Neutral Citation Number: [2018] EWHC 3388 (Admin)

Case No: CO/1769/2018

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/12/2018

Before

SIR ROSS CRANSTON
(sitting as a judge of the High Court)

- -

Between :

THE QUEEN (on the application of BENJAMIN CAMERON HOWELL)	**Claimant**
- and -	
WAVENEY DISTRICT COUNCIL	**Defendant**
(1) STAMFORD RENEWABLE POWER LTD **(2 & 3) SERGEI GRACHEV AND CELESTE BLOIS** **(4 & 5) GEOFFREY AND BRENDA MEEN**	**Interested Parties**

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Richard Harwood QC (instructed by **Harrison Grant**) for the **Claimant**
Jack Parker (instructed by **Waveney District Council**) for the **Defendant**
Jeremy Pike (instructed directly by public access) for the **First Interested Party**

Hearing dates: 27 November 2018

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Approved Judgment

Sir Ross Cranston:

INTRODUCTION

1. These judicial review proceedings challenge the decision of the Waveney District Council ("the Council") to approve the details under certain of the conditions imposed on a planning permission for a wind turbine. In outline, the claimant's case is that the Council wrongly discharged the conditions relating to aviation safety and archaeological work since they had been breached; that as a consequence of their breach the planning permission has expired; and that the Council also failed to comply with the publicity and consultation requirements relating to environmental matters. He applies for an order quashing the decision that the planning permission was capable of implementation; a declaration that the planning permission has expired; and an order quashing the approval of details under the conditions.

BACKGROUND

2. The claimant is the owner and occupier of Crake Hall, which is the nearest dwelling to the proposed turbine. The defendant is the local planning authority for the area. The first interested party in these proceedings is the developer, Stamford Renewable Power Limited ("Stamford"), whose sole director and shareholder is Mr Michael Stamford.

3. The second and third interested parties, Mr Sergey Grachev and Ms Celeste Blois, own and operate Church Farm Airstrip. This is a small airfield which is unlicensed but recognised by the Civil Aviation Authority. There is a helicopter school, and microlight and light aircraft fly from the strip. They support the present claim in respect of the aviation condition although they did not appear at the hearing. The fourth and fifth interested parties, Mr Geoffrey and Mrs Brenda Meen, own the land where the turbine is to stand. They also did not appear in these proceedings.

4. The developer applied for planning permission for a wind turbine in 2012 at Shipmeadow, near Beccles, Suffolk. This is near The Broads National Park. The wind turbine is to have an 80 metre hub height and its height to the blade tip will be 125 metres. There is also to be a 60 metre high wind mast and ancillary infrastructure. The application was opposed by The Broads Authority, ten town and parish councils and many local residents, including the claimant. The Council refused planning permission on visual, landscape and noise grounds. The developer appealed.

The inspector's decision and its aftermath

5. The planning inspector who heard the appeal granted planning permission in a decision dated 2 April 2014 ("the inspector's decision"). For the purposes of the relevant planning policies, he said, the potentially significant adverse effects of the development were adverse landscape effects, with some visual effects. There was also an adverse effect in some conditions on the convenient operation of flying activities at Church Farm Airstrip if safe flying practices were to be maintained. However, the inspector found significant renewable energy benefits from the turbine. Thus the overall planning balance came down in favour of the development.

6. Early on in his decision the inspector noted that the application was accompanied by an Environmental Statement which, he concluded, addressed the environmental impact of the proposal.

7. Following a lengthy consideration at paragraphs 35-106 of landscape character, visual impact and noise, the inspector addressed aviation. He outlined the Civil Aviation Authority's policy and guidelines on wind turbines and its advice, *Safe Operating Practices at Unlicensed Aerodromes*. He concluded that the presence of the turbine could create an increased risk of collision: paras 112-113. He noted that the airstrip did not have the benefit of either a planning permission or a certificate of lawful use, although there was the possibility that one could be obtained: para. 113. The inspector noted that the non-technical summary of the Environmental Statement acknowledged that the turbine would have a minor impact on flying activities: para. 114.

8. After summarising the views of the developer and the owners and operators of the airstrip at paragraphs 115-116, the inspector summed up aviation at paragraphs 117-118. The developer accepted that the turbine would affect flying activities but asserted that the effect would be minor; the latter considered that the effect would be greater and that although activities would not cease it would significantly constrain them.

