (Listed Buildings and Conservation Areas) Act 1990 ss.66 and 72.
- To identify that the application had not complied with CLARPA by not providing a heritage assessment.

10. In *Barnwell Manor Wind Energy Ltd v Northamptonshire DC [2014] EWCA Civ 137* Sullivan LJ dealt with the Listed Buildings Act 1990 ss.66(1) and 72(1). At [26] he stated that the Town and Country Planning Act 1990 s.70(b) provided that s.70(1), conferring the power to grant planning permission, has effect subject to those sections of the Listed Buildings Act. At [29] he agreed with the judge's conclusion that Parliament's intention in an acting s.66(1) was that decision makers should give "considerable importance and weight" to the desirability of preserving the setting of listed buildings when carrying out the balancing exercise. ***J.P.L. 248***

11. Lindblom J in *R. (on the application of Forge Field Society) v Sevenoaks DC [2014] EWHC 1895 (Admin)* said at [48]–[49]:

> 48. "As the Court of Appeal has made absolutely clear in its recent decision in *Barnwell* , the duties in sections 66 and 72 of the Listed Buildings Act do not allow a local planning authority to treat the desirability of preserving the settings of listed buildings and the character and appearance of conservation areas as mere material considerations to which it can simply attach such weight as it sees fit. If there was any doubt about this before the decision in *Barnwell* it has now been firmly dispelled. When an authority finds that a proposed development would harm the setting of a listed building or the character or appearance of a conservation area, it must give that harm considerable importance and weight.
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> 49. This does not mean that an authority's assessment of likely harm to the setting of a listed building or to a conservation area is other than a matter for its own planning judgment. It does not mean that the weight the authority should give to harm which it considers would be limited or less than substantial must be the same as the weight it might give to harm which would be substantial. But it is to recognize, as the Court of Appeal emphasized in *Barnwell* , that a finding of harm to the setting of a listed building or to a conservation area gives rise to a strong presumption against planning permission being granted. The presumption is a statutory one. It is not irrebuttable. It can be outweighed by

material considerations powerful enough to do so. But an authority can only properly strike the balance between harm to a heritage asset on the one hand and planning benefits on the other if it is conscious of the statutory presumption in favour of preservation and if it demonstrably applies that presumption to the proposal it is considering."

12. I have already set out in some detail the sections in the OR relating to heritage. It must be borne in mind that the committee members are an informed readership along with all the other considerations in the *Oxton Farms*, *Fabre* and *Siraj* cases. The OR specifically assessed in the conclusion (7.1.) that the proposal "would not cause harm to the character or appearance of the conservation area". It is a matter for D's own planning judgment as to what harm, if any, would be caused. There is nothing to suggest other than that the decision was in accordance with the OR i.e. it would not cause harm to the character or appearance of the conservation area. The OR did assess the harm and commented upon the proposal in this regard in some detail in the report, before coming to the conclusion, but, there was no finding of harm to the setting of the listed buildings/conservation area so as to give rise to the strong statutory presumption against planning permission being granted. Therefore the ratio of the *Barnwell Manor* case does not come into play.

13. Core Strategy Policy CS14 and DP25 were specifically referred to at para.6.21 of the OR and at para.4.2 it was noted that the Conservation Area Advisory Committee generally approved of the application as being ingenious and making best use of the corner site.

14. I deal first with the Planning (Listed Buildings and Conservation Areas) Act 1990 ss.66 and 72. I have not set out in full paras 6.21–6.28 of the OR but in my judgment it is clear from reading them that D complied with s.72(1) in that special attention was paid to the desirability of preserving or enhancing the character or appearance of that area (see also DP25). However, although the ratio of the *Barnwell Manor* case does not come into play, the emphasis in that case and the *Forge Field Society* case is that s.66 requires the LPA to have special regard to the desirability of preserving the building or its setting and therefore giving considerable importance and weight to this. Nothing approaching this was brought to the attention of members in the OR, thereby not drawing to Council's attention the proper approach required by law and a material consideration (see the *Maxwell* case above). It is said that the members could be expected to acquire a working knowledge of the statutory test (Pill LJ in the *Oxton Farms* case). ***J.P.L. 249*** However, this was said in the context of familiarity with 1990 Act ss.70(2) and 54A. These had not only been set out in the OR in the *Oxton Farms* case, they were also core provisions of the TCPA 1990. The same cannot necessarily be said about the Planning (Listed Buildings and Conservation Areas) Act 1990 s.66 and this was not referred to at all by officers. In my judgment, it is not sufficient in these circumstances to say that these were experienced officers in Camden which has a large number of listed buildings. I therefore accept C's contention in relation to s.66.

