Judgments

Howell v Secretary Of State For Communities And Local Government And Others

*Town and country planning – Permission for development – Wind turbine – Inspector appointed by first defendant **Secretary** of State granting planning permission for erection of wind turbine – Claimant challenging decision – Application being refused – Whether inspector misinterpreting statutory duty – Whether inspector misapplying planning policies – Whether inspector failing to have regard to material consideration – Whether noise condition being sufficient – Norfolk and Suffolk Broads Act 1988, s 17A.*

[2015] EWCA Civ 1189, (Transcript; WordWave International Limited Trading as DTI)

RICHARDS, BRIGGS LJ, KEEN

22 OCTOBER, 19 NOVEMBER 201519 NOVEMBER 2015,

R Harwood QC for the Appellant

R Honey for the First Respondent

J Pike for the Third Respondent

Government Legal Department, Mike Stamford on a Direct Access Basis

KEENE:

INTRODUCTION

[1] This appeal raises some interesting questions of planning law, particularly in respect of the interpretation of planning policy documents and of the statutory duty under s 17A of the Norfolk and Suffolk Broads Act 1988 ("the 1988 Act"). That section provides that:

> "(1) In exercising or performing any function in relation to, or so as to affect, land in the Broads, a relevant authority shall have regard to the purposes of–
>
> (a) conserving and enhancing the natural beauty of the Broads;
>
> (b) promoting the enjoyment of the Broads by the public; and
>
> (c) …"

Subsection (2) makes it clear that both the **Secretary** of State and local planning authorities are subject to that duty as a "relevant authority".

[2] It was the 1988 Act which set up the Broads Authority to manage the area defined as the Broads for certain specified purposes, including those purposes set out in s 17A(1). The Broads Authority is required by s 2(4) of the 1988 Act to have regard to "the national importance of the Broads as an area of natural beauty". What is meant by "the Broads" is defined by a deposited map, which shows the designated area.

[3] This appeal concerns a site which is not in the Broads as such, but which is located about 750 to 800 metres from the southern boundary of that part of the Broads formed by the Waveney valley and immediately adjoining land. That southern boundary is formed by a class B road.

[4] Stamford Renewables Limited ("the developer") sought planning permission for the erection of a single wind turbine of up to 2MW rated output capacity, together with a 60m high wind mast and ancillary infrastructure. The turbine would have a hub height of 80m. Permission was refused by the local planning authority but granted on appeal, after a six day inquiry, by an inspector appointed by the **Secretary** of State.

[5] The present appellant, Mr **Howell**, is with his wife the owner and occupier of Crake Hall, which is 500 metres from, and the nearest dwelling to, the proposed turbine. Crake Hall too is outside the designated area of the Broads. Mr **Howell** is a supporter of a local action group, HALT, which opposed the proposed development, and he participated in the public inquiry. He challenged the inspector's grant of planning permission by bringing a claim under s 288 of the Town and Country Planning Act 1990 on the basis that the decision was unlawful. His application was refused by Cranston J in a judgment dated 7 November 2014: [2014] EWHC 3627 (Admin). It is from that judgment that Mr **Howell** now appeals.

THE INSPECTOR'S DECISION

[6] Not all the matters raised before the judge below are now pursued on appeal, and it is unnecessary to set out the facts in as much detail as did Cranston J. His judgment forms a valuable account of the detailed facts, and that will enable me to take them more briefly.

[7] The issues now raised relate to the inspector's approach to the statutory duty under s 17A of the 1988 Act; his approach to the interpretation of development plan policies and national policies; his assessment of the benefits of the proposed wind turbine; and the way in which he dealt with the possible noise impact of the turbine. He had concluded on these issues that the proposed turbine would not harm the natural beauty of

the designated Broads landscape or conflict with the purposes of designation, and that, although there would be certain adverse effects upon the landscape more generally, they were not significant in policy terms. He found that there were significant benefits in the increase in the amount of renewable energy which would result from the turbine. The predicted noise level at Crake Hall would reach but not exceed the recommended limits for a noise-sensitive property. The inspector, when granting permission, imposed a condition agreed between the developer and the local planning authority, a condition containing noise limits which could, said the inspector, be enforced by the authority.

