

Neutral Citation Number: [2016] EWHC 1264 (Admin)

Case No: CO/4677/2015

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/05/2016

Before :

MR JUSTICE GILBART

Between :

THE QUEEN
on the application of
MATTHEW HILL
- and -
CORNWALL COUNCIL
-and-
TIM HOLBROOK

Claimant

Defendant

Interested
Party

Tom Cosgrove (instructed by **Stephens Scown LLP**) for the **Claimant**
Jack Parker (instructed by **Mrs Virginia Meldrum, Cornwall Council**) for the **Defendant**
The Interested party did not appear and was not represented

Hearing dates: 17th May 2016

Judgment Approved

MR JUSTICE GILBART :

1. In this matter the Claimant Mr Matthew Hill seeks to quash the grant of planning permission of 5th August 2015 by Cornwall Council (CC) to the Interested Party, for a synthetic pitch, enclosure, external store, floodlighting and regrading of existing sports pitch on land within the sports fields of Treviglas Community College, St Columb Minor, which lies on the eastern side of Newquay. The Interested party was making the application for the College.
2. He challenges the Defendant Council's treatment of the issue of the noise generated by use of the new pitch. He also challenges the legality of one of the conditions.
3. I shall deal with the matters as follows:
 - a. the site, the application and proposals;
 - b. the noise issue;
 - c. the Officer's report and the Committee hearing;
 - d. the planning permission;
 - e. submissions by Mr Cosgrove for the Claimant;
 - f. submissions by Mr Parker for the Defendant
 - g. discussion and conclusions.

(a) The site, the application and proposals

4. The College sits on generally flat land lying between St Columb Minor to the south and south east, and Porth to the west and northwest. The playing fields lie north of the College in the gap between housing to east and west, which is about 300 metres wide. To the north-east, about 120 metres from the application site, lies the Claimant's house where he lives with his family. One young member of it has a condition which results in sleep difficulties, but which benefits from darkness and a quiet environment.
5. As already indicated, the site lies within the existing playing fields immediately north of the College, next to the building called the College's "Sports Hub". There are other playing fields to the north of it which lie a little closer to the Claimant's house.
6. The proposal would see the creation of a synthetic pitch created centrally between the Sports Hub and the existing running track and football field, over the site of the rugby pitch. It would take an area of 106 metres by 76 metres to accommodate a full size pitch, two smaller pitches (9m x 9m and 7m x 7m) and 4 mini pitches. It would also contain a viewing area at the south western corner next to the Sports Hub. It would be fenced, with timber boarded acoustic screening 4.5 m in height on the east and west boundaries. There would be 4 floodlight masts to a height of 13.5 metres.
7. The proposal as originally put forward was for use as follows:

- a. during school hours; by the school;
 - b. Saturday mornings: children's football club training drills followed by 10 minutes' kickabout;
 - c. Newquay AFC Under 7s up to Under 10s: Saturdays and Sundays from 10 am to about 3 pm. They currently play on the playing field on pitches next to the eastern boundary;
 - d. Newquay Hockey Club would play matches on Saturday or Sunday afternoons;
 - e. the playing fields would be available to local sports clubs;
 - f. the floodlights would not operate after 9.30 pm.
8. Its location is such that it would sit within what are already playing fields in use for training and team sports.

(b) The noise issue

9. One of the main issues about this application was the effect on the local noise climate. Consultants were employed by both the Community College, and by the Claimant. Before identifying what happened with regard to noise issues, it may be helpful to say a little about it by way of introduction.
10. Evidence and reports about noise are of course directed to the issue in a case such as this, of whether the amenities of those in the vicinity of the proposed use would be affected adversely by the noise generated by it. Some noise issues can be very technical and depend upon expert evidence about the creation, propagation and assessment of noise effects from activities which are not commonplace. Others are rather easier to grasp, arising as they do from more ordinary activities, such as the effect of sport being played. I shall return to that topic in due course.
11. The effect of noise depends to some very real degree on perception, but there are generally accepted technical ways of looking at noise. The accepted method of measurement, the decibel (dB) scale, is logarithmic, so that a doubling of sound energy produces an increase of about 3 dB, but, as was agreed in this case, the generally accepted view is that a change of 3 dB is perceptible, but a perceived doubling comes at something nearer 10dB. Different noises will have different tonal qualities, given the different frequencies at which noise may be emitted. The dB(A) quotient is intended to reflect a typical basket of frequencies.
12. The measurement of noise comes in different forms. The following are relevant in this case
- a. $LA_{eq} T$: an expression of the average noise level over a time period T . The noise meter takes the noises in the period T and derives an average. However it is logarithmic, so that the average lies in the upper part of the scale of the noises measured or predicted. LA_{eq} is widely used to determine the ambient noise level. Common values of T are 1 hr and 16 hr, among others;

- b. LA_{max} . That is the peak level of a noise created by an event;
 - c. LA_{90} : that is the noise level exceeded for 90% of the time and is often referred to as the background level. (But in some cases the $LA_{eq} T$ figure is referred to as a background level, which will usually be greater than the L_{90} figure. Plainly, the greater the value of T , the greater the influence of the events other than peaks, and the more representative it is of a background level).
13. There are various methods of assessing the effect of the introduction of a new noise source. Two were particularly in point here;
- a. the use of WHO guidelines on community noise with BS 8233 “Guidance on sound insulation and noise reduction for buildings.” The WHO guidelines, which are expressed in LA_{eq} , set a level for the external areas of buildings at 55dB LA_{eq} in the hours of 0700 to 2300 to avoid serious annoyance, and one of 50dB LA_{eq} to avoid moderate annoyance. BS 8233 gives a figure for “background” noise levels for suitable internal conditions: of 35db $LA_{eq} 16\text{ hr}$ for resting (so used in the living room) or 40 db $LA_{eq} 16\text{ hr}$ for a dining room. One may then see how the predicted noise level would be perceived externally or internally;
 - b. another approach is given in BS 4142 “Rating industrial noise affecting mixed residential and industrial areas.” It takes the predicted noise level at the receptor point in question. It calculates the time for which the activity in question will be carried on (in this case it was assumed to be for 10 mins in an hour) and then in appropriate cases adds 5dBA to the predicted noise level to account for the frequency, character or duration of the noise sources (here the use of whistles). That level is then compared to the background noise level measured on the LA_{90} index. If the exceedance is over a certain level, it advises that complaints are likely.
14. In this case a firm called Mach Acoustics advised the Applicant for permission. A report was prepared and submitted which assumed the usage as being from 0800-2200 Mondays to Fridays, and 0800-1900 on Saturdays and Sundays. It noted that the existing use by Newquay Football Club was the noisiest of the sports activities currently taking place. It measured the noise levels at the nearest residential properties, using LA_{eq} , LA_{90} and LA_{max} .
15. It noted that there was no guidance for assessing noise from all weather sports pitches, and concluded that the assessment methodology should be based on the specifics of the existing noise climate, and the nature of the proposed development. It took what it called a “worst case,” which was a football match with 22 players, a referee, two linesmen and 4 coaches, all shouting at the same time. All were within the pitch, and distributed within it. It took a noise spectrum based on a person shouting. However it said that the noise levels thus created were unlikely, and also took a “normal case” of one quarter of them shouting at once. Those cases were modelled against the topography. It included what were modelled as solid barriers at the eastern and western boundaries of the proposed pitch

