

Case No: CO/347/2014

Neutral Citation Number: [2014] EWHC 3657 (Admin)

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/11/2014

Before :

MR JUSTICE CRANSTON

Between :

The Queen (on the application of Joicey

Claimant

- and -

Northumberland County Council

Defendant

-and-

R & J Barber Farms Ltd

Interested Party

Richard Harwood QC (instructed by Richard Buxton) for the Claimant

Sasha White QC (instructed by Northumberland County Council) for the Defendant

John Barber appeared in person for the Interested Party

Hearing dates: 21-22 October 2014

Judgment

Mr Justice Cranston :

I INTRODUCTION

1. This judicial review raises an issue about the consequences when information which by law is to be accessible to members of the public is not available in a timely fashion to enable them to participate effectively in democratic decision-making. I decide that a claimant in this position is entitled to have the decision quashed unless the decision-maker can demonstrate that it would inevitably have come to the same conclusion even if the information had been available. The issue arises in the context of an application to quash the grant of planning permission for the erection of a wind turbine at Brackenside Farm, Berwick-upon-Tweed, Northumberland. Another issue which arises in the course of the case is the interpretation of the concept of financial involvement, where in planning guidance financial involvement in a wind turbine can lead to a greater exposure to the noise it will generate if permission is granted to erect it.

II BACKGROUND

The parties

2. R & J Barber Farms Ltd (“the applicant”) is the company of John Barber and his family, which owns and farms Brackenside Farm in Northumberland (“Brackenside”). They applied for planning permission to erect a wind turbine on the farm. Brackenside is approximately 4km west of the village of Lowick and 11.5km south of Berwick-upon-Tweed. Of the properties on the farm, one is occupied by Mr John Barber and his wife, another by his son and his wife. There are three cottages occupied on shorthold tenancies. A sixth property is occupied by a retired farm worker and the seventh is rented out as a holiday let. The applicant says that when the wind turbine is operational, all the properties will be connected to the grid and receive electricity at the preferential export rate.
3. The claimant, Andrew Joicey, is a landowner and farmer who lives at New Etal, Cornhill-on-Tweed in Northumberland. He is critical of the way that renewable energy is subsidised which leads (in his view) to a less than optimal selection of sites for wind turbines. He campaigns on the issue. His friend, Dr John Ferguson, a retired chartered engineer and clergyman, lives in the neighbourhood.
4. The defendant, Northumberland County Council (“the Council”), is the planning authority for the area and granted permission for the Brackenside turbine. Cllr Paul Kelly chairs the Council’s Planning, Environment and Rights of Way Committee (“the planning committee”). Karen Ledger is the head of Development Services in the Council and Joe Nugent is a senior planning officer. At the relevant time Geoffrey Newcombe was the Council’s environmental protection officer in the Public Protection department. Mr Newcombe explains in his witness statement that as an internal consultee of the Council to the planning service, his role would be to check if noise pollution consultants were competent and correct assessment references were cited, such as the Institute of Acoustics Good Practice Guide. In other words, it was a limited role.

The history of the application

5. In early 2006 there was an application to erect 9 wind turbines on a wind farm at Barmoor, which is just south of Brackenside. Three of the nine proposed turbines were to be on the applicant's land but the developer agreed to withdraw these from the proposal. Following a public inquiry in 2009, the Secretary of State approved the six turbines at Barmoor ("the Barmoor wind farm") while rejecting two other proposed wind farms elsewhere in Northumberland. The planning permission for the Barmoor wind farm sets daytime and night-time noise limits for different properties. Those noise limits vary according to the existing background noise levels at each location, measured and recorded at a range of wind speeds, and sometimes between the same grouping of buildings according to whether the occupiers are financially involved in the wind farm. The Barmoor wind farm is now in the process of being built.
6. In 2011 the applicant applied to the Council for planning permission for the erection on Brackenside "of a single wind turbine of 37 metres to hub with a total height tip of 47.1 metres, and an output of approximately 334,000 kWh per annum". The rationale of the planning application was to reduce the farm's carbon footprint and exposure to energy prices. The planning application conceded that there was some impact on the surrounding landscape and visual amenity of the area but asserted that this was limited.
7. On 2 February 2012 the Council's north area planning committee granted planning permission. The claimant challenged the permission on six grounds in judicial review proceedings. The Council and the applicant submitted to judgment on the basis that the noise condition imposed was defective; the distance of the proposed turbine from the nearest turbine of the approved Barmoor wind farm to the south had been misstated; Environmental Impact Assessment screening had not been carried out; and there was a failure to advertise and to notify English Heritage, since the application affected the setting of listed buildings (notably to the east the grade II* listed Barmoor Castle).
8. On 1 November 2012 the Council's north area planning committee resolved again to approve the application and planning permission was issued a fortnight later. The claimant challenged by way of judicial review, this time on five grounds. The council and the applicant again agreed to a court approved consent order on the basis that (1) the noise condition, which was identical to that in the first permission, was defective (it only assessed noise from the proposed turbine in isolation, not in cumulation with the approved Barmoor wind farm, and the condition relating to noise was unenforceable, since it relied on control of the Barmoor development); and (2) English Heritage should have been consulted.

The application in 2013 and the noise assessment report

9. The applicant pursued the application for a wind turbine at Brackenside. To deal with the English Heritage point its agent prepared a Heritage Statement. On 23 April 2013 English Heritage stated that in its opinion the proposed turbine would not cause harm to the setting of heritage assets in the area, particularly Barmoor Castle.
10. Coincidentally that day Dr Ferguson sent the Council a list of objections to the Brackenside turbine. Amongst other points he refuted as unrealistic the output figure claimed of 334,000 kWh per annum. That was on the basis that the turbine was capable of producing 38 percent of its maximum output, whereas in 2010 the national average

for commercial turbines was only 21 percent. Dr Ferguson said that this was central to the benefit/harm balance.