9. In the inspector's view the turbine would be a safety-hazard, although its effects and their mitigation were disputed. The weight to be accorded to them was reduced, he continued, because the airstrip appeared to provide only for hobby activities and because of its planning status. The inspector summed up: "Nevertheless there is some evidence of potential harm to aviation safety which needs to be included in the planning balance." In introducing the conditions he stated that aviation conditions were required in the interests of safety.

10. Under the heading "other matters" the inspector stated that consideration had been given to all other matters raised in representations. He then addressed a variety of issues, but not archaeology. However, in introducing the conditions which he proposed on the permission, he had a sentence that an archaeology condition was required "as the appeal site may be of archaeological interest."

11. Condition 1 in the inspector's schedule of conditions is in standard form: the development shall begin not later than three years from the date of the decision.

12. Conditions 3 and 4 concern aviation. Condition 3 reads:

> "3. No development shall commence until at least 3 months after the applicant, or their agents or successors in title, has provided written confirmation of the following details to the Local Planning Authority:
>
> (a) Proposed date of commencement of the development
>
> (b) The maximum extension height of any construction equipment
>
> (c) The expected date of completion of construction
>
> (d)The height above ground level of the highest potential obstacle (anemometry mast or wind turbine)

(e) The position of that structure in latitude and longitude."

13. Condition 4 provides for aviation lighting for the turbine.

14. Archaeology is dealt with in conditions 6-8. Condition 6 states that no development is to take place within the development site until implementation of a programme of archaeological work has been secured, in accordance with a Written Scheme of Investigation submitted to and approved in writing by the Council. Condition 7 sets out what a scheme of investigation should include, for example methodology, post investigation analysis, archive deposition of the analysis, and "(g) the site investigation shall be completed prior to development, or in such other phased arrangement as agreed and approved in writing by the [Council]." Condition 8 adds that no development shall be commenced until the site investigation and post investigation assessment has been completed, submitted to and approved in writing by the Council, and provision made for analysis, publication and retention of the results.

15. The claimant challenged the inspector's decision under section 288 of the Town and Country Planning Act 1990, in particular with regard to the effect on the Broads. He was unsuccessful: *Howell v Secretary of State for Communities and Local Government* [2014] EWHC 3627 (Admin); [2015] EWCA Civ 1189. Despite the adverse impacts, the Court of Appeal held, the inspector had been entitled to conclude that the turbine would not fail to conserve and enhance the natural beauty of the Broads area. Permission to appeal to the Supreme Court was refused on 5 May 2016.

Application to discharge conditions

16. As a result of the legal proceedings the period within which the development had to begin was extended by a year, to 2nd April 2018: see Town and Country Planning Act 1990, s 91(3A), (3B).

17. On 26 January 2018 the developer sought the approval of pre-commencement details required by the conditions on the planning permission and the discharge of some sixteen conditions. In relation to conditions 3 and 4 concerning aviation, which it acknowledged as condition precedent, the developer explained that the Ministry of Defence had been consulted. In relation to condition 4 its low flying technical advisor had requested that the turbine have lighting meeting certain specifications, which the developer had accepted.

18. As regards conditions 6-8, concerning archaeology, also acknowledged as condition precedent, the developer stated that the consultants Suffolk Archaeology CIC (formerly the Field Team of Suffolk County Council) had been commissioned to carry out the monitoring and reporting tasks required when access and track works were scheduled to begin.

19. Attached was a Written Scheme of Investigation from them. It described how the archaeological work would involve what was described as "strip, map and excavate" and "continuous archaeological monitoring". It provided for an experienced field archaeologist to be constantly present when groundworks were carried out. Records would be made. Contractors would "allow time during and after their excavations for archaeological recording to be undertaken". A metal detector search of the site prior to and during evacuation would be undertaken at all stages.

The officer's report

20. An officer of the Council prepared a report in March 2018 for delegated decision-making, recommending that the application for discharge of some 16 conditions be approved.