16. The “worst case” model produced 50 dB at the exterior of the Claimant’s house, and the normal case 30.2 dB. The noise climate had been measured as 47 dBA LA_{eq} by day, and 45 dBA leq by night. The measurements also revealed average LA_{90} levels of 32 dB by day, and 31dB by night. The effect of adding in the worst case new noise at the Claimant’s house was to lift the ambient daytime level from 47 to 51.8 dBA, which lies marginally above the WHO threshold figure of 50 dBA. The noise from the pitch alone would be significantly below the WHO threshold. They then modelled the internal noise climate, based on a solid wall with a double glazed window, which produced an internal figure of 24dBA given the external level of 52 dBA .
17. It also gave a “subjective assessment.” That showed that, if the activity on the area of the pitch doubled from what it had been, then for the operational period of 14 hours (0800 to 2200), the leq_{14hr} would increase by the negligible amount of 3dbA. That coincides with the general experience, noted above (and a very familiar one in the development control context) that a doubling of sound energy (i.e +3db on the relevant logarithmic scale) from an existing source produces what is no more than a perceptible noise increase.
18. For those reasons, Mach Acoustics concluded that while

“a subjective increase in noise levels may at times be perceived by local residents, the worst case predicted noise levels from the proposed pitch were “within the guideline targets most commonly used for assessments of this nature. It can therefore be stated that the proposed development should not be refused on the grounds of noise.”
19. A report was then commissioned on behalf of the Claimant from ISVR Consulting at the University of Southampton. It reviewed the Mach Acoustics’ report. It disagreed on the choice of methodology, saying that BS 8233 was concerned with long term average noise levels, and not with the likelihood of complaint associated with different noise sources, nor did it provide a way of considering the existing noise climate when new noises were introduced. It also stated that the assessment method used did not deal with the frequency, character or duration of the noise sources with regard to the likelihood of complaint.
20. It considered that there would be houses to the south of the pitch which would be more affected. As to the “normal” case, it considered that if only 25% of the 28 persons were making a noise, the reduction should not have been one of 17-20 dB, but one of 6dB. In any event, it considered that it was not a worst case event to imagine that all 28 people were shouting. It also considered that the difference between the exterior and interior predicted levels if the windows were open would be reduced by 15-20dB. It considered that the assessment method “significantly understate(d) the potential impact due to use of the sports pitch.”
21. A further report was then obtained in November 2014 by the Claimant from another Consultant, Solent Acoustics. It had some technical comments on details of presentation by Mach Acoustics, and on some aspects of their methodology (on the use of a baseline level taken when no sporting activities were under way on the existing pitches) . On the assessment issue, it criticised Mach Acoustics for the use of WHO guidelines, which it thought appropriate for measuring the effect of continuous

noise such as that produced by traffic, but which was not suited to sporadic noise events such as shouting, whistling, or the sounds of balls hitting barriers. It thought that the sound propagation model relied on stationary point sources, which were not representative of sports activity such as football. It said that the sound power level of a shout was taken from an unreferenced source as being 86 dbA, whereas the sound power rating of a typical whistle (and one was specified) is 115 dbA, or almost 30 dbA more. It also stated that Newquay Football Club did not currently use the pitches.

22. It recommended the use of the BS 4142 methodology, which it said was commonly used in the UK to assess the impact of noise other than industrial noise. When it did so, it concluded that if all 28 persons were shouting at once, the noise level at the nearest receptor would be 50db. Allowance should be made for the fact that the voices would be raised for 10 minutes in an hour (-7 dB) and an “acoustic penalty” of 5dB added because the noise from the pitch would be sporadic and contain whistles. That produced a rating of $(50\text{dB}-7\text{db}+5\text{dB}) = 48 \text{ db}$. When compared to the measured background level (i.e. LA_{90}) that produced an exceedance 15 dB, which led to the conclusion that complaints were likely.
23. On 25th November 2014 Mach Acoustics wrote a response to the two reports. It defended its methodology. In particular
 - a. The method of assessing noise events against background levels had been agreed with the Environmental Health Officer to be inappropriate. It was wrong to use BS 4142, because this was not the introduction of a new source of noise to the site. Sporting activity was already present;
 - b. It could be expected that for most of the time noise would be at the “normal case” levels;
 - c. The proposed noise attenuation measures would attenuate noise levels from those currently experienced;
 - d. Spectator noise was not modelled because there would not be competitive matches during the newly extended evening hours;
 - e. As to internal noise levels and the effect of attenuation, Mach Acoustics is a leading British consultancy dealing with the topic of noise attenuation by windows. If one took the widely accepted figure of 15 dBA, the effect would be to reduce an external level of 50 dBA to 35 dBA, which is an entirely appropriate level for an internal noise climate for the hours during which the pitch would be used;
 - f. The ISVR application of BS 4142 was not what had been accepted by the local authority, and was therefore not addressed specifically;
 - g. Given the fact that there were currently no restrictions on the extent of activities on the sports pitches, the creation of the noise barriers represented “a significant improvement over the existing scenario;”
 - h. It disagreed with Solent Acoustics on the use of the baseline;