15. As to the four other points made by C, the NPPF para.128 and CLARPA both required the applicant to describe the significance of any heritage assets affected including any contribution made by their setting. Nowhere in the OR is there an assessment of the significance of the heritage assets. It is submitted by C that it is not possible to come to a conclusion about harm until an assessment has been made of the significance of the asset affected. Nor were members told that the NPPF s.12 (particularly at para.128) required the applicant to describe the significance of heritage assets affected. D accepted that the process had been "truncated" but again emphasised that officers had come to the conclusion that there was no harm and that the Committee were experienced. One wonders in those circumstances why there is the requirement in CLARPA and the NPPF para.128 as stated above. The reality is, in my judgment, that these were material considerations which were not considered and therefore the decision is flawed (cf. TCPA 1990 s.70(2); Planning and Compulsory Purchase Act 2004 s.38(6)).

16. For the above reasons the challenge on Ground 1 succeeds.

Ground 2: Flawed assessment of noise impact

17. Clearly noise was a material consideration and the NPPF para.123 and the Development Plan Policy DP28 (both in Appendix 1 to this judgment) are relevant.

18. Further CLARPA required a noise and vibration impact assessment prepared by a qualified acoustician providing details of existing background noise levels measured over 24 hours, proposed noise output, the measures proposed to reduce noise and vibration (e.g. design, orientation, foundation design) and the method used to compile the report and examples of the calculations and assumptions made and, addition, D's self certified acoustic report checklist.

19. The relevant sections of the OR dealing with noise are para.4.4, where C's objection is mentioned as follows:

> 4.4 "Two objections have been received from local bars, KOKO and the Purple Turtle, which neighbour the site, a summary of which is provided below:
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> - The scheme fails to fully consider the long established character of its surrounding environment and the amenity of future residents. We therefore question the suitability of the site for residential accommodation, unless it can be demonstrated that resident amenity would not be impacted by the existing noise and activities within the Town Centre which include night time economy uses.
> - The development is likely to lead to complaints over noise, resulting in a serious threat to established local businesses.
> - There are no assurances that the future of existing businesses will be protected.
> - Local businesses are an integral part of the creative industry in London, providing significant employment and associated employment in the wider industry.
> - A noise report should have been submitted with the planning application. …"

In the assessment section under para.6 the following is stated: ***J.P.L. 250***

> 6.13 "With regard to noise, the application site neighbours KOKO which is a late night music venue and there is also the Purple Turtle located opposite at No.65 Crowndale Road. Both local businesses have objected to the proposal, mainly on the grounds of the impact having residential accommodation at the application site might have on the future operation of their business.
>
> 6.14 Looking firstly to the Purple Turtle located to No.65 Crowndale Road, it is important to note there is an existing terrace of residential properties neighbouring the Purple Turtle from 55 Crowndale Road and extending to the East. Given these residential properties are already in existence and located closer to the Purple Turtle than the application site, the future occupiers would not experience any more noise or disturbance from the Purple Turtle than the existing neighbouring residents and as such the development is unlikely to impact on the future operation of this local business.
>
> 6.15 With regard to KOKO, during the course of the application, the applicant has undertaken a noise survey to determine how much noise is evident in the existing building from KOKO late night activities. The noise survey was undertaken from 17:45 on Friday 20 June until 17:45 on Sunday 22 June. (There are then details where noise recorders were placed).
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> 6.16 Whilst on site the noise engineers noted that the noise levels of the first recorder was dominated by structure-borne venue noise, primarily transferred through the party wall, some noise was noted as coming through the window overlooking KOKO's rear courtyard. Venue noise at the front of the premises close to the second recorder was noted to be lower and overall noise levels subjectively judged to be dominated by airborne street noise.
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> 6.17 Results of the survey indicate that on Friday and Saturday night the noise level at the first recorder increased by 15dB during venue operating hours, therefore not complying with DP28. The second recorder showed no apparent sustained substantial increase in noise levels during venue operating hours and as such would meet DP28.
>
> 6.18 To mitigate against the increased levels of noise that would be experienced within the proposed unit, as the noise levels are noted to be through the party wall with KOKO, it would be necessary to fully structurally isolate the proposed residential premises from the KOKO building structure. The noise consultant has recommended the implementation of independent walls, floors and ceilings to noise sensitive habitable rooms … [Details are then given of the specifications] The applicant has confirmed that they are willing to undertake the mitigation measures recommended by the noise assessors and have amended the proposed floor plans to demonstrate the proposed new wall to isolate the new residential accommodation from KOKO.
>
> 6.19. Officers consider that with the relevant mitigation measures the proposed residential use would not be inhibited by being adjacent to the late night music venue and would not result in increased noise and complaints which may result in harm to the future operation of the neighbouring businesses. Details of the mitigation measures as noted within

