



Neutral Citation Number: [2024] EWHC 2711 (Admin)

Case No: AC-2023-LON-003509

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/10/2024

Before :

HIS HONOUR JUDGE JARMAN KC

Sitting as a judge of the High Court

Between :

THE KING

(on the application of DAVIES)

- and -

**ROYAL BROUGH OF KENSINGTON AND
CHELSEA**

Claimant

Defendant

-and-

IMPERIUM CORPORATE DIRECTORS GROUP

**Interested
Party**

Ms Jenny Wigley KC (instructed by **Town Legal LLP**) for the **claimant**
Mr Charles Streeten (instructed by **Bi-Borough Legal Services**) for the **defendant**
Mr Robert Walton KC (instructed by **Mischon de Reya**) for the **interested party**

Hearing dates: 15 October 2024

Approved Judgment

This judgment was handed down remotely at 10.30am on 31 October 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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HIS HONOUR JUDGE JARMAN KC

HHJ JARMAN KC:

Introduction

1. The essential question in this claim is whether the defendant local planning authority (the authority) in granting planning permission and listed building consent in October 2023 for the development of a basement in a dwelling in Holland Park, London, properly took into account the impact of construction noise on neighbours. The claimant and his family live next door to the proposed development. Each of the dwellings concerned is a five storey detached Grade II listed dwelling with a large garden backing onto Holland Park.
2. The proposed development comprises the construction of a basement under the rear garden to house a swimming pool, pool lounge, pool lobby, changing areas, gym, plant room and wine store, and will amount to 271 square metres. The main part, including the pool, will be about 7 metres below ground level. Construction will involve demolition, ground breaking using percussive equipment, soil removal, and sheet piling over a period of 63 weeks.
3. Lang J granted permission to challenge the grants by way of judicial review on two out of four original grounds. The first of those is as follows:

“Failure to take into account material considerations, namely, failure have regard to the PPG as to the need to consider whether the noise exposure of neighbouring residents would be ‘above or below the significant observed adverse effect level’; failure to have regard to the Noise SPD and to objectors’ points as to the significant increase in noise above background levels, matters which should have informed whether the noise would amount to a significant observed adverse effect and whether there was conflict with development plan policies; failure to take expert internal advice in relation to these matters; failure to have regard to the Claimant’s rights under Article 8 of the European Convention of Human Rights.”

4. The second, and I shall refer to them as grounds 1 and 2 respectively, is particularised thus:

“Error of law as to the effect of (perceived) compliance with Policy CL7. Contrary to what was said by the officer at the meeting, CL7 is not a ‘permissive policy’. It is not supportive of basement development in principle; it simply sets out a list of requirements that must be complied with. Those requirements are in addition to other relevant policy requirements in the development plan. There is no presumption that compliance with CL7 (even if properly applied) trumps any conflict with other policies in the development plan.”

Policy

5. I will, at the outset, set out the policy background to the grants under challenge. The statutory development plan includes the London Plan 2021 and the Kensington and Chelsea Local Plan 2019.

6. Policy CL5 of the latter, entitled Living Conditions, materially states as follows:

“The Council will require all development ensures good living conditions for occupants of new, existing and neighbouring buildings. To deliver this the Council will:

...

e. require that the reasonable enjoyment of the use of buildings, gardens and other spaces is not harmed due to increases in traffic, servicing, parking, noise, disturbance, odours or vibration or local microclimatic effects.”

7. As is clear from the wording of the policy, and from its explanatory text, such harm is not only that which may arise from the development as constructed but also from the construction period.

8. CL7 under the heading Basements states as follows, so far as material:

“The Council will require all basement development to:

a. not exceed a maximum of 50 per cent of each garden or open part of the site. The unaffected garden must be in a single area and where relevant should form a continuous area with other neighbouring gardens. Exceptions may be made on large sites.

...

l. ensure that construction impacts such as noise, vibration and dust are kept to acceptable levels for the duration of the works.”

9. The explanatory text to that policy includes the following:

“A basement development next door has an immediacy which can have a serious impact on the quality of life, while the effect of multiple excavations in many streets can be the equivalent of having a permanent inappropriate use in a residential area. There are also concerns over the structural stability of adjacent property, character of rear gardens, sustainable drainage and the impact on carbon emissions. Planning deals with the use of land and it is expedient to deal with these issues proactively and address the long term harm to residents’ living conditions rather than rely only on mitigation. For all these reasons the Council considers that careful control is required over the scale, form and extent of basements. The policy therefore restricts the extent of basement excavation to no more than under half the garden or

open part of the site and limits the depth of excavation to a single storey in most cases.