- i. It pointed out that Newquay FC did use the pitches for training;
 - j. It resisted the idea of making an allowance for peaks of noise. While it was accepted that peaks of noise do occur during sports activity, the noise level during sports activity was fairly constant. That was in some ways comparable to road traffic noise where a steady LAeq exists, albeit with intermittent peaks. For that reason, it was right to use BS 8233 on internal noise levels. The time when one looked at peaks was in considering sleep disturbance, when LAmax was commonly used, but that was between 2300 and 0700 when the sports pitch would not be used. An assessment based on LAmax would not be feasible as it would vary wildly between different kinds of noise and selection of a figure to model would be speculative only;
 - k. The use of whistles occurs in the existing noise climate anyway, and thus the proposal would not introduce a new source of noise. In fact the new barriers would provide more attenuation of the existing whistle noise. The noise barriers could have a chain link fence on the side facing the pitch, thus removing the noise of balls hitting the barrier.
24. The Claimant then obtained a further report from Solent Acoustics on 5th December 2014. The debate was continued. It is unnecessary to set out their responses, save to say that they maintained their position. They regarded the new activity as “commercial sporting activity outside daylight hours” as introducing a new noise to the environment, and that its character, including the whistles, would be more noticeable than the effect of introducing road traffic.
25. All of the above reports had been sent to the Defendant Council. They were all considered by its Environmental Health department. The officer who dealt with the matter at first was Miranda Flannigan. On 18th November 2014 she advised the planning officer dealing with the planning application (Tracy Young) that, having reviewed the various reports then available to her, she advised against the use of the BS 4142 method (i.e. as per ISVR) , but accepted some of the points made. As to the Mach Acoustics’ report, she raised various issues including

“ The report takes into account men shouting, but what about whistles (+5dB tonal) and spectators shouting on the northern and southern side of the pitch?”

She also thought that the internal level predicted in the first Mach Acoustics report (24dB) was too low.

26. On 19th December 2014 Ms Flannigan gave her response to Ms Young on the planning application. It read as follows:

“My colleague has now had a chance to look at the reports and responses from both acoustic consultants.

I am satisfied with all the responses regarding the floodlights.

With regards to the acoustic responses both acoustic consultants have valid points but I have 2 concerns:

1. In the winter months there (are) currently no activities on the outside areas/playing fields when it is dark, currently it is dark at

16:30 hrs and the area is extremely quiet as soon as it is dark, whilst Environmental Health has no objection to the facility, provided the facility is built with the appropriate attenuation measures (i.e, acoustic fence) for use during the day, however I would consider that 22:00 hrs is too late and this hour should be brought forwards.

2. MACH have stated that the facility is intended only for training purposes and whistles would not be used, I would suggest it is condition(ed) for no use of whistles outside of school hours.

3. Floodlights should also be conditioned to an earlier time and should be installed in accordance to the light report.”

27. On 2nd June 2015 Ms Flannigan advised Ms Young’s colleagues (Ms Young was on holiday) that when she had considered the proposal it was not to be used for matches. She expressed concern that it was now to be used by Newquay FC for matches, and by hockey teams on a Saturday. She also advised that the presence of spectators would add noise, and that she was already dealing with a complaint about spectator noise.

28. On 2nd June 2015, after those emails had been sent, the Group Leader of the Development Management Team in the Planning Department asked Ms Flannigan to consider the draft report of Ms Young to the Planning Committee. It pointed out that it was going to state that a condition preventing the use of whistles was regarded as unenforceable. At that time, the Committee was due to meet on 8th June 2015. In the event the meeting was postponed because of the concerns Ms Flannigan had expressed.

29. On 25th June 2015 the architects for the Applicant for permission submitted further information which Ms Flannigan had requested. It described the proposed use of the pitch during the existing playing hours. That use included the hockey matches and the matches Newquay AFC under 7 to under 14 teams (but not the adult mens and ladies’ teams). The under 7 to under 14 teams currently played on the eastern side of where the barrier was to be constructed, so that noise from their activities would be attenuated. All the pitches would be available to local sports clubs. As to activities in the new hours when the floodlighting would permit games when it was dark, up to 2200 hours, that would be for training only, and would not attract spectators. It would not include Newquay FC training except for the Under 7 to Under 13 teams.

30. Ms Flannigan was then asked on 26th June 2015 for her final comments by 14th July 2015. She replied on 9th July 2015 that

“ I have looked at the additional information and I have no further comments / recommendations to add to my previous recommendations.”

31. The Committee Report included a summary of the Mach Acoustics report submitted with the application. It dealt with the views of the Environmental Health Department by citing the observations of 22nd December 2014 which appear above, and also set out the response of 9th July 2015.

32. The Committee Report was published. On 27th July 2015 the Claimant submitted a further report from Solent Acoustics commenting on the report. In turn its report was the subject of comment from a Senior Environmental Health Officer Mr Kevin

Brader. He is senior to Ms Flannigan, who was away on holiday at the time. I shall set out the passage in the officer's report commented on by Solent, and then Mr Brader's comment on it, which he made by an email of 28th July 2015.

33. The relevant passages in the proposed Committee Report, upon which comment was made, read as follows:

“72 Assessment of the proposed development is challenging as activities will take place on a relatively sporadic basis. This means that noise levels generated will vary from day to day, and from week to week. Establishing a worst case is therefore essential in ensuring that the assessment of the proposed development is robust.

73. A summary of the full report is set out below:

Environmental Noise Modelling

74. In order to provide predictions for noise levels from the proposed all-weather sports pitch, a noise modelling assessment has been conducted using CadnaA noise prediction software. The software allows for the propagation of sound to be calculated over a scaled model of a site, including topographical features, buildings and areas of absorption. Sources of noise can be represented in a model in various ways, including point sources. A point source is specified in a particular location in the model, with a specific sound power.

75. Newquay Football Club is seen to constitute the highest level of activity for the proposed pitch. Information provided indicates that the maximum number of people within the proposed pitch would be 28 (24 players and 4 coaches). 28 point sources have therefore been placed within the proposed pitch area at evenly spaced locations. In order to establish a worst case, each point source has been given the same sound power. This sound power is equal to the sound energy produced by a human male shouting.

