

Interpreting the scope of planning conditions

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Planning analysis: Wayne Beglan of Cornerstone Barristers discusses the approach the court will take when interpreting the scope of planning conditions following the decision in *R (on the application of XPL Ltd) v Harlow Council* where the court upheld the issuing of a breach of condition notice (BCN).

Original news

R (on the application of XPL Ltd) v Harlow Council [2016] EWCA Civ 378, [2016] All ER (D) 124 (Apr)

The Court of Appeal has upheld a BCN issued by Harlow Council in relation to the hours of operation of a sui generis coach depot, affirming the judgment of the High Court (R (on the application of XPL Ltd) v Harlow Council [2014] EWHC 3860 (Admin), [2014] All ER (D) 263 (Nov)).

What was the background to the case and why did the court dismiss the appeal?

This is the latest in a series of cases dealing with the correct approach to the construction of various documents generated within the planning sphere, including:

- *Wood v Secretary of State for Communities and Local Government* [2015] EWHC 2368 (Admin), [2015] All ER (D) 67 (Sep)
- *Trump International Golf Club Ltd v Scottish Ministers (Scotland)* [2015] UKSC 74, [2015] All ER (D) 155 (Dec)

In *Trump*, the Supreme Court considered the correct approach to construing a consent for a wind farm granted under section 36 of the Electricity Act 1989. In *XPL*, the Court of Appeal applied those principles to BCNs. In particular, at para [17] Lindblom LJ referred to paras [33], [34] and [66] of the *Trump* decision. At para [34], Lord Hodge said:

'When the court is concerned with the interpretation of words in a condition in a public document such as a section 36 [of the Electricity Act 1989] consent, it asks itself what a reasonable reader would understand the words to mean when reading the condition in the context of the other conditions and of the consent as a whole. This is an objective exercise in which the court will have regard to the natural and ordinary meaning of the relevant words, the overall purpose of the consent, any other conditions which cast light on the purpose of the relevant words, and common sense. Whether the court may also look at other documents that are connected with the application for the consent or are referred to in the consent will depend on the circumstances of the case, in particular the wording of the document that it is interpreting. Other documents may be relevant if they are incorporated into the consent by reference...or there is an ambiguity in the consent, which can be resolved, for example, by considering the application for consent.'

At para [66], Lord Carnwath said:

'[...] I do not think it is right to regard the process of interpreting a planning permission as differing materially from that appropriate to other legal documents. As has been seen, that was not how it was regarded by Lord Denning in the *Fawcett* case [1961] [AC 636]. Any such document of course must be interpreted in its particular legal and factual context. One aspect of that context is that a planning permission is a public document which may be relied on by parties unrelated to those originally involved.'

The court went on to apply those principles to the planning permission underlying the BCN which had been served upon the appellant.

The relevant words of the BCN were directed at 'the running of engines of any passenger carrying vehicles (ie coaches and buses) at the site and associated with the coach park/depot (except when the vehicles are being moved onto the site to park) outside the permitted hours specified within condition 4'.

Condition 4 and its reason provided:

'No repairs or maintenance of vehicles or other industrial or commercial activities (other than the parking of coaches and other vehicles associated with the Coach Park/Depot hereby permitted) shall take place at the site except between the hours of 8.00 am and 6.00 pm on Mondays to Fridays, 8.00 am to 1.00 pm on Saturdays, and not at any time on Sundays or public holidays, unless otherwise agreed

in writing with the Local Planning Authority. REASON: To ensure that any industrial operations associated with the use do not prejudice the amenity of neighbouring residents and to accord with Policy BE17 of the Adopted Replacement Harlow Local Plan, July 2006.'

Does the decision provide any general guidance on interpreting the scope of planning conditions and how can a recipient of a breach of condition use section 73 of the Town and Country Planning Act 1990 (TCPA 1990) to avoid future breach?

In dismissing the appellant's appeal, the court:

- rejected the suggestion that the ejusdem generis principle was applicable to the construction of planning conditions (para [27])—and, it is suggested it must follow, in construing planning permissions more generally
- held that the proper construction of the condition, while it might have severe commercial implications for the appellant, did not render the planning permission unworkable in breach of the principle in *Kent County Council v Secretary of State for the Environment and Burmah Total Refineries Trust* (1976) 75 LGR 452
- found that the activity of starting and running an engine was a commercial activity in the context of a planning permission for a coach depot, and therefore fell within the activities prohibited by condition 4 (para [39])
- held that, in context, 'parking' did not include the removal of a vehicle from a place where it had been parked, and therefore the limited exception within condition 4 could not be relied upon to permit the starting of engines and driving coaches away from the depot (para [28])
- found that there was no ambiguity between the condition and the reason given for its imposition—although the reason did not contain the word 'commercial' and therefore was not an exact mirror of the wording used in the condition itself, the reason was capable of being read consistently with the condition and did not cut down its effect. Accordingly, there was no justification for going in search of extraneous material—such as the officer's report or any model condition—as an aid to interpretation (para [30])
- emphasised that, in those circumstances, it remained open to the recipient of a BCN to seek to apply under TCPA 1990, s 73 for the condition to be relaxed and/or for the conditions to be varied based on an assessment of the planning merits of varying the condition—by way of example in relation to the latter, the court suggested the possibility of an acoustic barrier being the subject of a condition so that the hours of operation contained in condition 4 might be relaxed

Wayne Beglan of Cornerstone Barristers represented Harlow Council in this case. He has particular expertise in judicial review, housing, planning, regeneration, landlord and tenant, employment, procurement and contractual work for local authorities, RPs, developers and corporations. He is recognised as a leading junior barrister in administrative law, local government, planning and housing.

Interviewed by Barbara Bergin.

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