...

Restricting the size of basements will help protect residential living conditions in the borough by limiting the extent and duration of construction and by reducing the volume of soil to be excavated. Large basement construction in residential neighbourhoods can affect the health and well-being of residents with issues such as noise, vibration and heavy vehicles experienced for a prolonged period. A limit on the size of basements will reduce this impact.”

10. Policy CE6 is entitled Noise and Vibration and insofar as material provides as follows:

“The Council will carefully control the impact of noise and vibration generating sources which affect amenity both during the construction and operational phases of development.

...

To deliver this the Council will:

- b. resist developments which fail to meet adopted local noise and vibration standards;
- c. resist all applications for noise and vibration generating development and plant that would have an unacceptable noise and vibration impact on surrounding amenity.”

11. The authority has also adopted a supplementary planning document (SPD) on noise. That applies to new housing development, and is therefore not directly relevant to a case such as this which involves development of an existing dwelling. Nevertheless, Ms Wigley KC, for the claimant, places some reliance upon it. It provides that planning permission for new dwellings should not normally be granted where noise levels at the location of those dwellings would be above 63dB LAeqT during the day. Moreover, it provides that planning permission should be refused where noise levels would be above 72 dB LAeqT during the day. In relation to noise generating development, it is stated that new sources of noise should be either 10dBA or 15dBA below existing background noise. Ms Wigley KC submits that that gives a clear indication as to the level above which noise is intolerable in residential areas.
12. As for national policy, National Planning Policy Framework (NPPF) at [174(e)] requires that existing development should not be adversely affected by unacceptable levels of noise pollution. Paragraph 185(a) of the NPPF requires that planning decisions should ensure that new development is appropriate for its location taking into account the likely effects of pollution on health by avoiding noise giving rise to significant adverse impacts on health and the quality of life. At [188], it is provided that planning decisions should assume that pollution control regimes will operate effectively.

13. Planning Practice Guidance (PPG) at [4] sets out what decision makers need to take into account in relation to noise as follows:

“Plan-making and decision making need to take account of the acoustic environment and in doing so consider:

- whether or not a significant adverse effect is occurring or likely to occur;
- whether or not an adverse effect is occurring or likely to occur; and
- whether or not a good standard of amenity can be achieved.

In line with the Explanatory note of the noise policy statement for England, this would include identifying whether the overall effect of the noise exposure (including the impact during the construction phase wherever applicable) is, or would be, above or below the significant observed adverse effect level and the lowest observed adverse effect level for the given situation. As noise is a complex technical issue, it may be appropriate to seek experienced specialist assistance when applying this policy.”

14. The paragraphs which then follow set out what the observed effect levels are and the factors that need to be considered with a link to a noise exposure hierarchy table of levels of effects which need to be mitigated/reduced, avoided or prevented. At [15] there is a list of other documents that may be of assistance in the management of noise, which includes BS 8233:2014 Guidance on sound insulation and noise reduction for buildings. That in turn draws on guidance from the World Health Organisation as to the impact of magnitude of noise on health and wellbeing.

The decision making process

15. With that policy context in mind, I will set out a summary of the decision making process leading to the challenged decisions, and it is the process and not the merits of the decision with which this court is concerned.
16. The applications in question were accompanied by several expert assessment reviews and statements, including a noise dust vibration assessment by designers Knight Build Ltd. Appendix B of the assessment set out predicted noise levels of the construction period produced by environmental noise mapping software known as Noisemap. There was no comment in this assessment as to the acceptability of the impact of such levels on living conditions. The assessment identified the timeline for the construction works as follows

“Site Set Up and Enabling Works 10 Weeks (wk01-10) Piling + Temporary Works 18 Weeks (wk01-18) Substructure Works 32 Weeks (wk03-35) Basement Box 29 weeks (wk34-63).”