76. During most sporting events, all individuals will at some point generate noise. Despite this fact, it would not be expected that all individuals would be active at the same time. Under normal circumstances, it would be expected that only a small percentage of individuals would be actively making noise at any one time.

Assessment against World Health Organisation Guidelines

77. Noise levels at residential receptors should not normally exceed 50 dBA during the day (0700 - 2300). It should be noted that these levels may at times be exceeded due to existing noise levels on site.

78. It should be noted that the barriers forming the East and West boundaries of the proposed pitch have been modelled as solid. This means that they play a significant role in attenuating noise propagation towards residential receivers. In order to enable compliance with WHO guidelines with a worst case for activity noise, these barriers should be solid, and at least 4 metres in height.

79. Predicted noise from the pitch has been compared to the recommendations of the World Health Organisation, as well as the internal noise level targets contained within BS8233.

80. The acoustics assessment has indicated that although a subjective increase in noise levels may at times be perceived by local residents, the worst case

predicted noise levels from the proposed pitch are within the guideline targets most commonly used for assessments of this nature.

34. On 27th July 2015 the Claimant submitted a further report from Solent Acoustics. It gave the following comments:

a. Paragraph 72

“1.1 Comment: The noise model presented so far is far from being a worst case as it will be argued below (see 1.6).

b. Paragraph 74

“1.2 Comment: This noise modelling software is typically used for the assessment of transportation and industrial noise sources, which have very different nature to that of sport activities. Hence a sporting activity noise model calculated with CadnaA should be treated with caution.”

c. Paragraph 75

“1.3 Comment: The sources are being modelled as continuous, when it is the discontinuous nature of sporting noise (shouting, whistles) that it is of concern to the residents. The level being reported is time-averaged (LAeq), and thus its tonality and impulsive nature is disregarded, especially from spectators and refereeing. The modelling of only 28 sources seems at odds with the 'worst case' claim. No spectators in the viewing are or refereeing are taken into account.

1.4 Assessments of this type of sporting events have been done previously using maximum levels such as L_{Amax}, instead of time-averaged continuous levels as reported.....” (reference was made to an assessment where WHO levels were used but L_{Amax} levels for sleep disturbance were applied to daytime activity as a conservative approach)

d. Paragraph 78

“1.5 The realistic impact of the proposed noise barriers would be at most 5 dB of attenuation due to diffraction issues. It is crucial to note that even with this attenuation, the tonality and impulsivity characteristics of whistling or shouting would not be mitigated.”

e. Paragraph 79

“1.6 Comment: The noise level targets referenced to BS8233:2014 [2] are incorrectly set. From the standard (our emphasis)

“7.7.1 Dwelling houses, flats and rooms in residential use

This subclause applies to external noise as it affects the internal acoustic environment from sources *without a specific character*, previously termed ‘anonymous noise’. Occupants are usually more tolerant of noise without a specific character than, for example, that from neighbours which can trigger complex emotional reactions.
.....

NOTE Noise has a *specific character* if it contains features such

as a *distinguishable, discrete* and continuous tone, *is irregular enough to attract attention*, or has strong low frequency content, in which case *lower noise limits might be appropriate*.

- 1.7 It must be noted that whistling and shouting, which are unavoidable in team sport activities, are used with the specific purpose of attracting attention. The noise model, presented as worst case, treats sources from sport practitioners as being continuous, like the rumble of a car's engine. However the problem arising from this activities" (sic) "is the discontinuous nature (whistling and shouting) which can be equated to a car's horn or emergency siren.
- 1.8 Establishing a penalty of +5dB to whistling due to tonality is nowadays considered conservative. A referee's whistle has not only a tonal but an impulsive and irregular nature which is bound to make it very noticeable. Commercial whistles can easily be heard within a mile in normal sound propagation conditions.
- 1.9 As argued in 1.3, the use of time-averaged sound energy levels such as LAeq for setting limits in this case is inadequate. For example a half-second instance of whistling every hour during night-time in a very quiet room would barely change the (time-averaged) night time equivalent level (LAeq), however it would cause serious disturbance to the occupants of said room .
- 2.0 CONCLUSIONS
We would conclude that the (...) modelling of the sporting activity as a continuous sound source is fundamentally flawed and does not reflect a 'worst case'. The number of sources modelled and their character are inadequate and the performance of the noise barriers is unrealistic. Furthermore to establish limits based on continuous time-averaged levels is against the spirit of British Standard BS8233:2014 (see 1.6) Commercial sporting activity outside daylight hours introduces a new source in the environment, and this source would be more noticeable than noise without a specific character [i.e. traffic noise) due to the source type (shouting whistling etc.)"

35. Ms Young sought advice from the Environmental Health Department. Mr Kevin Brader replied as follows on 28th July 2015:

"Please see comments below;

- 1.1 This is an opinion and does not have any supporting evidence.
- 1.2 Is the applicant able to provide evidence to support this opinion?
- 1.3 My view is that continuous modelling is an acceptable measurement parameter. Whilst noise sources may vary throughout the game there is generally a continuous noise throughout a sporting event.
- 1.4 Refer to 1.3
- 1.5 No additional comments
- 1.6 Consideration should be always be given the duration of the events and time of day and weighted accordingly.
- 1.7 This is the same point as raised in 1.3
- 1.8 No additional comments to make

1.9 This is the same point as raised in 1.3 and 1.7 -- no additional comments.”

(c) The Officer’s report and the Committee hearing

36. The Officer’s report, which was put before the Committee at its meeting, was 39 pages and 133 paragraphs long. There was also a one page addendum of some importance, to which I shall refer presently. After its summary, the report included the following sections

- a. Site Description
- b. Proposal
- c. Relevant constraints
- d. Relevant planning/enforcement history
- e. Relevant local/national policy guidance
- f. Consultations
- g. Representations
- h. Assessment of key planning issues
 - i. Principle of development
 - ii. Neighbour amenity
 - 1. Floodlighting
 - 2. Noise (including Planning Conditions)
 - iii. Parking
 - iv. Biodiversity/protected species
 - v. Surface water Drainage
- i. Procedural matters
- j. Planning Balance/Overall Conclusion
- k. Recommendation with Conditions.