11. To address the concerns about noise, the applicant engaged WSP Environmental Ltd of London. They prepared an “Environmental Noise Assessment” report dated 20 August 2013 (“the WSP noise assessment”). The report stated that it took into account the noise which would be generated when Barmoor wind farm to the south was in operation. Noise limits had been set for the turbines in that wind farm in relation to neighbouring properties, with higher limits for those which had a financial involvement (in accordance with ETSU-R-97). Since Barmoor wind farm was yet to be constructed, WSP prepared a model to predict noise for the Brackenside site and surrounding area. As a worst case scenario, WSP assumed that Vestas turbines would be used, which were noisier than Siemens turbines. Calculations were made at different wind speeds and different times of the day. Predictions were then made to identify noise levels at the properties closest to the Brackenside turbine, as a result of the Barmoor turbines operating within their set limits. Further calculations were undertaken with the Brackenside turbine operating both alone and with the Barmoor turbines for both daytime and nighttime. In the assessment Brackenside Farm was assumed to have a financial involvement in the turbine as were the Barmoor properties. The report concluded that there would be no significant cumulative noise impact. Thus noise need not be considered a determining factor in granting planning permission.
12. The Council received the WSP noise assessment from the applicant’s agents on 21 August 2013. There are emails suggesting that a corrected version of the assessment was sent the following day but the version which was ultimately made available to the Council planning committee and the public is dated 20 August 2013. Mr Nugent’s evidence is that he printed a copy of the report and placed it on the planning file. No copy was uploaded to the Council’s publicly accessible website until much later.

The officer’s report

13. The officer’s report recommending approval of the Brackenside application, subject to conditions, was made available on 23 October 2013. On Friday 25 October 2013 the Council notified objectors and others by second class letter that there would be a meeting of the planning committee to consider it on 5 November 2013. Most likely the letter would not have arrived until Monday, 28 October.
14. The report’s introduction covered the previous judicial reviews and the key matters they identified as including a failure to consult English Heritage and noise. After referring to the planning history (“no relevant planning history”), public responses (32 neighbours opposed; 28 in support) and planning policy, the report had the heading “Appraisal”. The first topic canvassed planning policies and their support for renewable sources of energy. The report referred to the applicant’s statement that the turbine would generate approximately 334,000 kWh of electricity per annum, to be exported to the farm, and that that would reduce energy costs and dependence on external sources of energy. The discussion then turned to the impact on landscape character. It noted that Northumberland had a moderate sensitivity to wind turbines but concluded that the Brackenside turbine would not result in any unacceptable adverse impacts. As regards the impact on visual amenity, the report concluded that the Brackenside turbine would not be unacceptable for residents, drivers, walkers and users of tourist sites, given that it would be set back and was partly screened by woodland.

The topic “Cumulative effects” considered the Brackenside turbine with other wind turbines but concluded that the combination would not become a defining feature of the landscape. There were no significant ecological impacts under that sub-heading, and while constituting change in the landscape the sub-heading concerning impact on cultural heritage reported that there would be no harm.

15. Given the planning history, noise was perhaps the most important of the topics in the appraisal section. The discussion noted that letters of objection had raised concerns regarding potential noise. The report added that the applicant had provided a noise assessment which concluded that the turbine could be operated in line with the guidance set out in ETSU-R-97 for the nearest residential properties. The predicted noise levels from the operational wind farm would be below the limits required by the guidance. Therefore, the report stated, it was considered that the development would not result in unacceptable impacts on residential amenity. The report stated that the Public Protection department in the Council had been consulted and confirmed that the noise assessment had been undertaken having regard to ETSU-R-97. Public Protection had raised no objections, subject to revised planning conditions.
16. The conclusions to the officer’s report noted that national and local planning policies provided a positive framework for encouraging renewable energy developments. The Brackenside turbine had the potential to contribute to the production of electricity from a renewable resource and would contribute to targets for renewable energy generation. It would also provide other benefits such as locally generated electricity, assisting security of electricity supply. The key consideration was whether the application was in accordance with national planning policies and the Development Plan and whether its benefits outweighed any adverse impacts. The applicant had demonstrated that the proposed wind turbine would not result in unacceptable adverse impacts on local residents in terms of noise and shadow flicker and also in terms of ecology and cultural heritage. “On balance”, the report concluded, “the potential benefits are considered sufficient to outweigh the potential impacts on the character of the local landscape and visual amenity”.
17. There was no list of supporting reports at the end of the officer’s report. The Council’s pro forma, Determination of Planning Applications, stated that a list of sub-reports appeared at the end of an officer’s report.

Noise assessment report on website; the committee meets the next day

18. Having seen the reference under the noise sub-heading in the officer’s report to a noise assessment, Dr Ferguson emailed the Council’s planning and environmental health officers on 30 October asking if there was a new noise assessment report. There was no immediate reply. The claimant visited the Council’s planning department on 1 November to inspect the planning file for Brackenside. He was not asked to return and the duty officer produced a Brackenside file. There was no noise assessment report either on the file or made available to him during his visit. On Monday, 4 November Mr Nugent, who had been on leave the previous week (28 October to 1 November), spoke on the telephone with the applicant’s agent. He was informed that they did not have any objection to the WSP noise assessment being made public. Within minutes Mr Nugent replied to Dr Ferguson’s email of 30 October, that a supplementary noise assessment had been submitted by the applicant, and that this was on the public file for viewing by members of the public. He attached a copy of the report to his email.

During a telephone conversation that day with Mr Nugent, Dr Ferguson suggested that the meeting of the planning committee needed to be postponed.