17. The assessment then went on to consider what it termed as high impact works:

“All high impact works will be carried out during the restricted working hours of Monday to Friday 9am to noon and 2pm to 5.30pm unless otherwise stated in the Section 61 prior consent. Such works may include but will not be inclusive to the following: - Demolition works - Ground breaking using percussive equipment - Percussive pile reduction works - Sheet Piling for temporary shoring - All works where percussive hand held tools will be required.”

18. The assessment then considered control measures as follows:

“General Noise and Vibration Control Measures Site Personnel. All operatives on site will be trained to ensure that noise minimisation is implemented at all times. Operatives will also be trained in line with the Best Practicable Means (BPM), as defined in Section 72 of the Control of Pollution Act 1974. Works will be checked regularly by site management to ensure that BPM are being undertaken and where necessary corrective actions implemented. Employees must show consideration to the sensitive receptors, including residential neighbours, and must not generate unnecessary noise when walking to and from the site, or when leaving from, and arriving, at work.

Community Engagement • details of the site personnel responsible for noise and vibration, the head office, the duration of the project and site working hours, will be displayed on the site boundary; • letter drops to neighbouring residents before work begins giving the information identified in Table 1 of the CoCP. • website with site information and contact email address will be provided. • liaison with neighbouring construction sites to co-ordinate works as far as practicable, particularly off-site vehicle movements, to avoid waiting vehicles. • establish contact with the relevant residents’ association, meetings with residents at appropriate intervals, minutes of meeting and agreed actions circulated to residents. • site will keep an observations, investigations, and complaints log, to be made available to RBKC on request; and all complaints will be responded to.”

19. Appendix B set out the methodology of the noise calculations:

“Construction noise levels are calculated using the methodology presented in BS 5228- 1:2009+A1:2014 - Code of practice for noise and vibration control on construction and open sites, implemented within the software modelling package NoiseMap Five. Façade noise levels are predicted at sensitive receptor locations at each floor specific to the identified receptor location, with the height of intervening floor repetitions being 2.5 m. The results for the 1st floor (assumed to be at 4.0 m are displayed below).”

20. There then followed detailed calculations for construction noise levels at 6 neighbouring properties including that of the claimant, through each phase of the proposed construction. The highest figures were 71dB LAeq,10hr during site set up and piling. Cumulative figures were then given for each week of construction. The highest figures were for weeks 3 to 15, up to 74.8 dB LAeq,10hr, which then reduced to between 71.4 dB LAeq,10hr and 67dB LAeq,10hr for the remainder of the construction period.
21. The authority consulted its environmental health officer. The director of environmental health considered not only noise but also dust and vibration. In terms of noise, this was considered in terms of construction noise and the operation of the necessary plant after construction. The response was that the applicant's noise assessment addressed the noise issues and so the director made no objection to the applications.
22. There were 44 objections to the proposal, many of which, including those of the claimant, raised concerns about construction noise amongst many other matters. This was supported by a letter dated 12 May 2023 from Norton Taylor Nunn Ltd, planning consultants, obtained by local residents, which stated:

“However, the Construction Noise, Vibration and Dust Assessment does set out the proposed weekly average noise levels. Appendix B of this document sets out that the expected construction noise levels for 11 and 13 Holland Park – the two addresses most likely to be affected – will vary from 67dB to 74.7dB over the 63 weeks this construction is predicted to last. Sound is measured on a logarithmic scale, so every 10dB increase is a doubling of the noise that can be measured. Effectively this proposes a noise level that is more than four times the current background noise – all day, every weekday, for the next 63 weeks – that’s a year and two months. This should be unacceptable to the Council and will certainly be unacceptable to local residents. We note that the impact on the Grade II listed Park and Garden, Holland Park, has not been measured, but such an increase in noise is likely to be even more extreme in the peace and quiet of this oasis of calm.”
23. There was no consultation by the authority of its environmental health officers on this objection.
24. A report of the authority's planning officer was put before its planning committee which outlined the proposal and the assessments in support, including the noise assessment, the statutory consultations and responses, including that of the director of environmental health, and the objections.
25. At 6.12, the report stated:

“The proposed size of the basement would be considered acceptable, given its location, depth, height, retention of the garden level and large rear garden and therefore would comply with policies CL7(a, b, c) of the Local Plan. Although there would be some disturbance during construction, conditions are

recommended to help minimise the impact of the construction process on nearby properties and therefore subject to the recommended conditions the proposals would comply with Basements policy CL7 and the recommendations of the Basements SPD.”