37. The Report itself, which recommended approval, included this summary

“Summary;

Planning permission is sought for the construction of a full size all-weather synthetic pitch with associated floodlights and external store within the Treviglas Community College sports field. The main issues of concern raised by local residents and the town council relate to noise and light pollution generated when the pitch is being used by local clubs outside of school hours.

The sports field is not subject to any conditions restricting hours of operation. The use of the floodlights would be subject to a condition requiring them to be turned off at 21.30 hours in order to protect the amenities of the neighbouring properties and to reduce any impact on protected species (bats) which may be using the boundary hedges as commuting routes to feeding sites. Environmental Health raises no objections to the floodlights subject to the imposition of a condition to control hours of use.

In terms of noise the field can currently be used by the school at any time in the evening and weekends. However the introduction of the floodlights would allow games to be played after dark and therefore the use of the new pitch would introduce a level of noise not currently experienced by the local residents. Environmental

Health has suggested the granting of planning permission be subject to a condition restricting the use of whistles however this is not a reasonable request nor enforceable. By restricting the use of the floodlights to 21.30 hours will in itself restrict the use of the site beyond this time.

There is adequate parking on site for after school activities which would not impact upon the current parking arrangement in the locality. The application has been assessed by the Highways Officer who raises no objection.

Sport England has re-considered the application in the light of its playing fields policy following additional information provided by the applicant and agent.

The issue regarding cricket

The physical location of the new facility has been identified to complement the Sports Hub building (which provides changing for the (pitch) and has been carefully located to reduce impact on surrounding uses in relation to sports lighting and noise, and ecology. Other locations were considered on the site.

Community availability has been confirmed within the application, The site has existing community use of sports facilities, The facility would also be used by primary schools in the area as well as clubs, Sport England would seek a planning condition to ensure community use. As such Sport England does not wish to raise an objection to this application, subject to conditions being attached to the decision notice (if the Council are minded to approve the application)”

38. The Addendum dealt with matters relating to ecology, noise and the issue of the health of the Claimant’s family member referred to above. Insofar as the latter two issues are concerned, it stated:

“The Local Planning Authority has received additional correspondence relating to noise

Both documents have been acknowledged by the case officer and subsequently considered by the Environmental Health Officer

Environmental Health 30 July 2015

No additional comments

Health matters

The planning authority is aware of the health issues of a local resident which is supported by a hospital letter which suggests that the development may have an impact on this individuals sleeping pattern.

The parents of this individual suggest that council take into account the child's legal rights into and at the minimum restrict this development until 7pm.

The health and wellbeing of the community is considered when assessing development proposals. The Council will ensure that no serious noise disamenity will result from development both from the existing noise or future noise (where development involves a site where noise levels are likely to increase) and from light pollution from the floodlights

In this case the likely increase in noise has been mitigated by the 4.5m high timber acoustic fence along the east and west boundaries which will result in a significant level of noise attenuation

The barriers have been included to protect the amenities of neighbouring properties as a whole and including the property- of the local resident with the specific health issues.”

39. It is relevant to note what was said about a condition restricting noise in the report, given the fact that the Environmental Health Officer had suggested a condition. This appears at paragraphs 86-94 of the Report:

“86 The Noise Impact Assessment states that the facility is intended only for training purposes and whistles would not be used. The Environmental Health Officer recommends the granting of planning permission should be subject to a planning condition for no use of whistles outside of school hours.

87 The school field is currently free from any out of hours operating conditions and could be used for activities in the summer months until 9.30pm when it starts to get dark.

88 Paragraph 206 of the National Planning Policy Framework states "Planning conditions should only be imposed where they are:

- 1 necessary ;
- 2 relevant to planning and;
- 3 to the development to be permitted:
- 4 enforceable;
- 5 precise and;
6. reasonable in all other respects.

89 The policy requirement above is referred to in this guidance as the six tests.

90 It is the view of the Enforcement Group Leader that a condition restricting the use of whistles does not meet the six tests in this instance.

91 The pitch area is located within the existing playing field area, where there are no restrictive conditions. Therefore, unless it was witnessed that someone on the new pitch was using a whistle it would be difficult to distinguish whether it was from the pitch or from any other area of the playing fields, making it a difficult condition to enforce.

92 However, the enforceability of a condition is only one element. The main concern would be whether it would be reasonable to restrict the use of whistles on the new pitch when they could be used in the surrounding areas with no restriction the opinion in this case is that it would not be reasonable.

93 In light of the above advice provided by the Enforcement Group Leader and the concerns raised by the Environmental Health Officer the granting of planning permission will be subject to the following condition in order to protect the amenities of the neighbouring residential properties;

94 "The floodlights approved as part of this development will not be switched on between the hours of 21:30 in the evening and 08:30 the following morning.”

40. The officer's report also describes the consultation responses that had been received. The proposals received both support and objections, although in numerical terms the latter far outnumbered the former.

41. At the Committee meeting, concerns were expressed about the extension of the hours of use, and reference was made to the fact that whistles would be used. The solicitor for the Claimant was permitted to speak for 3 minutes, in accordance with Standing Orders. He dealt with points relating to noise and the effect on bats. He made the point that account had not been taken of the worst case. In his witness statement he says that he was unable to bring to the attention of the Committee the expert analysis from the Claimant's experts. However that is not what the Grounds say. At paragraphs 32-34 on page 16, this appears:

“32. The Claimant afforded the Defendant multiple opportunities to meaningfully engage with the character of the noise arising from the Development and to address the shortcomings in the Interested Party's noise impact assessment. Through the application process, the Claimant submitted expert noise reports dated October 2014, 6 November 2014, 5 December 2014 and 27 July 2015. These reports, inter alia, raised doubts about the assessment methodology adopted by the Interested Party's noise consultants and indicated that the noise levels associated with the Development were likely to be understated.

33. As pointed out in the Claimant's expert reports, noise from sporting activities is sporadic or non-continuous and therefore more noticeable than continuous sources of noise such as traffic, on which the Interested Party's noise assessment was predicated. As further pointed out by the Claimant's expert reports, the Interested Party's noise models did not take into account other sources of noise aside from shouting. The Defendant was made aware that this was unreflective of the actual noise sources associated with the Development, which would also include noise generated by spectators as well as whistles.