19. That day, 4 November 2013, the WSP noise assessment report was uploaded to the Council's publicly accessible website. The website page listing the relevant documents relating to the Brackenside planning application gave, as the date published, 9 September 2013. In January this year the claimant explained in his witness statement that after examining the last number of the URL address for viewing the document on the website this date could not be correct. Mr Nugent now accepts that although he uploaded the document on 4 November he backdated it to 9 September 2013. The reason he did this was because he had thought he had uploaded the document on 9 September but because of a technical glitch and unknown to him at the time, the exercise must have been unsuccessful.
20. On 5 November the planning committee met. It was chaired by Cllr Kelly. Ms Ledger, Mr Newcombe and Mr Nugent were in attendance. The committee first considered another wind turbine application, at Bavington Mount, Hallington. In introducing that application Mr Nugent referred to the July 2013 Planning Guidance for Renewables and Low Carbon Energy. The document was also mentioned in the presentation of Mr Short, an objector to the Bavington Mount turbine, and in debate. The committee approved that application.
21. The committee then turned to the Brackenside application. Mr Nugent introduced the officer's report with the aid of a slide presentation. He asked the committee to give delegated power to change the conditions to any permission granted.
22. The claimant then addressed the committee for his allotted 5 minutes. He highlighted the statement in the officer's report – "no relevant planning history". In fact, he said, the Brackenside application had a long and troubled history which was extremely relevant to understanding cumulative noise impacts. The claimant said this about the WSP noise assessment report:

"Noise impact assessment has been carried out again, in full, for this application, but I don't suppose any of you have seen it, because this highly relevant document (74 pages of it) appeared only yesterday, and that was after requests to see it. If you study it, and you are properly armed with the knowledge of previous planning history connected with this site, you will find that it is actually fundamentally flawed, again, and that it shows that this application must actually be refused on noise grounds. Yet once again your officers have failed to pick this up.

The Grounds for refusal on noise are that the Noise Assessment shows that the existing noise limits for the Barmoor Wind Farm (the Barmoor wind farm) do not leave any headroom for further turbine noise at certain key locations.

It is very complicated, very complex, but there is a problem, and they have fudged the results. (Sorry to use that word)."

The claimant then mentioned the omission from the officer's report of mention of the July 2013 Planning Practice Guidance for Renewable and Low Carbon Energy. He added that the effect a proposed turbine would have on the rural landscape was a concern to local residents and businesses. The Brackenside turbine would look as though it was an extension of the proposed Barmoor wind farm.

23. Following this the applicant's agent spoke, as did the applicant's son. As head of Development Services, Ms Ledger reassured the committee that a large amount of additional information had been requested and reviewed by officers and she was confident in the recommendation contained in the report. In response to questions she noted that the WSP noise assessment had been carried out in accordance with ETSU guidance, including taking into account of the cumulative effects of both sites being in operation simultaneously. The appropriate wording of conditions relating to noise was to be reconsidered in consultation with Mr White QC.
24. Cllr Thorn proposed acceptance of the officer's recommendation for approval, noting that noise investigations had been thoroughly completed by officers and the application had been approved twice previously. Cllr Horncastle seconded the recommendation and added that the claimant's points had been adequately answered and officers had provided a professional report. Another councillor spoke in opposition. There was then a vote with 10 councillors in favour, 3 against and 1 abstention. The committee resolved that the application be granted for the reasons outlined in the report and that delegated authority be given to the head of Development Services to agree to the conditions to be attached to the planning permission.

Events following the committee's approval

25. On 8 November 2013 the claimant emailed Mr Newcombe, the environmental protection manager, regarding what he said were problems with the WSP noise assessment report. First, there was the issue of its availability. Secondly, if there been time to study it beforehand he would have asked about the assumptions that the turbines at the Barmoor wind farm would run in mitigated mode and that all residents at Brackenside had a financial involvement. Thirdly, there was the history of noise problems at Barmoor and fourthly, the problem of wind turbines developing "tones" with age. Finally, there was the issue of cumulative noise. The claimant followed this email with one to Cllr Kelly on 10 November.
26. Around this time the claimant obtained a report from an acoustic consultant, Dick Bowdler, that the methodology used by the WSP report was contrary to the good practice laid down in ETSU-R-97 and the Institute of Acoustics guidance. Mr Bowdler specifically raised the issue that not all properties at Brackenside or Barmoor might be financially involved.
27. On 26 November 2013 the Council sent a letter to objectors inviting comments on the potential noise conditions. The letter said, by reference to the 5 November meeting:

"At the meeting it was alleged during public speaking that third parties had not had the opportunity to comment on a noise survey that had been submitted by the applicant ...

Whilst the formal consultation period for this application has now expired the Council is providing the opportunity for further comments on the attached noise conditions that have been copied from the noise report entitled “Brackenside Wind Turbine, Environmental Noise Assessment, WSP Environmental Ltd. 20/08/13.”

Responses were requested by 8 December (a Sunday), although a letter to the claimant’s solicitors extended the date by two days to Tuesday, 10 December.

28. WSP wrote to the applicant on 2 December 2013 with a response to the points raised in the claimant’s emails to Mr Newcombe on 8 November, and to Cllr Kelly on 10 November. It explained that the reduced operational modes it had used in its report for the Barmoor wind farm were consistent with the planning conditions imposed on their use. As to the financial involvement point WSP said:

“[I]t should also be noted that all of the properties at Brackenside are within the ownership and control of the applicant for the Brackenside turbine, who has a financial involvement in the proposed development. These properties are either vacant, occupied by family members, are holiday cottages, or occupied by persons on short term lease agreements.”

This WSP letter was subsequently sent to the Council.