26. At 6.27:

“Living conditions of neighbouring occupiers both during and after construction

6.27 The submitted Noise, Vibration and Dust Assessment demonstrates that the proposal would be acceptable. Condition 12 is recommended to ensure that the construction would be overseen by a professional engineer. Condition 13 is recommended to ensure that the contractor would be signed up to the considerate constructors scheme. Condition 14 is recommended to ensure that the works would be overseen by the Council’s construction management team.”

27. And at 6.34:

“The proposed development would preserve the special architectural and historic interest and heritage significance of this Grade II listed building and would preserve the character and appearance of the conservation area. The proposals would have an acceptable impact on neighbouring living conditions. Although there would be some disturbance during construction, conditions are recommended to help minimise the impact of the construction process on nearby properties. Subject to the recommended conditions the proposals would preserve the living conditions of neighbouring occupiers and would safeguard the trees of amenity value and would comply with Basements policy CL7 and the recommendations of the Basement SPD.”

Legal principles

28. The relevant legal principles to be applied in this case were not in issue before me and may be summarised briefly. On a challenge to reports of planning officers to a planning committee, the question is whether, on a fair reading of the report as a whole, the officer’s advice was seriously misleading on a matter bearing upon the decision, and that matter was not corrected before the decision was made. In an oft quoted passage, Lindblom LJ in *Mansell v Tonbridge and Malling BC* [2017] EWCA Civ 1314 said at [42]:

“. The question for the court will always be whether, on a fair reading of the report as a whole, the officer has materially misled the members on a matter bearing upon their decision, and the

error has gone uncorrected before the decision was made. Minor or inconsequential errors may be excused. It is only if the advice in the officer's report is such as to misdirect the members in a material way – so that, but for the flawed advice it was given, the committee's decision would or might have been different – that the court will be able to conclude that the decision itself was rendered unlawful by that advice.”

29. Where a committee accepts the recommendation of officers, the reasons for its decision will be taken to be those set out in the officer's report. What is said by individual members of a committee during debate and before the vote is not significant (see *Scottish Widows PLC v Cherwell DC* [2013] EWHC 3968 (Admin) [21-22] and *R(Cook) v RBKC* [2024] EWHC 42 (Admin) [80]).
30. It is for the officer to assess how much information should be included in the report. Overburdening the report with information or materials may impact upon the effectiveness of committee members to deal with them (see *R (Fabre) v Mendip DC* [2017] PTSR 1112 at 1120D and *R (Maxwell) v Wiltshire Council* [2011] EWHC 1840 (Admin) [43]).
31. The lack of reference to an issue in an officer's report does not mean it was not taken into account, and a contrary conclusion will only be appropriate where all other known facts and circumstances point overwhelmingly to that conclusion (*South Bucks v Porter (No 2)* [2004] 1 WLR 1953 [34-35]).
32. Decision makers may give material considerations whatever weight they think fit, or no weight at all, provided they do so rationally (*Tesco Stores v SSE* [1995] 1 WLR 759 [56]), and matters of planning judgment are for them. A charge of *Wednesbury* unreasonableness in a planning case faces a steep uphill struggle (*R (Newsmith Stainless Ltd) v SoS* [2017] PTSR 1126 [7]).
33. There is normally no duty to give reasons for granting planning permission, but where reasons are given these may be stated briefly and need only refer to the main issues in dispute. Only where the party aggrieved can show that they have genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision will a challenge on this basis succeed (*South Bucks (No 2)* [36]).
34. Decision-makers use local knowledge and common sense. Local authority planners have expertise and can be taken to have understood the legal context in which their decisions are taken (*R (Bishop's Stortford Civic Federation) v East Herts DC* [2014] PTSR 1035 [40]).

Ground 1

35. With those principles in mind, I turn to consider each ground in turn. Ms Wigley KC accepts that the objection of the planning consultants for the local residents was put before the committee but submits that as the officer's report made no mention of it, it cannot be assumed that the members took note of it. Policies such as NPPF and PPG require that if a proposal gives rise to an impact from noise which is unacceptable then the application should be refused. These were not referred to in the officer's report. Ms Wigley KC accepts that such an omission does not necessarily lead to the conclusion

that these were not taken into account, but it is clear that they were not. She accepts that there was no statutory duty to reconsult the environmental health officers in light of the residents' objection, but submits that this should have been done in light of the PPG. Those officers' response to the initial consultation approach the issue the wrong way by considering mitigation rather than whether construction noise was acceptable in the first place. Best practice and controls do not deal with the issue of whether the impact is acceptable in the first place.