[8] Subject to that and other conditions, the inspector allowed the appeal and granted planning permission.

THE 1988 ACT ISSUE

[9] It is not contended by the appellant that the inspector failed to have regard to the statutory purposes under s 17A of the 1988 Act, set out in the opening paragraph of this judgment. That argument could never succeed, since the inspector specifically refers to that duty in his decision, especially at paras 80 and 81. He concluded in express terms that the proposal would not fail to conserve the natural beauty of the Broads.

[10] The appellant's case is that such a conclusion was not open to the inspector, given the other findings that he had made. At this point, it becomes necessary to set out in more detail what those findings were.

[11] Both the Broads Authority and Waveney District Council had done Landscape Character Assessments for their respective areas. Such assessments are recommended by Natural England, and make use of guidelines produced by the Landscape Institute and the Institute for Environmental Assessment. The appeal site itself falls within the Council's Area H4, “Mid-Waveney Tributary Valley farmland”, described as having a rolling landform, with arable cultivation, patches of woodland and field boundary vegetation, small settlements, and generally rural and tranquil. The northern boundary of this area H4 abuts the southern boundary of the Broads designated area along much of its length.

[12] The designated area of the Broads is unsurprisingly very irregular in shape. That part of it which could potentially be affected by the proposed turbine is essentially the valley of the River Waveney and runs generally east-west following the course of the river. The inspector referred to the valley as providing a sense of enclosure. The Landscape Character Assessment done by the Broads Authority divided the land for which it was responsible into a number of areas, each given a Landscape Character Assessment number (“LCA”). The southernmost part of the designated area closest to the appeal site was described as LCA 0; somewhat further away are areas LCA 2 and LCA 3.

[13] The inspector described LCA 0 at para 43 of his decision letter:

> “The immediately adjoining land to the north of H4 is gently sloping arable land along the valley sides and is that land described as Area LCA0 within the Broads LCA (2006) (CD5.12) (updated in 2012). Paragraph 5.47 of the Guidelines to Landscape and Visual Impact Assessment 3rd Ed. (GLVIA3) confirms that boundaries of nationally designated landscapes are often defined to follow convenient physical features (in this case the B road) and as a result there may be land inside the boundary that does not meet the designation criteria. That is relevant when assessing specific development proposals and their effects. In this case the Broads LCA concluded that the LCA0 land is not of Broads character and did not further assess it but referred instead to the character assessment of similar adjoining landscape in the Waveney LCA; in this case that is the H4 area.”

The H4 area is, of course, not land designated as part of the Broads. The inspector later noted that a landscape sensitivity study carried out for the Broads Authority and the Council effectively treated the LCA 0 land as being of similar character to the H4 area: para 49.

[14] Of areas LCA 2 and LCA 3, the inspector said this:

> "The Waveney valley floor floodplain at below about 3m AOD does have a distinctive Broads character as upper river valley marshlands. Those areas of Broads character closest to the appeal site are defined as LCA2 (which includes the Geldeston and Shipmeadow marshes and the valley floor to the west) and LCA3 (which includes the Barsham and Gillingham and Marhes to the north west of Beccles). The proposed turbine would be about 1km from the nearest edge of LCA2. It would be about 1.2km from the nearest edge of LCA3."

[15] At para 47, he made some further relevant comments:

> "The H4 land forms a backdrop to views out of the valley from LCA2 or LCA3. In those views the frequent patches of woodland within H4 merge to create the appearance of an almost continually wooded valley crest. The appeal site is located on high ground at the southern edge of the H4 area beyond and to the south of that apparently wooded crest. Whereas the existing land around the appeal site would consequently not be seen from the main valley floor, the turbine's height would make it visible above the trees. It would be taller than the nearby pylons that already similarly break the skyline."

[16] The inspector made certain findings about the effect that the turbine would have on views into and out of the designated area. Of views into the Broads area, he said this at para 64:

> "Owing to the landform and vegetation, views into the Broads area are rarely available in the near vicinity of the appeal site or to its south, whether as framed views or otherwise. The turbine would thus be unlikely to intrude into the foreground of any such views and none have been emphasised in the evidence".