29. Meanwhile, there were thirteen responses to the Council’s consultation on the conditions to be imposed on the Brackenside permission. On 2 December Dr Ferguson emailed that the WSP noise assessment report contained errors, such as assuming that all occupiers of properties at Barmoor Ridge and Brackenside had a financial involvement in the Barmoor wind farm. In relation to the Barmoor wind farm, he added, WSP did not know the turbine type, the reduced mode which the operator might use, mitigation measures (and the triggers for them) and the wind directions.
30. Mrs Reavley’s response was dated 6 December. She lives at Barmoor Ridge and two of the turbines in the Barmoor wind farm are on her husband’s farm. She wrote that there was no headroom for any extra noise for a wind turbine at Brackenside given the permission conditions for the Barmoor wind farm. She added that of the three houses at Barmoor Ridge, two had no financial connection with the wind farm there, which was made clear in the conditions attached to the planning permission for that development. One was occupied by her and her husband. Although they owned the other two these were used for holiday lets.
31. The claimant himself emailed the Council on 10 December. He reiterated that the WSP report was only available late in the day. The claimant said that he had obtained the advice of noise experts and set out the substance of Mr Bowdler’s advice in the email. In the light of this, he stated, the planning committee should never have granted permission.
32. The Council issued the Notice of Planning Permission on Friday 13 December 2013. It contains a lengthy condition, condition 13, regarding noise, with 4 guidance notes attached.

33. This judicial review was lodged on 24 January 2014. After an oral hearing on 4 July 2014 Collins J gave permission on all grounds.

III LEGAL FRAMEWORK

Legislation

34. The Local Government (Access to Information) Act 1985 inserted a number of right to know provisions as part VA of the Local Government Act 1972 (“the 1972 Act”). Section 100A deals with the admission of the public and press to council meetings. Section 100B addresses access to the agenda and connected reports for council meetings. It provides, in its relevant parts;

“100B.-Access to agenda and connected reports.

(1) Copies of the agenda for a meeting of a principal council and, subject to subsection (2) below, copies of any report for the meeting shall be open to inspection by members of the public at the offices of the council in accordance with subsection (3) below.

..

(3) Any document which is required by subsection (1) above to be open to inspection shall be so open at least five clear days before the meeting, except that—

(a) where the meeting is convened at shorter notice, the copies of the agenda and reports shall be open to inspection from the time the meeting is convened, and

(b) where an item is added to an agenda copies of which are open to inspection by the public, copies of the item (or of the revised agenda), and the copies of any report for the meeting relating to the item, shall be open to inspection from the time the item is added to the agenda;

but nothing in this subsection requires copies of any agenda, item or report to be open to inspection by the public until copies are available to members of the council.”

35. Section 100C covers access to the minutes and other documents following council meetings. Section 100D addresses access to background papers. It provides in its relevant parts:

“100D.- Inspection of background papers.

(1) Subject, in the case of section 100C(1), to subsection (2) below [a time limit], if and so long as copies of the whole or part of a report for a meeting of a principal council are required by

section 100B(1) or 100C(1) above to be open to inspection by members of the public—

(a) those copies shall each include a copy of a list, compiled by the proper officer, of the background papers for the report or the part of the report, and

(b) at least one copy of each of the documents included in that list shall also be open to inspection at the offices of the council.

...

(3) Where a copy of any of the background papers for a report is required by subsection (1) above to be open to inspection by members of the public, the copy shall be taken for the purposes of this Part to be so open if arrangements exist for its production to members of the public as soon as is reasonably practicable after the making of a request to inspect the copy.

Background papers are defined in section 100D(5).

(5) For the purposes of this section the background papers for a report are those documents relating to the subject matter of the report which—

(a) disclose any facts or matters on which, in the opinion of the proper officer, the report or an important part of the report is based, and

(b) have, in his opinion, been relied on to a material extent in preparing the report,

but do not include any published works.”

Section 100E applies sections 100A to 100D to the meetings of council committees and sub-committees.

36. Section 18(1) of the Planning and Compulsory Purchase Act 2004 provides that a local planning authority must prepare a statement of community involvement. That is a statement of the authority's policy as to the involvement in the exercise of its functions, including its development control functions, of persons who appear to it to have an interest in matters relating to development in their area: s. 18(2). In September 2009 the Council published its statement of community involvement. This contains the following undertaking:

“Once a valid planning application has been received we will:

...

Publish details of the application with supporting documentation on the council website.”

Planning policies

37. The National Planning Policy Framework (“NPPF”) contains a presumption in favour of sustainable development “which should be seen as a golden thread running through both plan-making and decision-taking”. It states that where the development plan is absent or silent, or relevant policies are out-of-date, permission should be granted unless any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in the NPPF taken as a whole. In paragraph 97 the NPPF provides that to help increase the use and supply of renewable and low carbon energy, local planning authorities should contribute to energy generation from renewable or low carbon sources. Paragraph 98 of the NPPF adds that, when determining planning applications, local planning authorities should recognise that even small-scale projects provide a valuable contribution to cutting greenhouse gas emissions. They should approve the application if its impacts are, or can be made, acceptable.
38. A note to paragraph 97 of NPPF states that, in assessing the likely impacts of potential wind energy development, planning authorities should follow the approach set out in the National Policy Statement for Renewable Energy Infrastructure (“the Renewable Energy policy”) when identifying suitable areas, and in determining planning applications for such development.
39. Part of the Renewable Energy policy is the Planning Practice Guidance for Renewable and Low Carbon Energy, 2013 (“the Renewable Energy guidance”). In addressing the particular planning considerations which relate to wind turbines, this guidance states that a number of questions should be considered when determining planning applications for them. As regards the noise impacts of wind turbines, it states that The Assessment and Rating of Noise from Wind Farms, ETSU-R-97 (“ETSU”) should be used by local planning authorities. It also refers to the Good Practice Guidance on Noise Assessments of Wind Farms prepared by the Institute Of Acoustics (“the IOA Good Practice Guide”). It endorses it as current industry good practice and as a supplement to ETSU-R-97. The Renewable Energy Guidance also deals with the question: “How to assess the likely energy output of a wind turbine?” It answers at paragraph 38 that as with any form of energy generation this can vary for a number of reasons and that the energy capture at a site – the ‘capacity factor’ – will vary with location and even by turbine in an individual wind farm. It can be “useful information in considering the energy contribution to be made by the proposal, particularly when a decision is finely balanced”.
40. ETSU states that in low noise environments the day-time level of wind farm noise should be limited to an absolute level within the range of 35-40dB(A), although the actual value chosen within this range will depend upon the number of dwellings in the neighbourhood of the wind farm, the effect of noise limits on the number of kilowatts generated, and the duration and level of exposure. It recommends that the fixed limit for night-time is 43dB(A). Both day- and night-time lower fixed limits can be increased to 45dB(A), and consideration should be given to increasing the permissible margin above the background limit, where the occupier of the property has some “financial involvement” in the wind farm. The increased lower fixed limit with financial involvement is explained in ETSU as follows:

“It is widely accepted that the level of disturbance or annoyance caused by a noise source is not only dependent upon the level and character of the noise but also on the receiver’s attitude towards the noise source in general. If the residents at the noise-sensitive properties were financially involved in the project then higher noise limits will be appropriate, particularly if a tie could be made between the wind farm and the property, such as giving the developer first option to buy the property if it came up for sale. We recommend that both day- and night-time lower fixed limited can be increased to 45dB(A) and that consideration should be given to increasing the permissible margin above background where the occupier of the property has some financial involvement in the wind farm.”

41. The IOA Good Practice Guide contains a section on noise predictions. One aspect of that is what it calls “propagation directivity”, i.e. in considering cumulative noise impacts the effects of propagation in different wind directions can be considered. Another aspect deals with “cumulative issues”. Scenarios under this heading concern the impact on calculations for a new turbine of noise limits for existing or approved wind farms. The concepts of “headroom” and “controlling property” are used – in simple terms the margin for additional noise given the noise limits for the existing or approved sources at the location of the key receptors in the area. With approved wind farms, not yet constructed, and the type of turbine not yet identified, the Good Practice Guide recommends using a worst case scenario.

IV GROUNDS OF CHALLENGE

Ground 1: Non-availability of WPS noise assessment

42. The claimant puts ground one as a series of failures on the part of the Council: the failure to produce a list of background papers for the officer’s report in breach of section 100D of the Local Government Act 1972; to make available the WSP noise assessment report as required by section 100D; to make the report available or publish it on the Council’s website allowing a reasonable time for its consideration as required by paragraph 7.11 of the Council’s Statement of Community Involvement; and to give a fair opportunity for comment on the report at the planning committee meeting on 5 November 2013.
43. There is no doubt that there were a number of breaches of the public’s right to know under the Local Government Act 1972. First, under sections 100B(3), 100D(1) and 100E(1), agendas and reports for committee meetings must be available for public inspection at least five clear working days before the meeting and reports must include a list of the background papers. There is no doubt that the WSP noise assessment report falls within the definition of background papers in section 100D(5). Yet the officer’s report on Brackenside for the 5 November meeting of the planning committee did not contain a list of background papers, including the WSP noise assessment report (despite an earlier assertion by Mr Nugent that it did).
44. Secondly, contrary to sections 100D(1)(b) and (3) the WSP noise assessment report was not “open to inspection at the offices of the council” by members of the public in that arrangements were not in place for it to be produced. The claimant had visited the

planning department on 1 November, but when he asked to see the Brackenside planning file he was given a file which did not contain the report. For the Council Mr White QC suggested that on Mr Nugent's evidence he had printed a copy in early September and placed it on the file so it was available. If that were the case why on earth on 1 November should Mr Nugent have to consult the applicant's agent whether he could place it on the website? The implications of all this would undoubtedly have been the subject of vigorous cross-examination if there had been oral evidence in the case. But even if the report was on a Brackenside file, it was not open to inspection by members of the public since the files were in such a state that the duty officer on 1 November fetched what must have been a Brackenside file, but not one with the report. If the Council cannot organize its files in a way which means the duty officer is able to produce a particular report within a reasonably practicable time the report is not available.

45. Thirdly, the fact that the WSP noise assessment was not on the Council's publicly accessible website was in breach of the undertaking in paragraph 7.11 of its Statement of Community Involvement. The Council now accept that the WSP noise assessment was first uploaded on the website on 4 November 2013 although backdated to 9 September, when Mr Nugent said that he attempted that but the uploading had been unsuccessful. As I made clear at the hearing I take a dim view of any public authority backdating a document in a manner which could give a false impression to the public. Publication of a Statement of Community Involvement is a statutory obligation. In my judgment that paragraph in the Council's statement is a promise, going beyond the statutory obligations in the 1972 Act, giving rise to a legitimate expectation that there will be publication in accordance with its terms: see R (on the application of Majed) v Camden LBC [2009] EWCA Civ 1029; [2010] J.P.L. 621, [12]-[15]; R (on the application of Kelly) v Hounslow LBC [2010] EWHC 1256 (Admin). It is a continuing promise, for otherwise the public's right to know what is being proposed regarding a planning application would be frustrated.
46. For the Council, Mr White QC advanced three main arguments, all subsumed in a sense in his contention that the claimant was not prejudiced by the statutory breaches or the denial of the claimant's legitimate expectation. First, he submitted, the councillors had the WSP noise assessment report before them on the day of the planning committee. The claimant himself had access to it, for some 36 hours before the meeting. Not only was he able to make the point about its late availability in his 5 minute presentation, but he was also able to lay before the committee the main points of his critique of the noise assessment report and where the applicant's consultants had gone wrong. In Mr White's submission the claimant's line that the report was flawed could not have been clearer. His presentation to the committee was a clear, cogent and powerful case about the noise issues. The points about the WSP noise assessment, which he made in his email on 8 November to the Council, and in his email on 10 November to Cllr Kelly he made in his presentation to the planning committee. Even now we have not been told what would have been in the detailed submissions which the claimant contends with more time he would have made. If the committee meeting of 5 November had been postponed for several months the claimant's submissions would have remained the same.
47. If this is an argument that the Council complied with its legal obligations to publish, it is not one I accept. Right to know provisions relevant to the taking of a decision such