34. In addition to written evidence, these shortcomings in the interested Party's noise evidence were highlighted in oral submissions to the Committee by the Claimant's representative. In particular, the Claimant's representative underscored that the Interested Party's noise assessment failed to account for the impulsive and tonal noise which arises from the use of whistles.”

42. The Minutes refer to a “ full and detailed debate” the main points of which were noted as follows:

“A full and detailed debate ensued, the main points of which were noted as follows

- (i) the proposal would benefit both the school and community, it was considered that a restriction on the use of the floodlights to 7.00 pm was too early;
- (ii) the facility would provide a benefit to children in the area, promoting sport, exercise and team work;

- (iii) there was overall support for the development, however, there was a need to restrict the use of the pitch to prevent matches being played in the evenings to reduce noise pollution;
- (iv) it was suggested that the proposed conditions be amended or an additional condition be imposed to restrict the time when matches could be played;
- (v) it was acknowledged that there were concerns from residents regarding the proposal. The applicant had sited the pitch in the middle of the sports field to mitigate its impact;
- (vi) the proposal would provide a facility for the broader area, there was an increasing need for recreational space due to the increasing developments in the area. The committee should look to restrict the activities that generate an unacceptable level of noise.

In response to issues raised in debate, the Committee was advised that an additional condition could be imposed to prevent competitive matches being played after 7.00pm.”

43. The outcome of the debate is then recorded:

“ RESOLVED That Application No. PA14/10437 be approved subject to the conditions set out in the report and the following additional condition:-

10. No competitive matches as part of a scheduled league or championship programme shall be undertaken on the pitch hereby approved after 7pm.

Reason; In the interests of the amenity of adjoining neighbours and in accordance with saved policy 37 of the Restormel Local Plan 2001 and paragraph 17 of the National Planning Policy Framework 2012.

The reason given by the Proposer for wishing to approve the above application was that the issues raised in the report had been balanced against the harm that the proposal would have upon the amenities of neighbouring residential properties and whether this would outweigh the benefits of the scheme to the local community. With all the evidence now tested and having undertaken the necessary planning balance, there were insufficient grounds for refusing this application. Given the above and having regard to all other matters raised, it had been concluded that the proposed development should be supported subject to conditions.”

(d) The planning permission

44. The permission permitted the development, described as “ proposed synthetic pitch, enclosure, external store, floodlighting and regrading of existing sports pitch” subject to 10 conditions, including the following:

- a. Condition 2 required that the floodlights be switched off from 21.30 pm until 08.30 am;

- b. Condition 5 required that before the development was brought into use, the noise barriers and noise attenuation panels should be erected in accordance with the approved plans, and thereafter retained.
- c. Condition 7 reads

“prior to the commencement of the development a Community Use Agreement shall be submitted to and approved by the Local Planning Authority. The Agreement shall include details of pricing policy, hours of use, access by non-school users/non-members, management responsibilities and include a mechanism for review. The development shall not be used at any other time than in strict compliance with the approved agreement.”
- d. Condition 9 prevents the use of the pitch approved for competitive matches as part of a scheduled league or championship programme, after 7.00 pm and before 8.00 am.

(e) ***Submissions by Mr Cosgrove for the Claimant***

45. The challenge was made on 4 grounds. The third ground (which related to the absence of a screening opinion) was not proceeded with. The Grounds which were proceeded with are
- a. Ground 1 :The Defendant irrationally determined that a restriction of the use of whistles did not meet the “six tests” for imposing planning conditions;
 - b. Ground 2: the officer’s report failed to deal adequately or fairly with the evidence about potential noise generation;
 - c. Ground 4: condition 7 is unintelligible. It is imprecise and fails to deal with what occurs during the hours not specified in the agreement.
46. At the hearing Mr Cosgrove concentrated his fire principally on Ground 2, together with some short submissions on Grounds 1 and 4.

Ground 2

47. He made propositions of law. Some were on matters of broad legal principle or the nature of the tests in judicial review, which were not controversial and require no repetition here. However he also made submissions on the approach to be adopted towards the reports of planning officers. I was referred to the summary of the principles in the judgement of Hickinbottom J in *R(Trashorfield Ltd) v Bristol City Council & Ors* [2014] EWHC 757 (Admin) at [13]:

“The legal principles relevant to this ground are well-trodden. They are as follows.

- i) Section 70(2) of the *Town and Country Planning Act 1990* requires that planning authorities, in dealing with an application for planning permission, must have regard to all "material considerations". What amounts to a material consideration is a question of law. Statements of central government policy are material considerations. Since March 2012, such

statements are set out mainly in the National Planning Policy Framework ("the NPPF").

- ii) Whereas what amounts to a material consideration is a matter of law the weight to be given to such considerations – the part any particular material consideration should play in the decision-making process, if any – is a question of planning judgment, and is a matter entirely for those to whom Parliament has assigned the task of planning decision-making. They are democratically elected bodies (e.g. a committee of councillors), or persons accountable such a body; and it is an important principle that planning decisions, which inevitably involve the public interest, are made by those who are ultimately democratically accountable (see, e.g. *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295 at [69], per Lord Hoffmann; and *R (Morge) v Hampshire County Council* [2011] UKSC 2 at [36], per Baroness Hale). Thus, an application for judicial review does not provide an open opportunity for a disappointed party to contest the planning merits of a decision. The court will intervene, and will only intervene, on conventional public law grounds, which focus on process; and, if a challenge is successful, the court will usually quash the decision and send the matter back to the planning decision-maker to redetermine the planning application lawfully.
- iii) A local planning authority usually delegates its planning functions to a planning committee of councillors, who act on the basis of information provided by case officers in the form of a report. Such a report usually also includes a recommendation as to how the application should be dealt with. In the absence of contrary evidence, it is a reasonable inference that, where a recommendation is adopted, members of the planning committee follow the reasoning of the report. The officers' report is therefore often a crucial document. It has to be sufficiently clear and full to enable councillors to understand the important issues and the material considerations that bear upon them; and decide those issues within the limits of planning judgment that the law allows them. Whilst the report must be sufficient for those purposes, the courts have stressed the need for reports to be concise and focused, and the dangers of reports being too long, elaborate or defensive:

"... [T]he courts should not impose too high a standard upon such reports, for otherwise their whole purpose will be defeated: the councillors either will not read them or will not have a clear enough grasp of the issues to make a decision for themselves." (*Morge* at [36], per Baroness Hale).