36. As an additional limb to this ground, Ms Wigley KC relied upon Article 8 of the European Convention on Human Rights and the right to protection of the home from unnecessary interference by public authorities. She accepts that the officer's report need not have referred to this expressly, but submits that what should have been carried out, but which was not, was an assessment of the proportionality of the impact of construction noise.

37. Article 8 provides:

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

38. Mr Streeten for the authority and Mr Walton KC for the interested party submit that it was a matter of planning judgement for the planning officers as to how much information to put in the report and an inference that a matter was overlooked will only be appropriate where all known facts point clearly to that conclusion. The officer's report accepted that there is likely to be noise impact on neighbours during construction but that was not assessed as significant and with mitigation and controls was assessed as acceptable. This was a matter of planning judgement for the officers and in substance corresponded with the requirements of NPPF to PPG. There was no need to refer to these specifically in relation to noise. There was no evidence to suggest that the impact would be significant.

39. Likewise, the SPD relates to new build and continuous noise and there was no need for the officer to refer to this. The officers were entitled to take into account the statutory environmental controls in place and the NPPF recognises that it may be assumed that such controls will operate effectively.

40. In my judgment ground 1 amounts to no more than a disagreement as to the judgement of the planning officer whether it was necessary to re-consult the environmental health officers and with their assessment of construction noise as acceptable. On a fair reading of the officer's report as a whole that was the conclusion which was arrived at and which the officer, and thus the committee, was entitled to arrive at. This conclusion was consistent with local and national policy and entailed the exercise required by Article 8

as to whether interference with neighbours was necessary in the interests referred to. There is no sufficient indication that such policies and rights were overlooked.

41. No issue was or has been taken with the very detailed noise levels predicted for each phase of the construction work set out in the noise assessment, and the residents' objection did not seek to go behind those predictions. The planning officer and the environmental officers may be taken to have some expertise in such matters, and may also be taken to know the legal context in which the decisions were taken.
42. In my judgment ground 1 is not made out.

Ground 2

43. Turning to ground 2, this relies upon a transcript of the debate amongst the three members of the planning committee who made the challenged decision. Ms Wigley KC submits that this shows that they misunderstood the policy background, and proceeded on the basis that once the proposals were shown to comply with the 50% figure within CL7 figure permission should be granted. The transcript shows that just before the vote was taken, the chair said that he was struggling with the size of the basement concerned. The planning officer indicated that CL7 was permissive and that although the basement was very large the proposal was policy compliant. The other members also then expressed concern over the size of the basement. Ms Wigley KC submits that, as is clear from the terms of CL7, the size issue impacts upon the issue of construction noise.
44. Mr Streeten and Mr Walton KC submit that the tenor of the debate was concern at the 50% figure in just one part of CL7 and whether that part of the policy could or should be changed. It was clear from the officer's report that the acceptability of construction noise was a material consideration. Permissive is precisely that, that unless the requirements set out in CL7 are met by a proposal, then the proposal does not comply with that policy. If such requirements are met then the proposal complies with that policy but regard must be had to other policies and material considerations.
45. In my judgment, although there is a clear connection in the policy between the relative size of the basement and the garden and construction noise, it is also clear from the terms of the policy and from the explanatory policy that the relative size also impacts upon several other issues therein referred to such as inappropriate development, stability, character of gardens, drainage and carbon emissions. The tenor of this specific aspect of the debate was to question the 50% figure where, as here, the basement was very large. It is not justifiable to infer from that the if that figure were complied with, the committee thought that permission must be granted or that all other material consideration could be ignored.
46. In my judgment ground 2 is not made out.

Conclusion

47. It follows that this claim is dismissed. I would be grateful if counsel, within 14 days of hand down of this judgement, would file a draft order agreed as far as possible, together with written submissions on any consequential matters which are not agreed. These will then be determined on the basis of any such submissions.

48. I am grateful to counsel for their assistance.