as those in the 1972 Act and the Council's Statement of Community Involvement require timely publication. Information must be published by the public authority in good time for members of the public to be able to digest it and make intelligent representations: cf. R v North and East Devon Health Authority Ex p. Coughlan [2001] Q.B. 213, [108]; R (on the application of Moseley) (in substitution of Stirling Deceased) v Haringey LBC [2014] UKSC 56, [25]. The very purpose of a legal obligation conferring a right to know is to put members of the public in a position where they can make sensible contributions to democratic decision-making. In practice whether the publication of the information is timely will turn on factors such as its character (easily digested/technical), the audience (sophisticated/ ordinary members of the public) and its bearing on the decision (tangential/ central).

48. In my view publication was not effected in a timely manner in this case. The WSP noise assessment was a 74 page technical document. It was directed to ordinary members of the public who might wish to make representations on the planning application. As to the claimant, he has some background in wind turbines and was able to make a few effective points about what he conceived as the flaws in the assessment in his presentation to the committee. But this was only one of a number of points he had to deal with in what, after all, was a very short period of 5 minutes. In light of the statement in the officer's report of "no planning history", he dealt with that, as well as the officer's failure to mention the Renewable Energy guidance. So the claimant's exposure of what he contended were the flaws in the assessment report was necessarily brief. With more time than 36 hours I have no doubt that he could have done more. Given the history of the matter, noise went to the heart of the committee's decision and not tangential.
49. Mr White then advanced his submission that it was not unfair to the claimant, and no prejudice had been caused to him, by the late publication of the WSP noise assessment report. Coupled with his earlier submissions Mr White contended that the planning committee's decision was inevitable. The Council had supported the planning application on two previous occasions and the officer's report was yet again in favour. The only objection related to noise and only one aspect of it. The committee's vote on 5 November was decisively in favour. Nothing the claimant has said or done could have turned the tide. If the matter returns to the committee again the grant of permission is a foregone conclusion.
50. Mr White invoked the known test in Bolton MBC v Secretary of State for the Environment (1990) 61 P. & C.R. 343 at 353, where Glidewell LJ held that if the court is uncertain whether the consideration of a matter would have meant a real possibility of a difference to the decision, there is no basis for concluding that the decision is invalid because of its absence. Recently in R (on the application of Holder) v Gedding District Council [2014] EWCA Civ 599 Maurice Kay LJ considered the Glidewell test and the test derived from Simplex GE Holdings Ltd v Secretary of State for Environment (1988) 3 PLR 25, that where a material consideration is not taken into account the court should grant relief unless satisfied that the decision maker would have reached the same decision. Maurice Kay LJ said "These formulations are really two sides of the same coin depending on whether one is determining materiality or relief": [24]. Patten LJ and Stanley Burnton J agreed.
51. All these cases are relevant material consideration cases. The present case involves a breach of statutory duty to disclose information. However, the remedial test Maurice Kay LJ stated in Holder, taken from Simplex, is in line with the principle laid down by

May LJ in R (Smith) v North Eastern Derbyshire Care Trust [2006] EWCA Civ 1291; [2006] 1 WLR 3315, where there was a failure in the statutory duty to consult those affected by a change in medical services. Citing Simplex and other authorities, May LJ held that the probability that the decision after consultation would have been the same is not enough. The decision-maker must show that the decision would inevitably have been the same with proper consultation, if the claimant is to be denied relief. In my view this is the appropriate test in the analogous situation of a breach of right to know legislation: the claimant will be entitled to relief unless the decision-maker can demonstrate that the decision it took would inevitably have been the same had it complied with its statutory obligation to disclose information in a timely fashion.

52. In the circumstances of this case the Council have not persuaded me that the decision would inevitably have been the same had the noise assessment report been available as it should have been. First, noise had been a key point which the Council had unlawfully determined twice previously. More time to prepare written representations, to accompany his oral presentation, might have enabled the claimant to persuade the planning committee to exercise caution in light of this background.
53. Secondly, the claimant obtained the services of the acoustic expert, Mr Bowdler, whose report critiqued the WSP report. If the claimant had had Mr Bowdler's report before the 5 November meeting he could have prepared better. Thirdly, Sullivan J noted in R v Mendip District Council ex p Fabre (2000) 80 P & CR 500, at 515, that representations after the public is alerted by disclosures under these provisions of the Local Government Act 1972 will in many cases lead to the need for further input from officers. That in turn may lead a Council to rethink. That could have been the case here with Mr Bowdler's critique. Finally, there is the decision-maker in this case. It was a committee of politicians where the vote was not whipped. It is a very bold person who will hazard that in such circumstances a particular result is inevitable.
54. Next, Mr White QC highlighted the post-committee consultation by the Council through the invitation sent out on 26 November. If there had been any unfairness or prejudice this, in his submission, remedied it. Despite the planning committee's vote in favour of planning permission for the Brackenside turbine, permission dated from the issue of the formal notice on 13 December. Had the submissions made in the consultation been persuasive, the Council could well have decided to hold back the issue of the notice and to refer the matter back to the planning committee for further consideration. The claimant, Dr Ferguson and others made submissions, but the Council concluded, as it was entitled to, based on the letter from WSP dated 2 December, that none justified the matter being returned to the committee.
55. In my judgment the Council's consultation after the committee voted to approve the application on 5 November could not remedy the earlier failings. Partly that was because the scope of the consultation was expressly confined to the wording of the noise conditions to be attached to the permission and was not concerned with whether the application was acceptable in the light of the noise issue. Consultation on the noise condition attached to the planning permission was no substitute for an opportunity to make representations as to whether planning permission should be granted in the first place.
56. Partly also, the consultation came too late. The committee had spoken, and although it could be reconvened, the inevitable institutional momentum would be to maintain the