the noise report will be secured by condition to be approved prior to commencement of the development. This will ensure the development would provide a suitable standard of accommodation …"

20. To complete the evidential picture in relation to noise it is necessary to note the following:

- C's letter of 18 August 2014 referred to the noise survey they had submitted in conjunction with the advice from their noise consultant, Mr Vivian. They suggested that their objection on the grounds of noise and lack of mitigation to protect the business could be resolved, being addressed by the use of a robust planning condition relating to noise, including the requirement of a post completion test. ***J.P.L. 251***
- There is a statement from Mr Vivian, dated 13 February 2015 in which he says that he spoke at the committee meeting on 21 August 2014, highlighting the lack of an environmental health representation and that members consequently did not have sufficient information on noise matters to make a decision. He says that in his professional experience it is unusual that a planning application for a residential development abutting a large late night licence premises goes before a planning committee without a formal representation from an environmental health officer. He then records some comments from three councillors which seemed to be supportive of his representations.
- A written representation from C was put before members. In this it is recorded that C is perplexed as to why the recommendation was being put forward to the committee in the absence of any consultation with or consideration of expert advice from Camden's environmental health team. They point out that in their representation dated 22 July 2014 they had proposed conditions but that the committee report made no reference to them.
- In the minutes it is recorded that the committee raised questions and concerns with particular regard to the assessment and information from the environmental health team in relation to noise. In response the Planning Officer: "stated that the planning department do not receive a separate environmental health report. When specialist advice was required from another department, this was incorporated into the Planning Officer's report. All the information that the environmental health officers had seen was available online." It is further recorded that the Planning Officer said that the amendment of the plans to move habitable rooms from the party wall to the front of the building was sensible as there would be a lot of noise transmission through the party wall and, to ensure noise mitigation pressures the proposal included the erection of a wall between the development and C's premises. Finally the minutes record that there were still strong concerns about this and possible jeopardy to C's business which was an asset to Camden. In response planning officers commented that there was already a large residential population in the vicinity and it was an already noisy town centre location. The committee suggested another obligation could be added to ensure there was a management plan to address any noise complaints.

21. The Committee; according to the minutes (see later):

"Resolved—That planning permission be granted subject to a 106 Legal Agreement conditions set out in the report and the following additional conditions and obligations."

Attached to this judgment is Appendix 2. In that Appendix are the noise conditions the subject of that resolution and the noise conditions in the eventual planning permission. The conditions the subject of the resolution were the same as the conditions in the OR, save that the penultimate sentence in Condition 8 is new and Condition 12 is entirely new. In the planning permission conditions 12 and 13 are new and different from the conditions in the Resolution; though the reasons given for the conditions is the same as before.

22. Having set out the background in some detail it is now necessary to focus on C's complaints. In short it is said that D erred by not taking into account material representations made by its own officers, namely the environmental health officer, Edward Davies. Pursuant to a freedom of information request submitted on 3 December 2014 C received internal email correspondence on 5 January 2015. I will extract the material parts.

- Mr Davies to D's Senior Planning Officer, 16 July 2014: ***J.P.L. 252*** Having looked at the submitted noise report (i.e. the Hann Tucker Report), I have the following comments:

- 1. "The assessment only seems to have taken into account structure borne noise from KOKO into account (*sic*) which is all good and well. But in real life terms the Purple Turtle has its smoking area opposite and noise from patrons as a subjective measure needs to be taken into account as any new resident may be affected by patron noise late at night with windows open.
- 2. The isolation measures for the proposed development will need to be submitted for consideration as there is insufficient detail for it in the report.
- 3. As the development is on a very busy corner even late at night the traffic, the report does not take this into account and an assessment will need to be carried out to ensure the effects from traffic noise also is acceptable. Until these areas are covered I feel the application should be rejected until a more detailed assessment on the noise effects are carried out …"