[17] However, he found that views out of certain parts of the Broads area would be affected where the turbine was not screened by trees or vegetation close to the viewer. Within about 1km the turbine would be a dominant landscape feature where not screened by trees near the viewer. That would extend to the LCA 0 land. So far as views from LCA 2 and LCA 3 were concerned, he found that the main change would be the appearance of an addition to the largely undeveloped skyline outside the designated area from places where vegetation did not restrict the views (paras 64 – 66).

[18] In seeking to perform his duty under s 17A to have regard to the purpose of conserving and enhancing the natural beauty of the Broads, the inspector first made the obvious but relevant point that the appeal site was not within the designated area and so would not directly affect the natural beauty of the Broads landscape. Moreover, the turbine would not reduce the sense of enclosure in the Waveney valley. He went on to note that:

> "All the key characteristics of the Broads landscape would remain visible and the turbine's dominance of its immediate surroundings would not extend as far as those areas defined as of Broads character. It would be a new feature on the horizon seen against a small part of the wide sky but would not fail to conserve the natural beauty of the Broads." (para 80).

[19] In the next paragraph he accepted that the s 17A duty related to all parts of the Broads designated area:

> "The S17A duty clearly applies to all the designated land and its constituent parts and it should not be necessary to demonstrate some effect on the whole Broads area. However it is relevant here that the small LCA0 part of the designated area closest to the turbine is not defined in the Broads LCA as of Broads character and that the landscape character perceived within that area is akin to that of the adjoining non-designated landscape. Thus any changes seen within or from that landscape would have less effect on perceptions of the Broads than would changes seen within or from areas of Broads character that include LCA2 and LCA3."

[20] Thus he reached his conclusion that the natural beauty of the Broads would not be harmed. The process by which he reached that conclusion is now challenged by the appellant.

[21] The first point which is made is that the inspector was wrong to distinguish between parts of the designated Broads area which were of Broads character and those, such as LCA 0, which were not. Mr Harwood QC for the appellant emphasises that the statutory purpose of designation applies to all the land within the designated area and consequently, if the natural beauty of LCA 0 were harmed, there would be a failure to conserve the natural beauty of the Broads. The natural beauty of area LCA 0 is protected by its inclusion within the designated area. It is argued that the inspector downgraded the importance of the impact on area LCA 0 by focusing on those parts of the designated area which have a Broads character. He failed to ask whether the natural beauty of LCA 0 would be conserved. Given his finding that there would be significant adverse effects on landscape within 1km, there could only have been one answer to that question.

[22] The other argument advanced on behalf of the appellant is that s 17A creates a presumption in favour of achieving the statutory purpose and against harm to it. Mr Harwood contends that the s 17A duty to have regard to the purpose of conserving the natural beauty of the Broads recognises the desirability of achieving that purpose. That amounts to a presumption of the kind suggested.

[23] I do not find either of these arguments persuasive. I accept that area LCA 0, falling as it does within the designated area, comes within the scope of s 17A, but the inspector recognised that in para 81 of his decision, when he stated that the duty "clearly applies to all the designated land and its constituent parts". He cannot be said to have overlooked the impact on area LCA 0. What he found was that the views from it to land outside the designated area would be affected to a significant degree, save where intervening vegetation existed. He then had to decide whether that would, in his judgment, harm the natural beauty of the Broads, and in that connection he took into account national policy guidance set out in the National Policy Statement for Energy that:

> "[t]he fact that a proposed project will be visible from within a designated area should not in itself be a reason for refusing consent." (see para 27 of decision letter).

[24] A project on undesignated land may, of course, have such damaging effects on the natural beauty of the designated area that it conflicts with the statutory purpose. But that is a matter of fact and degree, *par excellence* a matter of planning judgment, aided by a site inspection. It is far from automatic: not every piece of development outside a designated area but visible from somewhere within it will harm the natural beauty of that area simply because it is visible from that location.