decision. Some of the objections canvassed the grant of permission, ranging beyond the content of the noise condition, but there is no evidence that these were considered as such. The WSP letter on 2 December, on which the Council rely, addressed the claimant's letters of 8 and 10 November. It did not address the consultation responses. In any event important responses from Mrs Reavley, Dr Ferguson and the claimant himself came after 2 December. There was never an analysis by the Council on these. Thus this consultation could not remedy the unlawful failure to make the WSP noise assessment available earlier.

57. Mr White's final submission in this respect was that the court should exercise its remedial discretion not to quash the planning decision because no prejudice has been or will be suffered by the claimant personally. Although the claimant has a real concern with wind turbines and has taken a very close interest in this and other proposals, in this instance he lives over 4 kilometres from the Brackenside site and the evidence is clearly that he will not be able to see, hear or have any other sensation affected by the proposal.
58. The jurisprudence addresses this type of argument in at least two ways. One concerns standing: there are cases where the nature and extent of a claimant's standing enters at the remedial stage. Secondly, it is more likely that the court will exercise its discretion to grant a remedy when the decision being challenged has serious consequences for the claimant: see *J Auburn, J Moffett, A Sharland, Judicial Review*, Oxford, 2013, 799, 808.
59. In this case I cannot see how Mr White's argument has any traction. Here the claimant had standing to challenge a decision of his local Council. By denying him timely access to information to which he was entitled it limited his full participation in democratic decision-making. The fact that he might not be immediately affected by the proposal where he lives is not a sufficient reason to deny him the remedy he seeks. This was a serious breach by the Council of its statutory obligations. An additional factor bearing on the exercise of discretion in this case is the Council's own behaviour in the back-dating of the website to when the WSP noise assessment was available to it. Although it did not have any consequences in the circumstances of this case, it had the potential to mislead members of the public about their right to know and to use the information disclosed. In all there is no reason to deny the claimant his remedy.

Grounds 2 and 3: Planning guidance and "financial involvement"

60. Essentially these grounds boil down to the Council misinterpreting the notion of "financial involvement" in planning guidance, ETSU, with the result that higher noise limits were allowed for the Brackenside turbine than should have been. Under ETSU a higher noise limit is allowed for a turbine where properties affected have a financial involvement in it. Ground 2 alleges that the Council erred in misinterpreting the Secretary of State's planning permission for the Barmoor wind farm, since WSP focused on the noise limits in the permission for the financially involved occupants, not the limits in the permission for those with no such interest. Moreover, the claimant alleges that the Council ignored Mrs Reavley's letter of 6 December 2013 explaining this. The Barmoor calculations had a bearing on whether there was headroom for the Brackenside turbine.
61. Ground 3 is that the Council applied high noise limits for all the properties at Brackenside, when some were not occupied by persons with a financial involvement in

the turbine. WSP assumed that because all the properties at Brackenside were owned and controlled by the applicant, all there had a financial involvement. The Council failed to address this conflict with planning policy.

62. The underlying rationale of the ETSU guidance is obvious, that the amenity of occupiers must be protected from a wind turbine but that if they are benefiting financially from it they can be treated as having a higher tolerance of the noise it generates. The meaning of “financial involvement” is a matter of law. I accept Mr Harwood’s submission that if the term “financially interested” been used a less substantive or active engagement with the scheme, possibly even a token financial benefit, might be sufficient. The notion of being financially involved means having a substantial financial benefit from a turbine, most obvious with the owner or operator of the turbine, or a landowner leasing land for the turbine.
63. Under ETSU either residents or occupiers must be financially involved. Those terms may not be identical although I note that the term “occupiers” is used in the final sentence of the passage from ETSU quoted earlier, which is the clearest statement of what it recommends must be done in applying the guidance. Clearly owners and tenants would be occupiers. Ordinarily someone in a holiday let would be the occupier of premises, even if only for a few days.
64. That the occupiers support the installation of a turbine is irrelevant for these purposes: having a financial involvement is the key. In theory the concept of financial involvement could be constituted by a benefit in kind as well as a direct benefit. Thus it could be that an occupier would be regarded as having a financial involvement in a wind turbine if there was in place an agreement that he or she would receive a direct payment when it became operational, the occupier’s rent on a property would be reduced, or electricity for the future would be free or at a preferential rate. From Mr Barber’s evidence for the hearing it seems that an owner can make five or six figure sums per annum from turbine subsidises. I accept Mr Harwood’s submission that consequently a modest sum reducing rent or electricity costs does not make an occupier financially involved, particularly if this is compensatory rather than profitable for the occupier. There can be practical difficulties with ensuring that a benefit in kind is delivered and these could need to be resolved before it would be taken into account under ETSU.
65. I am not persuaded that Ground 2 is made out. At Barmoor there are three residential properties, owned by the Reavleys. One is occupied as the family house, the other two used as holiday lets. Certainly in making its noise calculations for the purposes of the Brackenside application, WSP took noise limits in the Barmoor planning conditions as if all three had a financial involvement in the Barmoor wind farm. They ignored the lower noise limits calculated as if no one had a financial interest, which would have meant that the cumulative effect of the two schemes would have been above the limits in the guidance. As a matter of planning judgment it seems to me that WSP, and in turn the Council, were entitled to conclude that the financial involvement limits were applicable when one of the properties was owned and occupied by the Reavleys with a clear financial return from the Barmoor wind farm, and the other two were owned by them for letting out for short periods on holiday lets. Mrs Reavley’s letter of 6 December added nothing new in this report.