- Senior Planning Officer to Mr Davies, 16 July 2014: "… I just had a couple of queries. With regard to the Purple Turtle there are already existing neighbouring residents closer to the Purple Turtle at 55 Crowndale Road onwards, therefore future occupiers of the application property wouldn't experience any more noise disturbance than existing occupiers, I don't think we could reject on this point. Could details of the isolation measures be secured by condition prior to the commencement of development to ensure they would be sufficient enough for the residential accommodation? With regard to traffic noise, the assessment included a noise meter in a room facing Crowndale Road with the window open, [This was an error. The window had been closed. This was correctly stated in OR para.6.15. The error is not material to this issue] would that not take into account traffic noise?"

Mr Davies responded later on 16 July 2014.

(i) In relation to the Purple Turtle point he said: "We have had complaints of noise from residents in the past re music and noise from patrons and it would be prudent that this noise was taken into account as well as patron noise from KOKO late at night in the noise report. The last thing we need is residents moving in and then start to complain of the noise nuisance from patrons walking passed their open windows. So the report will need to be amended to take this into account."

(ii) He accepted that details of the isolation measures could be secured by a condition prior to the commencement of development.

(iii) As regards traffic noise he said: "No. An assessment in relation to BS8233 should be made. Could be by following condition …" He then set out a proposed condition.

23. D's case on this was that Mr Davies was in effect saying that the scheme may have potential noise problems but these could be overcome with appropriate conditions and this was how the development was presented in the OR and how the members approached their determination of the application.

24. It is necessary to consider carefully OR paras 6.17–6.19. In para.6.17 it was mentioned that the noise level of one recorder did not comply with DP28. In para.6.18 it was said that it would be necessary to fully structurally isolate the proposed residential premises from the KOKO building. What then follows ***J.P.L. 253*** is what "the noise consultant has recommended" and that the applicant has confirmed that "they are willing to undertake the mitigation measures recommended by the noise assessors". If one then reads para.6.19 in that context, an objective reading of the report suggests that there are concerns, that these have been addressed by the noise consultant and accepted by the applicant. And that "details of *the* (my emphasis) mitigation measures as noted within the noise report will be secured by condition to be approved prior to commencement of development".

25. There would be no case based on para.2 of Mr Davies' 16 July 2014 email. In respect of that paragraph he had accepted subsequently that day that a condition could be detailed enough and secured by via condition to ensure the isolation measures proposed in the noise consultants' report would be sufficient for the residential accommodation. The lack of detail was not reported to members but the report did trail in para.6.19 that details of the mitigation measures would be secured so as to be approved prior to commencement of development.

26. The position however is different in relation to Mr Davies' points (i) and (iii). The Purple Turtle issue was raised in OR para.6.14. There the report essentially says what the planning officer had written to Mr Davies. There is no record of fact that Mr Davies, as the noise expert, disagreed and considered that the noise report needed to be amended to take into account noise from the Purple Turtle. This concern was therefore not put before members and, in my judgment, it should have been. As regards point (iii), members were not told that an assessment of traffic noise should be made and could be dealt with by condition. Again, in my judgment, they should have been. The members were clearly expressing concerns about noise. The tenor of the OR is that so long as the noise consultant's mitigation measures were implemented, this would require further details of those particular mitigation measures, then the proposed residential use would not (para.6.19) "result in increased noise and complaints which may result in harm to the future operation of the neighbouring businesses". This was not accurate. Therefore the overall effect of the report in relation to noise significantly misled the Committee about material matters which were left uncorrected at the meeting before the relevant decision was taken (see Judge LJ in the *Oxton Farms* case cited above).

27. Therefore the claimant succeeds on Ground 2.

28. I should mention that in an email of 26 November 2014 Mr Davies refers to an application for emails of 16 July 2014 to be disclosed and says:

"There are issues with this one as my original comments were not taken up by planning for some reason. I am not sure if these should be given to a third party as it may leave us open to complaint."

I do not regard this as taking the matter any further. It is for me to decide whether the members were misled. Nevertheless it is corroboration of my judgment on this point.

Ground 3: Failure to report the application back to the Committee

29. OR para.6.19 says that the mitigation measures details will be secured by condition to be approved prior to the commencement of the development. The OR contained conditions which, save for the addition of one subsequently added sentence in Condition 8, were the same as those subject to the Resolution.