[25] In that latter connection, it is proper for the decision-maker to consider what contribution to the natural beauty of the designated area is made by the part from which some views would be obtainable. The description of area LCA 0 as being "not of Broads character" was derived from the Broads Authority's own landscape character assessment, as Cranston J noted at [40] of his judgment. Area LCA 0 was seen by the Au-

thority as having the character of the neighbouring undesignated area, and it would seem from the material referred to by the inspector as having been included in the designated area principally so as to achieve a clear boundary formed by the B class road. That does not remove the statutory duty in respect of area LCA 0, but it is of relevance when judging whether that area has such a degree of sensitivity that the Broads' natural beauty would be materially harmed by a new visible feature located beyond the designated area. The inspector concluded that it would not and that was a matter of planning judgment which cannot be characterised as irrational.

[26] As Cranston J said at [48] of his judgment, when considering the purpose of conserving and enhancing the natural beauty of the Broads:

> "[i]t is relevant to consider the extent to which the land affected exhibits the characteristics of the Broads landscape, since those characteristics are what create 'the natural beauty…of the Broads'."

That is a realistic approach to the application of s 17A. In any event, even if it were to be argued that the inspector's comments about the character of LCA 0 (derived from the Broads Authority's own assessment) went more to the weight to be attached to the visual impact on that area than to whether there was complete compliance with the statutory purpose, that would not in the present context mean that he erred in law in the way in which he expressed himself. It is well-established that inspectors' decision letters must be read without excessive legalism and without the kind of scrutiny appropriate to the construction of a statute or contract: *Clarke Homes v* ***Secretary*** *of State for the Environment* (1993) 66 P & CR 263, 272; *Seddon v* ***Secretary*** *of State for the Environment* (1981) 42 P & CR 26, 28. It is also clear that, if he had found that there was, strictly speaking, a conflict with the statutory purpose in respect of views from LCA 0, he would have attached little weight to that factor because of his findings as to the role of area LCA 0 within the designated area. His ultimate decision could not have been affected.

[27] The concept of a statutory presumption urged on us by Mr Harwood seems to me to be a wholly unnecessary gloss on the statute. The wording of s 17A is perfectly clear: the decision-maker, like any other public body exercising functions which affect land within the Broads, must have regard to the statutory purposes. The language of presumptions complicates the position quite unnecessarily. In any event, given the inspector's conclusion that the natural beauty of the Broads would not be harmed by the proposal, no such presumption could arise in the present case even if that were to be seen as the proper approach. For my part, therefore, I would reject the appellant's case on this first issue.

THE PLANNING POLICIES ISSUE

[28] There were three development plan policies identified by the inspector as relevant to the proposed development. The first in time was in the District Council's Core Strategy, adopted in January 2009. That was policy CS 16, which stated that the Council would work with various bodies:

> "to protect and enhance the natural and historic environment in the District."

It continued:

> "In addition, proposals should conserve and contribute towards the enhancement of the landscape character, biodiversity and geodiversity of the District, including … the visual setting of the Norfolk and Suffolk Broads."

[29] The subsequent Development Management Policies (2011) contained the other two relevant local policies. Policy DM 03 was headed “Low Carbon and Renewable Energy”. Insofar as relevant for present purposes, it read as follows:

> “Proposals for stand alone energy generation and other CO2 reductions will generally be supported. The District is seeking new renewable energy generation capacity to deliver an appropriate contribution towards the UK Government's binding renewable energy target. Therefore targets for Waveney District include:
>
> ● Approximately 30% electricity from renewable sources by 2021
>
> ● Approximately 12% heat from renewable sources by 2021.
>
> Renewable energy schemes will be permitted where:
>
> ● There are no significant adverse effects or cumulative adverse effects upon the landscape, townscape and historic features;
>
> ● There are no significant adverse effects on the amenities of nearby residents by way of noise, dust, odour or increases in traffic; and
>
> ● The wider environmental, economic, social and community benefits directly related to the scheme outweigh any potentially significant adverse effects.”