21. On environmental matters, the report noted what the inspector had said about the Environment Statement ("ES"); stated that account had been taken of the ES submitted earlier and all other environmental information in connection with the appeal, including the written and oral evidence; concluded that the current application did not result in any material change in circumstances and had been entirely anticipated following the inspector's decision; and "considered that the ES submitted with the planning application…is adequate to assess the effects of this application…[and] has been taken into consideration in the determination of this application to discharge conditions." The report continued:

> "This application is a 'subsequent application' for the purposes of Regulation 2 of the Town and Country Planning (Environmental Impact Assessment) Regulations 2017. However, it is not considered that the application results in any material change in circumstances and the application was entirely anticipated following the Inspectors decision notice. It is considered that the ES submitted with the planning application DC/12/1332/FUL is adequate to assess the effects of this application on the environment and, pursuant to Regulation 9(2) of the 2017 EIA Regulations; that the ES submitted with the planning application DC/12/1332/FUL has been taken into consideration in the determination of this application to discharge conditions. As the environmental information is adequate to assess the significance of effects from the development on the environment it is not necessary to request further information in accordance with Regulation 25 of the 2017 EIA Regulations.".

22. The report dealt with the aviation issue by referring to what the Ministry of Defence had said, namely, that it had no objection to the discharge of conditions 3 and 4 although the details were submitted late. In other words, it was acceptable for development to commence less than three months after submission of the requisite details. These had already been sent to the relevant department so that the turbine could be charted appropriately. No significant harm to public safety would arise.

23. As to the archaeological conditions, the officer's report stated that the County Archaeologist had approved the Written Scheme of Investigation and recommended a partial discharge of the conditions, since the scheme contemplated strip, map and excavate, together with monitoring. Full discharge of the conditions was not possible until the full schedule of work had been completed.

24. The report went on to deal with the parties who had been consulted and to the many who had responded to the consultation. The Ministry of Defence had replied in the terms already indicated stating in particular that construction details had already been sent to the relevant department so the turbine could be charted appropriately. The report continued: "As such then should development commence prior to the three month period then no significant harm to public safety many then arise." The Civil Aviation Authority did not reply.

25. In summarising the responses, the report addressed issues such as those raised by the Parish Council regarding concerns about the Construction Management Scheme, access/exit via Clarke's Lane, and utility pipelines. In particular it took issue with the point raised by the claimant's solicitors about there been no publicity or public consultation as required for environmental impact assessment purposes. The report stated that this was not an application for planning permission. The only consultation with the discharge of conditions was with the relevant experts pursuant to the conditions.

Decision to discharge

26. On the basis of the officer's report the Council took the decision to discharge the 16 conditions on 21 March 2018. Conditions 3 and 4 were discharged. Conditions 6 and 7 were discharged on the basis of the Written Scheme of Investigation. Condition 8 was partially discharged. It could not be fully discharged until the final report had been completed and submitted to the Suffolk Historic Environment Record.

27. On 3 April 2018 Suffolk Archaeology produced an interim monitoring report carried out during the construction of an access route for the wind turbine. It found no significant archaeological assets. The only observed feature was a boundary ditch, which had been filled in in recent decades.

28. The claimant's solicitors sent a pre-action letter on 24 April 2018. Proceedings were issued on 2 May 2018. The defendant lodged an Acknowledgment of Service.

29. Then on 29 May 2018 the Council sent letters to local residents and statutory agencies, advertised locally and erected a site notice about the discharge application. The letter said the matter had been determined but that nevertheless the Council would still like to receive comments, but not from those who had commented previously. There were a number of responses, including from the second and third interested parties.

30. Permission to apply for judicial review was granted on the papers on 19 June 2018 by Mr John Howell QC, sitting as a Deputy High Court judge.

THE LEGAL FRAMEWORK

Planning conditions

31. In interpreting planning conditions there is only limited scope for the use of extrinsic material because of possible third parties interested in them. That compares with interpreting contacts where the shared knowledge of the parties enters the process of interpretation: *Trump International Golf Club Scotland Ltd v Scottish Ministers* [2015] UKSC 74; [2016] 1 WLR 85, [33], per Lord Hodge. The court asks itself what a reasonable reader would understand the words of a planning condition to mean in the context of the other conditions and of the planning consent as a whole. This is an objective exercise in which the court will have regard to the natural and ordinary meaning of the relevant words, the overall purpose of the consent, any other conditions which cast light on the purpose of the relevant words, and common sense: at [34].