"The court should focus on the substance of a report by officers given in the present sort of context, to see whether it has sufficiently drawn councillors' attention to the proper approach required by the law and material considerations, rather than to insist upon an elaborate citation of underlying background materials. Otherwise, there will be a danger that officers will draft reports with excessive defensiveness, lengthening them and over-burdening them with quotation of materials, which may have a tendency to undermine the willingness and ability of busy council members

to read and digest them effectively." (*R (Maxwell) v Wiltshire Council* [2011] EWHC 1840 (Admin) at [43], per Sales J).

The assessment of how much and what information should go into a report to enable it to perform its function is itself a matter for the officers, exercising their own expert judgment (*R v Mendip District Council ex parte Fabre* (2000) 80 P&CR 500 at page 509)

- iv) Of course, if the material included is insufficient to enable the Planning Committee to perform its function, or if it is misleading, the decision taken by the Committee on the basis of a report may be challengeable. However:

"[A]n application for judicial review based on criticisms of the planning officers' report will not normally begin to merit consideration unless the overall effect of the report significantly misleads the committee about material matters which thereafter are left uncorrected at the meeting of the planning committee before the relevant decision is taken" (*Oxton Farms, Samuel Smiths Old Brewery (Tadcaster) v Selby District Council* [1997] EWCA Civ 4004 [1997] EG 60, per Judge LJ).

- v) Furthermore, when challenged, officers' reports are not to be subjected to the same exegesis that might be appropriate for the interpretation of a statute: what is required is a fair reading of the report as a whole (*R (Zurich Assurance Limited trading as Threadneedle Property Investments) v North Lincolnshire Council* [2012] EWHC 3708 (Admin) at [15]).
- vi) In construing reports, it also has to be borne in mind that they are addressed to a "knowledgeable readership", including council members "who, by virtue of that membership, may be expected to have a substantial local and background knowledge" (Fabre at page 509, per Sullivan J as he then was). That background knowledge includes "a working knowledge of the statutory test" for determination of a planning application (*Oxton Farms*, per Pill LJ). Furthermore, in deciding whether they have got sufficient information to make a properly informed decision or request further information or analysis, again that involves the exercise of judgment on their part. Given the experience and expertise of Planning Committee members is coupled with the fact that they are democratically elected, the judicial approach to challenges to their decisions should be marked by particular prudence and caution (see *Bishops Stortford Civic Federation v East Hertfordshire District Council* [2014] EWHC 348 (Admin) at [40]-[41] per Cranston J).

48. Reference was also made to the very similar summary by Stewart J in *Obar Camden Ltd v The London Borough of Camden* [2015] EWHC 2475 (Admin) at [6].

49. Mr Cosgrove dealt first with whether there had been a proper consideration of the noise impact. He split his submissions into 2 issues namely

- a. There was no adequate analysis of noise impact

- b. The report was misleading with regard to the concerns of the Environmental Health Officer.
50. Mr Cosgrove pointed out that there seemed to have been some confusion about which teams were to use the pitch and when. But even on the basis that no competitive matches would be played during the new lit hours up to 9.30 pm, noise would still be generated by the use of whistles in training; indeed, they would be used just as much or more often than in a match.
51. In essence his case was that the Committee relied heavily on the report of the Planning Officer, who did not deal properly with the dispute between the experts on the issue of noise. He pointed out that there was only one reference, and a passing one at that, to the fact that there had been experts involved who differed. He pointed out that there was nothing in the officer's report which referred to the fact that there was a disagreement on the methodology which should be applied.
52. He submitted that the members should have been told that there was a particular dispute on the issue of making an allowance for a tonal element. He also submitted that the Environmental Health officer had raised concerns about the tonality element, and had expressly sought a restriction on the use of whistles during the now extended evening hours.
53. The summary at paragraphs 72- 81 of the officer's report failed to state that the assessment there set out was not only the subject of dispute, but also that the EHO concerned had subsequently raised concerns, after her consultation response. Once the decision was made not to include the "whistles" condition, the basis for the position of the Environmental Health Officer no longer remained.
54. Although the Claimant's solicitor had had the chance to address the Committee, and although he did tell the Committee that there was a dispute on methodology, that was far too short a time to be able to inform them sufficiently about the choice of methodology.
55. Ground 1: he submitted that the condition was irrational because it assumed that noise would be most harmful during competitive matches. Further there was no reason to think that scheduled matches would be noisier than (say) a friendly match.
56. As to Ground 4 condition 7 is unintelligible. It is imprecise and fails to deal with what occurs during the hours not specified in the agreement.

(e) Mr Parker's submissions for Cornwall Council

57. Mr Parker submitted first that the first issue was whether the members were able to consider the noise impact of the development. He resisted the idea that the report failed to inform them on the issue of noise. He pointed out that the report accepted that a main area of concern related to the creation of noise when used outside school hours. It stated that the use of the new pitch would introduce a new level of noise and referred to the use of whistles (see the summary, set out at paragraph 37 above). It

correctly cited the contents of the Noise Impact Assessment submitted by the Applicant, and that the predicted noise fell within WHO tolerances.

58. He also pointed out the basis of the Environmental Health Officer's concerns, and stated that she had sought the imposition of a condition restricting the use of whistles outside school hours. He pointed out that the Claimant's solicitor had addressed the Committee, and according to the Grounds had addressed the suggested shortcomings in the Applicant's witness' methodology. He argued that the Minutes showed that the Committee was well aware of the issue about the use of whistles.
59. As to the suggestion that the Committee was misled about the views of the Health Officer, he referred to Mr Brader's email, and to the context in which Ms Flannigan had said that she had no more comment to make.
60. Members were perfectly able to make a planning judgment about the effects noise effected by the substitution of a pitch.
61. As to Ground 1, there was nothing irrational about it. The point about the difficulties in enforcement was a perfectly rational one to make.
62. As to Ground 4 the council contended that it was comprehensible and rejected the complaint.