[30] Finally, policy DM 27, entitled “Protection of Landscape Character”, stated that:

> “Proposals for development should be informed by, and be sympathetic to, the distinctive character areas, strategic objectives and considerations identified in the Waveney District Landscape Character Assessment.
>
> Development proposals should demonstrate that their location, scale, design and materials will protect and where possible, enhance the special qualities and local distinctiveness of the area.
>
> Proposals that have an adverse effect will not be permitted unless it can be demonstrated that they cannot be located on alternative sites that would cause less harm and the benefits of the development clearly outweigh any adverse impacts.
>
> Development affecting the Broads Area and the Suffolk Coast and Heaths Area of Outstanding Natural Beauty and their settings, Rural River Valley and Tributary Valley Farmland areas will not be permitted unless it can be demonstrated there is an overriding national need for development and no alternative site can be found.”

[31] It will be seen at once that the wording of these three policies is not always easy to reconcile. In seeking to apply them, the inspector noted that the National Planning Policy Framework (“NPPF”) advised that the closer the policies in a local plan were to the policies in the NPPF, the greater the weight that might be given to them. He also observed that policy CS 16 was not fully consistent with the more specific policy and directly relevant policy tests set out for renewable energy in the more recent policy DM 03, which also included provision for the balancing of harm with any benefits of development (para 11). He interpreted policy

DM 03 to mean that proposals would be permitted where the effects were not significantly adverse, which was not consistent with DM 27 (para 16).

[32] Of the latter, the inspector noted at paras 18 and 19 that its wording would create a "sequential test" in its reference to alternative sites, which was not consistent with national planning policies and which, if applied to wind energy proposals, would be impractical to apply. He concluded that the DM 27 sequential test conflicted with the NPPF and with the specific tests for large scale renewable energy infrastructure set out in policy DM 03. As a result, he attached little weight to the DM 27 sequential test, but full weight to that part of it which dealt with the effects of development on landscape character areas. In his final conclusions he saw policy DM 03 and the first part of DM 27 as being the most relevant development plan policies. He found that the development proposal complied with those policies, which he described as being broadly consistent with national policy. He gave that compliance greater weight than what he called "the other more general development plan policies", which term he no doubt saw as embracing policy CS 16 (paras 18 – 20, 135 and 137).

[33] The appellant contends that that approach was wrong. It is argued first that the inspector was in effect setting aside a core strategy policy (CS 16) because of a "lower order" development plan policy, DM 03. Mr Harwood argues that there cannot be any inconsistency between those two policies, because regulation 13(6) of the Town and Country Planning (Local Development) (England) Regulations 2004 requires policies such as DM 03 to be in conformity with the policies in a core strategy. The Development Management Policies, including DM 03, had been adopted by the Council and so must be seen as consistent with such policies as CS 16.

[34] This is an ingenious argument, but an unreal one. First of all, it is recognised by statute that conflicts between policies in the development plan documents may sometimes arise. As Mr Honey on behalf of the **Secretary** of State pointed out, s 38(5) of the Planning and Compulsory Purchase Act 2004 ("the 2004 Act") envisages such a conflict, since it provides:

> "If to any extent a policy contained in a development plan for an area conflicts with another policy in the development plan, the conflict must be resolved in favour of the policy which is contained in the last document to be adopted, approved or published (as the case may be)."

Secondly, the inspector was entitled to take the view that policies CS 16 and DM 03 were not, in his words, "fully consistent" with each other: para 11. The former, a general policy applicable to all development, required proposals to conserve and contribute towards the enhancement of the landscape character of the District, including the visual setting of the Broads, without any provision for the benefits of a proposal to be able to outweigh a failure so to do. Policy DM 03 by contrast, when dealing with renewable energy projects, generally supported such projects and permitted them when there were no significant adverse effects upon the landscape. It also provided for the benefits of such projects to be capable of outweighing any significantly adverse effects. It is not realistic to contend that there is not a tension between these two policies when applied to the case of a proposed wind turbine. The inspector saw that there was such a tension.