32. If operations contravene the conditions to a planning permission, what has been termed the *Whitley* principle means that they cannot be properly described as commencing the development authorised by the permission. The operations constitute a breach of planning control if they do not comply with the permission and for planning purposes are unauthorised and unlawful: *Whitley & Sons Co Ltd v Secretary of State for Wales* (1992) 64 P & CR 296, 302 per Woolf LJ.

33. In *Bedford BC v Secretary of State for Communities and Local Government* [2008] EWHC 2304 (Admin); [2009] J.P.L. 604, Waksman J (as he now is) described this as stage 1 in considering the application of the *Whitley* principle, whether there has been a breach of condition. Stage 2 of the inquiry he characterised as whether the *Whitely* principle has been engaged. In that regard he referred to Sullivan J's judgment in *R (Hart Aggregates) v Hartlepool Borough Council* [2005] EWHC 840 (Admin); [2005] JPL 1602 and the extensive discussion stemming from it.

34. In *Hart Aggregates* Sullivan J had held that development in contravention of a planning condition did not render the development as a whole unlawful. That was a case towards one end of the spectrum where, under condition 10, prior permission had not been obtained for a restoration scheme where the mining operations had been going on for many years. Sullivan J said that the condition was a "condition precedent" in the sense that it required something to be done before extraction was commenced, but it was not a "condition precedent" in the sense that it went to the heart of the planning permission: [61].

35. Later in *Hart Aggregates* judgment Sullivan J stated that the statutory purpose was better served by drawing a distinction between those cases where there is only a permission in principle because no details whatsoever have been submitted (where common sense suggested that the planning permission has not been implemented at all), and those cases where the failure has been limited to a failure to obtain approval for one particular aspect of the development (where common sense suggested that the planning permission had been implemented but there has been a breach of condition which could be enforced against): [67].

36. Waksman J decided *Bedford BC v Secretary of State for Communities and Local Government* [2008] EWHC 2304 (Admin); [2009] J.P.L. 604 at his stage 2: he upheld an Inspector's view that details of landscaping and boundary treatment did not go to the heart of the permission and so the failure to obtain those approvals did not prevent implementation. However, I accept Mr Harwood's analysis that it is unclear from Sullivan J's judgment whether he was deciding the case on the basis of the irrationality exception to *Whitley* (what Waksman J characterised as stage 3, to which I turn shortly) or merely on the basis of a review as to whether the permission had been implemented.

37. Before the Court of Appeal in *Greyfort Properties Ltd v Secretary of State for Communities and Local Government* [2011] EWCA Civ 908; [2012] J.P.L. 39 the parties proceeded on the basis that *Hart Aggregates* was correctly decided, and that the substance of Sullivan J's observations on the *Whitley* principle was correct. Consequently the Court of Appeal proceeded on that basis for the purposes of the appeal. It held that a condition requiring the prior approval of the ground floor levels of the building was sufficiently important that the permission was not implemented in its absence.

38. In commenting on *Hart Aggregates*, Richards LJ emphasised its unusual facts. He accepted the good sense of what Sullivan J had said about the need to avoid an unduly rigid application of the *Whitley* principle where it would produce absurd results and run contrary to the underlying purpose or policy of the legislation: [19]. Richards LJ added that condition 10 in *Hart Aggregates* was rejected as a condition precedent engaging the *Whitley* principle not because it used one form of words rather than another: [32].

39. There is solid authority for the exceptions to the *Whitely* principle in what Waksman J called the third stage. Operations which on their face are in breach of condition are not treated as unlawful, and a breach of condition is excused for the purpose of the principle, if they cannot lawfully be the subject of enforcement action. The most common example in the jurisprudence is where enforcement would be irrational within the meaning of the *Wednesbury* principle or an abuse of power: see Ouseley J in *R (Hammerton) v London Underground* [2002] EWHC 2307 (Admin); [2003] J.P.L. 984, [125]-[129]; *R (on the application of Prokopp) v London Underground Ltd* [2003] EWCA Civ 961;[2004] Env. L.R. 8, [85].

40. In *Norris v First Secretary of State* [2006] EWCA Civ; [2007] 1 P. & C.R. 3 Laws LJ suggested that the reason why operations in breach of condition will not ordinarily suffice to commence development is that no one including a developer should be advantaged by their own unlawful act. "[A] breach of condition will not be treated as unlawful for this purpose if it would be irrational, or otherwise legally objectionable, to enforce against it. As it seems to me the true principle, therefore, is that *unlawful* operations cannot amount to the commencement of development": at [40] (emphasis in original).