30. The minutes show that the Committee granted planning permission subject to a s.106 agreement including the conditions in the first part of Appendix 2 to this judgment. These minutes were approved by Committee on 11 September 2014. In fact the wording of those conditions was not discussed or available to members during that meeting.

31. Prior to and subsequent to the approval by the Committee on 11 September 2014, there was email correspondence involving the planning officers and the environmental health officers. On 3 September 2014 the Senior Planning Officer wrote to Mr Davies and a noise Technician: ***J.P.L. 254***

"Following Development Control Committee the application for the change of use from the public house to A1/A2 and residential (C3), was approved by members however they asked for some of the conditions to be amended, would one of you be able to review and let me know you are happy with them and that they cover what is required. If you have any problems can you let me know."

She then set out condition 8 and condition 12 with the one sentence amendment which appears in the resolution.

32. On 11 September 2014 Mr Davies wrote to Helen Masterson, the Principal Environmental Health Officer:

"My concerns are that we should not specify what is required, just to insist on a more robust design in the basement area. Plus I am very concerned that no environmental survey was carried out for the building envelope, this is standard procedure for residential design."

On 12 September 2014 Mr Davies wrote to Helen Masterson saying:

"Looking at the conditions, they are all subject to authority approval. At this stage submitted details are not satisfactory and should be rejected.

But we can discuss later."

(He then suggested some detailed conditions which were a first draft of the noise conditions which eventually transformed into those in the planning permission).

On 12 September 2014, Helen Masterson wrote to the Senior Planning Officer going through the proposed C8 and C12 draft conditions on noise and said that they needed to be changed to the three conditions (drafted by Mr Davis) so as adequately to protect the residential part of the development.

33. C had thought that D's environmental health team carried out site visits/noise surveys in October 2014 but, according to the Summary Grounds of Defence (para.39) the purpose of the visit on 31 October/1 November 2014 was to ascertain the layout of the building internally and no noise survey was undertaken on that occasion.

34. In *R. (on the application of Couves) v Gravesham BC [2015] EWHC 504 (Admin); [2015] J.P.L. 1193*, Ouseley J considered a resolution that an application be permitted subject to "planning conditions, informatives, referral to the Secretary of State and negotiation of the Section 106 Agreement". In that context the Learned Judge said that once the committee had reached it decision and wanted to limit what the officer could then do, it could so decide but if it did not do so the power of the officer revives. The power needs no express re-conferring unless it is removed expressly. Therefore a resolution should not be searched for language giving delegated power to the officer, but rather for language removing the power ([38], [47] and [48]).

35. In summary D's case is that the members expected amendments (see the email of 3 September 2014. OR para.6.19 suggested that the detail would be secured by condition to be approved prior to the commencement of the development. However, that does not form part of the Resolution or the minutes of the meeting), they knew there was a noise problem and accepted that it could be dealt with by conditions. They expected officers to work on it. Nothing of this sort appears in the minutes. Nor in the resolution. It is difficult to go behind the documents without any evidence save the email of the 3 September 2014 and what officers actually did. Further, what was proposed by the Senior Planning Officer on 3 September 2014 and approved as part of the minutes by Committee on 11 September 2014 was, barring the addition of one sentence, exactly that which had been approved by Committee on 21 August 2014. What happened subsequent to 11 September 2014 were entirely new conditions. They were aiming to deal with the noise problems and the reason given for them was the same as that approved. Nevertheless they were entirely different in character from what had been approved.

36. The difficulty with D's case on this point is that the resolution by the committee was: ***J.P.L. 255***

"That planning permission be granted subject to a Section106 legal agreement, conditions set out in the report and the following additional conditions and obligations."

37. There then followed amended Condition 8 and Condition 12. There is nothing in the resolution or any other document which permits officers to reword the conditions which were specifically added and to which the resolution was expressly made subject. This is a very different position from the *Couves* case. The language of the resolution did not leave the conditions at large. They were set out in detail (I should record that there was a further argument by C that, unlike in *Couves* , there was no delegated power in the officers to grant planning permission/write conditions. This was based on a consideration of D's constitution which dealt with matters delegated and reserved to the Development Control Committee. It is not necessary for me to decide this point given my ruling that the resolution was clear on its face and did not allow officers to reword conditions in the way they did).

38. Therefore in my judgment, if officers wished to remove/amend those conditions they were under a duty to return to committee to have that done.