[35] There is clear authority that in such situations it is for the decision-maker to determine which policy should be given greater weight. As this court said in *R (TW Logistics Ltd) v Tendring District Council* [2013] EWCA Civ 9:

> "In a case in which different parts of the local plan point in different directions, it is for the planning authority to decide which policy should be given greater weight in relation to a particular decision." ([18]).

Those words apply with equal force to a planning inspector deciding an appeal. They accord with the approach taken by the House of Lords in *City of Edinburgh Council v **Secretary** of State for Scotland* [1997] 1

WLR 1447 and by Lindblom J in *Lark Energy v* ***Secretary*** *of State for Communities and Local Government* [2014] EWHC 2006 (Admin). They apply likewise to any perceived conflict between policies DM 03 and DM 27, a matter to which I shall come.

[36] The inspector here undoubtedly saw policy DM 03 as a more specific policy than CS 16, in that it dealt with precisely the type of development with which he was concerned. CS 16 was a general policy, DM 03 a more focused policy. He clearly explained the reasons why he saw DM 03 as the more relevant. At para 11 of his decision letter he emphasised that it was more specific, more recent and also made provision for a balancing exercise as between harm and benefits. That was an entirely rational basis for his preference.

[37] The next argument advanced by the appellant concerns the inspector's approach to policy DM 27. This is the landscape protection policy, part of which required development proposals (of any kind) to be refused if they affected the Broads and their setting unless it could be demonstrated that no alternative site could be found. This is what the inspector described as the sequential test, which he found was not consistent with the NPPF or DM 03 and which he saw as impractical if applied to wind energy proposals.

[38] Mr Harwood does not seek to challenge the finding that DM 27 was inconsistent with national policy as set out in the NPPF. Yet at the same time he emphasises that DM 27 had been adopted as part of the development plan, and by virtue of the 2004 Act it must have been found by the inspector who conducted the examination of the plan to be consistent with national policy. Reliance is placed on s 19(2) of that Act, by which the local planning authority in preparing a development plan must “have regard to” (inter alia) national policies, and on s 20(5), which specifies that as one of the purposes of the examination of the plan. Consequently it is argued that the inspector on this appeal could not properly give little weight to the sequential test as being inconsistent with national policy on renewable energy.

[39] I disagree. First, there is no doubt, as the inspector noted, that the NPPF is generally supportive of renewable energy proposals and states that even small scale projects can make a valuable contribution to cutting greenhouse gas emissions. Secondly, the sections of the 2004 Act relied on by Mr Harwood only require “regard” to be had to national policies. That leaves scope for some divergence from national policies. Thirdly, that is recognised by the NPPF itself in para 215, which is the passage referred to by the inspector (see [31] of this judgment). It states that the closer the policies in a local plan are to those in the NPPF, the greater the weight that might be given to them.

[40] There was undoubtedly some tension or conflict between the terms of DM 03 and DM 27. The inspector had to decide as to how he should deal with that. He had before him evidence that the local planning authority regarded policy DM 03 as the most relevant policy. He gave a rational explanation for his decision, which was to the same effect. I can see no basis on which that decision can now be regarded as unlawful or in any way illegitimate in public law terms. I would reject the appellant's case on this second issue.

THE BENEFITS OF THE PROJECT ISSUE

[41] In dealing with this issue and with that of the noise condition imposed by the inspector, the appellant advances as a preliminary a contention that the permission ultimately granted was not merely for a wind turbine with an 80m hub height, a rated output capacity of up to 2MW and all the other characteristics described in the decision letter, but was in addition limited to a particular type of turbine, namely a Vestas V90. This is based upon condition 5 of the permission, which requires the turbine to be completed strictly in accordance with the submitted plans and details. One of those plans has in the “legend” box a reference to a Vestas V90, and the elevation drawing also contains a proprietary notice, confirming that the turbine shown is a Vestas model.