Environmental impact assessment: consultation and publicity

41. Under the Environmental Assessment Directive 2011/92/EU (as amended by Directive 2014/52/EU) interested authorities and the public concerned must be informed of a request for development consent: Art 6(1)-(2). "Development consent" means the decision of the competent authority or authorities which entitles the developer to proceed with the project: Art 1(2). The public must be told of the arrangements for public participation, that an Environmental Impact Assessment is being carried out and given access to the information: Art 6(2)-(3). Article 6(4) provides:

> "The public concerned shall be given early and effective opportunities to participate in the environmental decision-making procedures referred to in Article 2(2) and shall, for that purpose, be entitled to express comments and opinions when all options are open to the competent authority or authorities before the decision on the request for development consent is taken."

It is up to Member States to determine how this is to be done: Art 6(5).

42. Regulations in the UK give effect to the Directive. There is no need to determine whether the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 or the earlier 2011 Regulations apply in this case since for present purposes they are not materially different. Under regulation 2 of the latter, an EIA (environmental impact assessment) application means an application for planning

permission for EIA development or a subsequent application in respect of EIA development. "EIA development" means development which is either Schedule 1 development or Schedule 2 development likely to have significant effects on the environment by virtue of factors such as its nature, size or location…"

43. A "subsequent application" is defined in regulation 2 to mean an application for approval of a matter "where the approval (a) is required by or under a condition to which a planning permission is subject; and (b) must be obtained before all or part of the development permitted by the planning permission may be begun": reg. 2(1).

44. Regulation 9 of the 2017 Regulations applies to subsequent applications where environmental information has previously been provided. It requires the original environmental statement and other environmental information to be taken into account if adequate or, if not, more information should be sought. Regulation 18(1) provides that subject to regulation 9, an EIA application must be accompanied by an environmental statement. Under regulation 18(2) a subsequent application "is to be taken to be accompanied by an environmental statement" where the original planning application was also accompanied by such a statement, but again subject to regulation 9.

45. Regulation 19 is headed "Procedure where an environmental statement is submitted to a local planning authority." Regulation 19 (1) states that where an application for planning permission or a subsequent application has been made without an environmental statement, and the applicant proposes to submit such a statement, the applicant must, before submitting it, comply with paragraphs (2) to (5). Regulation 19(5) provides:

> "(5) Where an applicant submits an environmental statement to the relevant planning authority under paragraph (1), the provisions of articles 15 and 16 of, and Schedule 3 to, the [Town and Country Planning (Development Management Procedure) (England) Order 2015] (publicity for applications for planning permission) apply to a subsequent application as they apply to an application for planning permission except that in the relevant requisite notice in Schedule 3 to the Order for the reference to (i) "application for planning permission" there is substituted "application for subsequent consent"; and (ii) "planning permission to" there is substituted "subsequent application in respect of"."

46. The Town and Country Planning (Development Management Procedure) (England) Order 2015 ("the 2015 Order") sets out the procedures for publicity and consultation in relation to planning applications. That includes publication in a local newspaper and the display of a site notice, along with consultation of bodies such as Natural England, the Environment Agency and in this case the Broads Authority.

GROUND 1: AVIATION

47. It is common ground that submission of the aviation details on 26 January 2018 was late and not in accordance with condition 3. The last day for starting development before the permission expired was 2 April 2018, so that the latest date for submitting the details was 2 January 2018. There was consequently a breach of condition.

48. As advanced by Mr Harwood QC, the claimant's case on this ground was that the breach of condition 3 meant that it was not possible lawfully to commence development within the remaining time. Albeit that the condition did not require the Council to approve the details submitted, given the breach the Council's decision to discharge the condition was unlawful and should be quashed. The Council's view that the permission could be implemented notwithstanding the failure to comply was unlawful and should also be quashed.

49. Mr Harwood highlighted the witness statements of Mr Grachev and Ms Blois explaining that the wind turbine was within the flying circuit for the airstrip. Three months' notice before the commencement of development was necessary so that warnings can be given to aircraft well in advance of the construction risks arising, including by amending the National Air Traffic Services' and other directories, as well as flight planning software. Giving notice to the Ministry of Defence and its approval did not resolve the safety issues for the airstrip.