39. In *R. (on the application of Kides) v South Cambridgeshire DC [2002] EWCA Civ 1370; [2003] J.P.L. 431*, Jonathan Parker LJ said:

"… where since the passing of the resolution some new factor has arisen of which the delegated officer is aware, and which might rationally be regarded as a 'material consideration' for the purposes of section 70(2), it must be a counsel of prudence for the delegated officer to err on the side of caution and refer the application back to the authority for specific reconsideration in the light of that new factor. In such circumstances the delegated officer can only safely proceed to issue the decision notice if he is satisfied (a) that the authority is aware of the new factor, (b) that it has considered it with the application in mind, and (c) that on a reconsideration the authority would reach (not might reach) the same decision."

40. Therefore the case succeeds on Ground 3, first because officers had no power to redraft the conditions given the express terms of the Resolution and, in any event, because the conditions as approved were regarded by the Environmental Health officers as wholly inadequate, reflecting the concerns expressed by Mr Davies in July 2014, (and more). Therefore the application should have been referred back to Committee.

Ground 4: Irrational and unlawful approach to planning conditions

41. This ground is based on a statement from Mr Vivian saying that the conditions do not secure the mitigation which members had been advised was required so as to protect the future business interests of a person such as C. Mr Vivian's statement is very detailed. A few extracts will give the flavour:

"Condition 12

…

> 5.16 … I would subjectively assess the acceptable criteria as proposed in this condition as being at a level where those experiencing the vibration would be likely to believe damage could occur to the building structure; i.e. the performance criteria is high and occupants would feel that the building would be noticeably shaking yet there would not be a breach of the condition …

Condition 13

… ***J.P.L. 256***

> 5.26 With noise levels in KOKO of up to 105DB then the condition would allow resultant noise levels in the residential rooms, due to music, of up to 105 - 63 = 42DB. Such a level would be clearly noticeable preventing rest and sleep, even though the sound insulation of the wall would be in compliance with the condition …

Overall

> 5.28 The planning conditions relating to noise in the decision notice dated 6 January 2015 require the developer to complete the development in accordance with an incomplete and contradictory set of documents. The technical assessment criteria fails to protect future residents from noise generated by the established and lawful operation of KOKO as low frequency airborne noise is not assessed, vibration measurements allow very high levels of structural movement, and the performance of the separating wall is inadequately specified. These criteria do not ensure reasonable living conditions for future occupants."

42. In the well known passages from the judgment of Sullivan J in *R. (on the application of Newsmith Stainless Ltd) v Secretary of State for Environment, Transport and the Regions [2001] EWHC Admin 74* the Learned Judge made it clear that where an expert tribunal is the fact finding body, the threshold of *Wednesbury* unreasonableness is a difficult obstacle for an applicant to surmount. An applicant alleging an inspector has reached a *Wednesbury* unreasonable conclusion on matters of planning judgment, faces a particularly daunting task ([7] and [8]). In [10] of the decision and in the context of an inspector's report Sullivan J said that in exceptional cases it may be necessary to produce additional evidence for example to show "some matter of real importance has been wholly omitted from the Inspector's report", adding that such cases would be rare and even in those cases applicants should firmly resist the temptation for their evidence to stray into a discussion of planning merits.

43. D has throughout merely asserted that this is a merits point. Of course the difficulty is that many *Wednesbury* challenges are merits points. Nevertheless Mr Vivian's report in effect says that the conditions cannot possibly fulfill the aims they seek to achieve. There is no evidence from D. The court would not expect a detailed technical response and would not become

involved in such a merits based argument. However, there is nothing apart from the fact that the conditions were drafted by D's officers, to refute any of the points made by Mr Vivian. A brief witness statement setting out in summary form why issue was taken with Mr Vivian's conclusions may well have been sufficient. Nevertheless the court is in effect left with a detailed and systematic witness statement alleging irrationality and nothing of real substance to begin to counteract it. Therefore in my judgment C succeeds on this ground also.