66. In the case of Brackenside however, WSP, and through it the Council, were in my judgment wrong to assume that because all the properties there were owned by the applicant that was the end of the matter and there was a financial involvement. This failed to take into account that ETSU refers to the occupiers having the financial involvement. The applicant's tenants do not have a financial involvement by virtue of the applicant's own financial involvement. Mr Barber informed me that he intended to offer cheaper electricity to his tenants once the turbine is operational. Quite apart from the practical aspects of achieving this, this was not part of the application.
67. For the Council Mr White submitted that the issue was academic, since if there is more than one property at a location the noise limits apply to all the occupants there. That does not assist because neither WSP nor the Council recognised that there was a split at Brackenside and that, as a matter of judgment, they would apply the higher limits. It was simply assumed that all the properties at Brackenside had a financial involvement and the higher limits should apply. Mr White also submitted that the difference between the noise limits for those with and without a financial involvement is small and in respect of the difference between 43dB(A) and 45dB(A) it is de minimus. However, the decibel scale is logarithmic and these differences are not necessarily small. The claimant succeeds on ground 3.

Grounds 4 & 5: Approach to "headroom" and wind direction

68. The claimant's case on ground 4 is that a cumulative approach was required under ETSU, considering noise from the approved Barmoor wind farm and the proposed Brackenside turbine. In particular, parts of the IOA Good Practice Guide highlighted earlier, and dealing with the issue, are said to have been ignored. Consequently the claimant's case is that WSP assessed turbines and mitigation schemes which would probably not be used and which did not necessarily represent the worst case. It misunderstood and failed to comply with the guidance as to headroom. It also failed to have regard to the guidance on the directional effect of wind and noise. These matters were raised by Dr Ferguson in his email on 29 November 2013 and by the claimant on a number of occasions.
69. These are very bold submissions when their legal basis is that the Council set the noise limits for the Brackenside turbine both contrary to the relevant technical guidance – without appreciating the conflict – and irrationally. The starting point is that WSP are experienced consultants on such matters. Neither Barmoor wind farm nor Brackenside turbine were operational so assumptions had to be made. WSP assumed Barmoor would use Vestas turbines as a worse case scenario and that the Barmoor wind farm would operate within its planning conditions when the wind was blowing. These were matters of judgment. I am not persuaded that the WSP analysis, adopted by the Council, went beyond the range of what is reasonable planning judgment: see R (on the application of TWS) v Manchester City Council [2013] EWHC 55 (Admin); [2013] JPL 972; [99], per Lindblom J.
70. It only needs to state ground 5 – that contrary to advice from its solicitor and Mr White QC the Council adopted a complicated noise condition 13, which does not work – to dismiss it. Quite apart from the judicial reluctance to become involved in the evaluation of planning conditions if they are fairly and reasonably related to a development – Newbury DC v Secretary of State for the Environment [1981] A.C. 578 – being complicated does not make a condition unlawful.

Ground 6: the Renewable Energy guidance

71. Here the claimant alleges that the Council failed to have regard to the Secretary of State's Renewable Energy guidance in respect of the need to consider the likely energy output of the Brackenside turbine. The current guidance in paragraph 38 refers to capacity. The claimant mentioned the matter to the Council but there was no reference to the guidance or the capacity issue at any point. In his 23 April 2013 objection Dr Ferguson had raised the capacity issue specifically in challenging the claimant's assertion that the turbine would generate some 334,000 kWh of electricity per annum. In his witness statement for this hearing it appears that Mr Barber now accepts that substantially less electricity will be generated, using a 25 percent capacity figure, rather than the 38 percent previously employed.
72. In R (on the application of Holder) v Gedding District Council [2014] EWCA Civ 599 the Court of Appeal held that the officer's report had been wrong to describe the turbine's capacity there as a non-material planning issue. But that concerned planning permission for the erection of a wind turbine on green belt land, and it is quite clear that it was that which drove Maurice Kay LJ's conclusion as to materiality: see [22].
73. In my view that is not the case. There is no doubt that the Council did not mention the Renewable Energy guidance in terms. However, it was touched on at several points at the planning committee meeting on 5 November in the debate on the previous agenda item, the application for a turbine at Bavington Mount. Moreover, the claimant mentioned it in his presentation. Crucially, in my view, he raised it not in the context of the Brackenside turbine's capacity but because, in his view, it changed the balance against wind turbines. In his correspondence with the Council after the meeting his focus was on flaws in the WSP noise assessment, not the Renewable Energy guidance and the capacity issue. In other words, the turbine's capacity, and the resultant amount of electricity to be produced, was not central in the particular circumstances of this planning application.

IV CONCLUSION

74. In his submissions Mr Barber explained that he and his family wanted the wind turbine as one aspect of modernising their farm, and reducing its dependence on fossil fuels. He had relied on a noise specialist he trusted and believed that there was sufficient headroom for the Brackenside turbine. He expressed his frustration that his attempts to erect a wind turbine have been thwarted through no fault of his own. Mr Barber's frustration is understandable. However, for the reasons I have given I quash the planning permission.