50. This was not a trivial breach, Mr Harwood submitted, since air safety was a very important requirement as the inspector had acknowledged. It would not be irrational for the Council to enforce against the commencement of development since this went to whether the development could be started safely. The permission was incapable of implementation due to the condition 3 failure, and there was no basis for approving the remainder of the details.

51. In my view one needs to approach the breach of condition 3 with a dose of reality. The Council was not required to approve the details; they needed to be submitted so that notice could be given of tall structures on the site. In fact the height of the turbine and its location have been known for some considerable time as a result of the inspector's decision. When the details were submitted on 26 January 2018, the Ministry of Defence responded that they had sent the construction details to the relevant department so the turbine could be charted. In its view it was acceptable for development to commence notwithstanding the details were late. Further, the safety objective of notifying users separately from the charts could be achieved by providing the details three months prior to tall structures being erected. The reality is that following work on the access road we are ten months on and there are as yet no tall structures on the site.

52. In these circumstances condition 3 is not a condition precedent going to the heart of the permission, as Sullivan J would characterise it, and the failure to comply with it did not mean that the entire development was to be regarded as unlawful: *Hart Aggregates v Hartlepool Borough Council* [2005] EWHC 840 (Admin); [2005] JPL 1602. In any event, consistently with the analysis of Ouseley J in *R (Hammerton) v London Underground* [2002] EWHC 2307 (Admin); [2003] J.P.L. 984, it would be irrational and an abuse of power for the Council to enforce against the developer for the late submission of the details. The late submission of the details has been remedied by the time which has now passed.

53. The upshot is that the judgement of the Council to discharge the condition does not attract any public law remedy. Notwithstanding the late lodging of details required by Condition 3, what has been done was effective to implement the permission which had not expired. The development was lawfully commenced; the breach did not render it unlawful.

GROUND 2: ARCHAEOLOGY

54. Mr Harwood's case on this ground was that the conditions required that a site investigation had to be completed prior to development or in such other phased arrangement as agreed, and approved in writing by the Council. Further, the development could not be commenced until the site investigation and post investigation assessment has been completed, submitted and approved in accordance with the scheme. These conditions could not be read as identifying a phased scheme. The Written Scheme of Investigation did not involve any archaeological works being carried out prior to the commencement of the development.

55. By reference to the standards and guidelines of the Chartered Institute of Archaeologists Mr Harwood contended that what had been submitted were not archaeological excavations in advance of development but a "watching brief". That might be appropriate in circumstances where the potential archaeological interest was not significant, but the conditions the inspector imposed established that was not this case. Thus the Written Scheme of Investigation was outwith the conditions. This was a serious breach and the harm caused was irreparable. The archaeology approval should be quashed and the court should rule that the planning permission was incapable of implementation.

56. In considering Mr Harwood's submissions it is as well to start with the reality that archaeology barely rated before the inspector. There is no mention of it in his report although he stated that he had addressed all matters raised before him. It is only when considering the conditions to be imposed on the planning permission that he said that an archaeological condition was justified since the appeal site "may" be of archaeological interest.

57. Reading condition 7(g) in light of Lord Hodge's judgment in *Trump International Golf Club Scotland Ltd v Scottish Ministers* [2015] UKSC 74; [2016] 1 WLR 85, [33], it seems to me that "a phased arrangement as agreed and approved" by the Council could encompass the Written Statement of Investigation with its archaeological investigation accompanying the development. This was more than a watching brief given the details of what the statement proposed for archaeological investigation, as described earlier in the judgment.

58. That is not the end of the story: first, the officer's report recounts that the Written Statement of Investigation had been approved by the County Archaeologist, in other words the person with the relevant expertise had decided that investigative works prior to the erection of the wind turbine were unnecessary and that continuous monitoring was acceptable; secondly, Suffolk Archaeology's report of April 2018 found that there were no significant archaeological features during what were the operations for the access route (apart from the filled-in boundary ditch); and thirdly, there is nothing to suggest that if further archaeological work was undertaken more features would emerge.