Ground 5: Breach of procedural requirement

44. The Town and Country Planning Act 1990 s.327A requires a Local Planning Authority not to entertain an application if it fails to comply with a requirement as to the form or manner in which an application or a document or other matter which accompanies the application must be made. Pursuant to s.62(3) of the Act, an LPA may require an application for planning permission to include such evidence in support of anything in or relating to the application as they think necessary. D says that the CLARPA document was not a "provision" made under the Act. D submits that it is not a document made under a development order which, under s.62(1), may make "provision" as to applications for planning permission (s.62(2) gives a partial definition of "provision" for the purposes of s.62(1)). Rather it is a requirement which the LPA is empowered to make under s.62(3). The difficulty is that, absent ss.62(1) and 62(2), the natural construction of s.62(3) is CLARPA is a provision made under the Act requiring a heritage assessment and a noise assessment. ***J.P.L. 257***

45. In my judgment, ss.62(1) and 62(2) do affect the natural construction of s.62(3). The word "provision" is specifically used, in my judgment as a term of art, in those subsections. It is important to note that s.327A(1)(a) and (b) essentially mirror s.62(2)(a) –(c).

46. My attention was drawn to the Town and Country Planning (Development Management Procedure) (England) Order 2010 (SI 2010/2184) para.10 (apparently repealed in April 2015). Subparagraph (2) requires an LPA to send an acknowledgement of a planning application once certain matters have been done. Those include any particulars required under the 1990 Act s.62(3). However, this does not, it seems to me, stipulate that an LPA may not send an acknowledgement if some of the requirements have not been complied with.

47. Therefore, I accept D's submission and Ground 5 fails.

Grant of relief

48. In any event, the defendant submits that the court should exercise its discretion not to grant relief on the basis that it is highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred. It is not possible to say that this is the case and I grant the relief sought, namely the decision of the Camden LBC to grant the planning permission (2014/2621/P) on 6 January 2015 to the interested party is quashed.

Comment. To those unfamiliar with the London live music scene, the claimant in this case operates the renowned KOKO venue in Camden High Street. Not only is it a Grade II listed building, but it also has a long and illustrious history as a live music venue. In recent years it has seen Coldplay launch their album X&Y, and was the venue for the 2009 iTunes festival and it hosted what was meant to be one of the last ever gigs by Wilko Johnson (who thankfully recovered from what appeared at the time to be terminal cancer). Clearly as a live music venue its importance is beyond dispute. However, next door is the site of the Hope & Anchor Pub for which the local planning authority had granted planning permission for a change of use and conversion into eight flats and a retail unit. Operators of night-time venues often experience difficulties once an incompatible use is permitted nearby. In some cases, complaints from incoming residents can result in the eventual closure of a venue. This can be disastrous for the local economy and also drain the life out of already suffering town centres.

This decision, therefore, provides a classic lesson on how not to deal with this type of application. The local planning authority made a number of mistakes in relation to some very important aspects of the development so it is difficult to see how Stewart J could have done anything other than quash the planning permission, especially given his very thorough analysis of all the issues and the local planning authority's numerous failings. Nevertheless it did not deter the authority from unsuccessfully arguing that the permission should stand.

The judge began by highlighting the main points derived from the established case law regarding the role of officers' reports to committee. These decisions give local planning authorities a generous degree of latitude and this only served to emphasise the magnitude of the local planning authority's failings in this case. It must also be a source of concern that some local planning

authorities still appear to be failing to get to grips with the full implications of the Court of Appeal's decision in the Barnwell Manor Wind Farm case. In this case there was no attempt to address the issues of Planning (Listed Buildings and Conservation Areas) Act 1991 s.66. Consequently, the submission that members could be expected to have acquired a working knowledge of the statutory test had an air of desperation about it.

Another ground of challenge related to the flawed noise assessment. When you have two seemingly incompatible neighbouring uses co-existing—residential flats and a music venue—the potential for noise to be a source of conflict must have been obvious to all. It appears to have been a concern to the members. Furthermore this potential is recognised in the NPPF and in development plan policies. This was a particularly tricky aspect of the development and it necessitated a lengthy factual exposition by the judge from which it could be seen that the officer's report significantly misled the members. This case demonstrates the need to take great care when writing on technical (as opposed to policy) issues in such reports because infelicities in drafting can appear relatively minor but which, in substance, have the potential to significantly mislead and could have dramatic consequences. One important feature of this case was that serious doubts about noise were being raised by one of the local planning authority's environmental health officers and this should have acted as a warning to the planning officers.

A related error concerned the drafting and approval of conditions. This judgment shows the degree of care that needs to be taken in drafting resolutions and minutes as the judge held that the particular resolution resulted in the officers having no power to redraft conditions that had been approved, on effect, by the members. Obviously the general position is encapsulated in the judgment of Ouseley J in the *Couves* case but this decision shows that this can still be ousted by the wording of a particular resolution.

Commentary by Martin Edwards.