(g) Discussion and Conclusions

63. On ground 2 there are two issues to address here:
 - a. Did the Committee have the material on which to address the noise impact of the proposal ?
 - b. Was the Committee misled about the concerns of the Environmental Health Officer ?
64. It is helpful to bear in mind the test set out by of Judge LJ in *Oxton Farms*, cited above. Did the overall effect of the report significantly mislead the committee about material matters which thereafter are left uncorrected at the meeting of the planning committee before the relevant decision is taken ?
65. I start with some observations about the topic of noise. As with most activities, it is possible to make scientific assessments and predictions, and I have set out some of the methods adopted above. But one must not lose sight of their purpose in this context. It is to provide the decision maker with information which may assist him/her/them in reaching a judgment. Some noise issues cannot be understood without scientific input; for example a layman cannot be expected to know the degree of attenuation a particular shape or height of barrier provides, or the shape of the noise contours for a new major piece of infrastructure such as road, railway or runway, or the tonal and acoustic properties of a new specialised industrial installation. Such issues can involve complex discussions, in which conclusions which are uninformed by expert assessment will carry much less weight. But then there are cases where the nature of the noises under consideration are very familiar indeed, and the question of their impact is much more subjective.

66. This proposal involved exactly the same use that had existed on the site for many years. What was different about it was that it would be usable for longer in evenings in the seasons apart from the summer. The central issues between the experts had been (a) whether one should have regard to the fact that the site was already in use for sports, as were its neighbours, and (b) whether one had regard to the noticeable effect of whistles. The current user involves matches, training and whistles, and the Committee would not need experts' reports to be able to form a judgment on those issues. It is also hard to imagine that the members needed an expert's report to point out that a whistle made a more distinctive and audible sound than the generality of noise, nor that they needed one to know that players and spectators could shout during a match.
67. A similar point can be made about the noise of spectators, but of course the effect of condition 9 is to reduce, if not eliminate altogether the use of the pitch in the additional hours for competitive matches.
68. The Committee were also aware from the report that the Environmental Health Officer had sought a condition related to whistles. It was up to the Committee to decide if it agreed with her, but it is plain that the issue was squarely before the members from the report.
69. The evidence is also that the Committee discussed the matter and brought forward condition 9 for just that reason. Once the competitive matches were excluded, or at least substantially reduced by the effect of the condition, the incidence of spectator noise in the evening is reduced to, at best, an occasional event.
70. Thus, while it would have been possible for the Committee to be told of the differences in methodology in the report, it would have added nothing to the issues they debated. If the evidence were that the Committee had approached the case on the basis that there would be no noise impacts, that point would be one of substance, but the facts is that it did not do so. Indeed it accepted that they would exist unless steps were taken to limit use.
71. So far as the alleged misleading of the Committee about the consultation response of the Environmental Health Officer, I reject it. Firstly, the response of Ms Flannigan of 9th July 2015 said that she did not want to change her original comments and recommendations having seen the draft report, and the further information from the Applicant. She had also seen the various reports submitted by the Claimant before that date. It must be taken from that that she was content, provided the conditions she had suggested were included. Those comments appeared in the report. They included her view that whistles should not be used outside school hours, which was put before the Committee.
72. As to the material contained in the Solent document of 27th July 2015, it is necessary to consider Mr Brader's response of 28th July 2015, remembering also that he is senior to Ms Flannigan. He accepted the Mach Acoustics' methodology of continuous modelling (1.3). That was also his answer on points 1.4., 1.7 and 1.9. His only acceptance of the Solent document was limited to accepting that consideration should be given to the duration of events and time of day and weighting applied accordingly. If that relates to whistles, that was already addressed in the earlier

response, and was much in the minds of the Committee. He did not accept the other criticisms.

73. In my judgement, the effect of Mr Brader's email was to disagree with Solent Acoustics' continued rejection of the Mach Acoustics' methodology, save in the one respect. It did not go to any issue that was not already before the Committee. It is to be noted also that at no time did the officers dispute the Mach Acoustics' assessment that the new barriers would attenuate some of the noise that would be created without the scheme.
74. It follows that the Committee had the issue squarely before it. They also had the benefit of being told about the issue by the Claimant's solicitor. I do not accept that he was unable to inform them, given the contents of the Grounds.
75. Thus it was that the Committee knew that the proposal would extend the hours of use, and that whistles would be used. It had all the information it needed to make a decision.
76. For the above reasons I reject Ground 2.
77. As to Ground 1, it is in my judgment unarguable. The enforcement officer's reasons for opposing the condition, as set out in the officer's report, are perfectly reasonable ones. It could not be said that they are irrational.
78. As to Ground 4, the Court suggested to the Defendant Council in argument that the last sentence of the condition was patently deficient, and invited any correction. None was forthcoming. As drafted and typed, it is unacceptable. It reads currently

“The development shall not be used at any other time than in strict compliance with the approved agreement.”

If what the Council intended was that it should not be used outside the times specified, it should have read

“The development shall not be used otherwise than in strict compliance with the approved agreement.”

79. The reference to “any other time” is confusing, unless it was intended to place a full stop after “time.”
80. When I sent out the judgment in draft, I invited written submissions on the effect of my conclusion that the condition, as drafted is unintelligible, and thus unenforceable, and on what orders should be made. I have received submissions, for which I am grateful. Both Claimant and Defendant have drawn my attention to the judgment of Holgate J in *R(Nicholson) v Allerdale BC and M Sport Ltd* [2015] EWHC 2510 (Admin) at paragraphs 82-89, where a similar problem arose.
81. Both parties accept that the proper way of dealing with this is for me to adjourn the final formal giving of judgement until an application has been made under s 96A *TCPA 1990* to amend the condition. In addition as Holgate J did in *Nicholson*, I shall make a declaration. For the reasons given above I refuse to make an order quashing the planning permission dated 16 January 2015. However, having regard to

paragraph 12 of the judgment of Lord Toulson JSC in *R (Hunt) v North Somerset Council* [2015] 1 WLR 3575, I accept the Claimant's submission that a declaration that the Claim has been successful to the extent set out in paragraphs 78 to 79 of this judgment should be made.

82. I adjourn the question of costs. Based on the submissions I have received, I am confident that the parties will reach agreement. I adjourn this matter to the first available date after 4th August 2016.