59. Against that background, if my interpretation of the archaeological conditions is incorrect and there was a breach, the same analysis and conclusions flow as with condition 3: this does not go to the heart of the planning permission and the entire development is not to be regarded as unlawful; it would be irrational and an abuse of power for the Council to take enforcement action, not least against the background of

the County Archaeologist's view that the Written Statement of Investigation was sufficient to safeguard archaeological features; further, the claimant has not demonstrated prejudice, in particular that the archaeological work required by statement will not safeguard archaeological features.

GROUND 3: ENVIRONMENTAL PUBLICITY AND CONSULTATION

60. The Council had concluded that applications for the approval of the details required by the planning conditions were subsequent applications under the Environmental Impact Assessment Regulations. Mr Harwood's submission in relation to this ground was that in light of the Directive, in particular Article 6, that conclusion meant that under regulation 19(5) the publicity and consultation requirements of the 2015 Order applied. However, the Council had not publicised the discharge application in accordance with the Order, and its consultation on it was more limited than required.

61. Mr Harwood (echoing local residents) was especially critical of what happened in late May. That was a consultation after the decision had been taken and clearly could not be taken into account in the decision-making; the notices were inconsistent and to some extent incomprehensible; and there was no power for the Council to reconsider the decision. Yet as he underlined there were many responses and concerns were raised about the utility pipelines, access to the site and the access works and the Construction Method Statement. As well this was when Mr Grachev and Mrs Blois had raised their objections. Mr Harwood submitted that in a proper consultation more representations might have been made in support of Mr Howell's case.

62. In my view this ground goes nowhere. I accept the background sketched out by Mr Pike: there was nothing in the application to discharge the conditions which suggested that the proposed development was materially different to the development for which planning permission had been granted. Therefore there was no reason to conclude that when carried out it would be likely to give rise to significant environmental effects which were different to those assessed in the original ES. The inspector had considered that adequate when he granted planning permission.

63. First, I doubt there has been a breach of the Environmental Impact Assessment Regulations. These are not straightforward as regards subsequent applications. However, regulation 19(5) applies the publicity requirements of the Order only where an applicant submits an Environmental Statement in accordance with regulation 19(1). Applying regulation 9 the officer's report had taken the view that although this was a subsequent application in terms of the regulations the environmental information previously provided was adequate and there was no need for anything further. The requirements to take further steps in regulation 18 are subject to regulation 9. Since regulation 19(1) did not apply, and there was no Environmental Statement submitted, there were no further publicity requirements.

64. Even if there has been a breach of the Environmental Impact Assessment Regulations, this is a case where relief should be refused as a matter of discretion or under section 31(2A) of the Senior Courts Act 1981: *Walton v Scottish Ministers* [2012] UKSC 44, [2013] PTSR 51; *R (Champion) v North Norfolk DC* [2015] UKSC 52 [2015], 1 W.L.R. 3710, [54]-[62]; *R (Goring Parish Council) v South Oxfordshire DC* [2016] EWHC 2898 (Admin), [74]; [2018] EWCA Civ 860, [2018] 1 W.L.R. 5161, [55]; *R*

(on the application of Surringer) v Vale of Glamorgan Council [2016] EWHC 494 (Admin); [2016] Env. L.R. 25, [78], [80].

65. That is because the claimant and others opposed to the development have not identified any substantial prejudice by breach of the publicity provisions, and it is highly likely that the outcome would not have been substantially different if there had been compliance. They have been fully engaged with the planning process throughout; they have made detailed representations both before the inspector and during the consultation to discharge the conditions; and they have not identified any likely significant environmental effects which might arise from the details submitted to discharge the conditions.

66. Moreover, this matter has been going on for years and the development has attracted determined opposition. I cannot accept that any further points about the environmental effects of the turbine would have emerged from publicity and consultation in accordance with the regulations. That conclusion is reinforced by the many further representations received as a result of the publicity the Council engaged in on 29 May 2018. The particular concerns Mr Harwood highlighted about the Construction Management Scheme, access/exit via Clarke's Lane, and utility pipelines – assuming they are environmental concerns - had already been addressed in the officer's report. As for the response of Mr Grachev and Mrs Blois, that did not address environmental concerns; their issue was about the impact on flying operations at the airport. In the result the no difference provision applies.

CONCLUSION

67. For the reasons I have given, I dismiss this application for judicial review.