[42] Cranston J rejected this interpretation of the permission, and there is no ground of appeal which seeks to challenge that finding. Mr Harwood nonetheless argues that it is relevant to decide the point in order to deal with the energy benefits issue and the noise issue. I do not accept that. As I shall say in due course, the inspector dealt with the energy output of the proposal on the basis of an estimated range of likely electricity to be generated, which was well below the rated capacity of a Vestas V90 turbine, and the rated energy capacity of the permitted turbine was in any case capped at 2MW. Nor was the noise condition imposed one which could only apply to a Vestas V90 turbine. It was a complicated noise measurement condition, unrelated to any particular model of turbine. It is therefore unnecessary to determine this interpretation point, which in any event not the subject of the appeal. I would only add that I see force in the reasoning of the judge: nothing in the decision letter indicates that this planning inquiry focused upon a particular manufacturer's model.

[43] I turn to the benefits issue itself. The appellant submits that, when considering the energy benefits which the turbine would produce, and then going on to weigh those against the harmful effects, the inspector ignored the likely output of the turbine and instead wrongly had regard only to the rated output, the capacity of up to 2MW of electricity. This was a failure to have regard to a material consideration.

[44] This argument is based on the brief discussion by the inspector of the benefits of the proposal, during which he refers to the rated capacity and does not discuss the likely output. Superficially one can see the attraction of such an argument. It certainly would be a fundamental error if the inspector had overlooked the fact that the turbine would not achieve the 2MW output and had thus exaggerated the anticipated benefits.

[45] But this is superficial. From the outset all those participating in the six day inquiry were well aware that the proposed turbine, like wind turbines generally, would never achieve on any enduring basis an output of 2MW. The developer had produced an Environmental Statement when it made the planning application, and the inspector records that he had taken account of that (para 34). That statement had used a likely output of 30 per cent of rated capacity. The Council in its closing submissions referred to an output of about one-third and HALT, the organisation supported by the appellant, suggested 25 per cent. The inspector simply cannot have been under any illusion that 100 per cent output would be achieved. He did not need to resolve such differences as there were in the likely output figure: this is an inherently uncertain topic, as this court emphasised in *Bayliss v* ***Secretary*** *of State for Communities and Local Government* [2014] EWCA Civ 347, and all the parties' estimates were in the same broad area. So there was no significant issue on this and not one to which he needed to refer in his decision letter.

[46] When he referred in para 122 of his decision letter to a 2MW turbine, he was therefore not seeking to quantify the likely output at such a figure. He was using the rated capacity of the proposed turbine as part of a comparison with the effects of a larger number of smaller turbines with a 20KW capacity each. Again, that would be the rated capacity. He was not failing to understand that likely output would be less, and I do not accept that he was exaggerating the benefits of the proposal.

NOISE IMPACT AND THE NOISE CONDITION

[47] The inspector found that the noise level from the turbine experienced at Crake Hall would reach but not exceed the recommended acceptable level. This was after adding 2dB to the predicted noise level to allow for uncertainty in the predictions. He regarded that as acceptable but imposed a lengthy condition on the planning permission requiring the monitoring of noise levels and the taking of steps to secure compliance with the noise levels set by the condition.

[48] The appellant's case on this topic is that that condition was not sufficient. In Mr Harwood's words, it would not *guarantee* that the required noise levels would not be exceeded, and he raises doubts as to its enforceability. It is submitted that there should have been a further condition requiring the wind turbine to operate in its quieter mode.

[49] This is not a persuasive argument. First, it is principally a matter of planning judgment as to what form a condition on a planning permission should take, and whether it will suffice to avoid an identified harm, subject to some well-established principles. Secondly, the noise condition imposed was one agreed between the developer and the local planning authority and, in the usual way, the inspector gave an opportunity at the inquiry for all parties to discuss conditions. Thirdly, in those circumstances the local planning authority clearly took the view that it could enforce the condition. That was the inspector's position also. Mr Harwood accepts that, if a condition is likely to work, in the sense of achieving the desired aim, it does not matter that a different condition could have been imposed with the same objective. It is not wrong to refrain from doing so. I can see no force in the part of the appellant's case.

CONCLUSION

[50] In a thorough and careful judgment, Cranston J rejected the various arguments which asserted that the inspector had erred in law. In my judgment, he was right to do so. I would dismiss this appeal.

BRIGGS LJ:

[51] I agree.

RICHARDS LJ:

[52] I also agree.

Appeal dismissed.