Neutral Citation Number: [2017] EWHC 2768 (Admin)

Case No: CO/873/2017

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT
IN THE MATTER OF AN APPLICATION UNDER SECTION 288 OF THE TOWN AND COUNTRY PLANNING ACT 1990

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 6 November 2017

Before :

THE HONOURABLE MR JUSTICE SUPPERSTONE

- -

Between :

GLADMAN DEVELOPMENTS LIMITED	**Claimant**
- and -	
1) SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT	**Defendants**
2) SWALE BOROUGH COUNCIL	
- and –	
CAMPAIGN TO PROTECT RURAL ENGLAND (KENT BRANCH)	**Interested Party**

- -
- -

Richard Kimblin QC (instructed by **Irwin Mitchell LLP**) for the **Claimant**
Richard Moules (instructed by **Government Legal Department**) for the **First Defendant**
Second Defendant did not appear and was not represented at the hearing
Ashley Bowes (instructed by **Richard Buxton Environmental and Public Law**) for the **Interested Party**

Hearing dates: 18-19 October 2017

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Approved Judgment

Mr Justice Supperstone :

Introduction

1. The Claimant applies pursuant to section 288 of the Town & Country Planning Act 1990 to quash the Decision dated 9 January 2017 of Roger Clews, an Inspector appointed by the First Defendant, who determined two appeals (Appeal A and Appeal B) on a conjoined basis at an Inquiry during November 2016 against refusals of planning permission for residential development for 330 (Appeal A) and 140 (Appeal B) dwellings plus 60 extra care units ("the Decision"). Lang J granted permission on all grounds.

2. The Claimant's planning application relates to land at London Road, Newington, Kent ("the Site").

3. The Second Defendant is the local planning authority for the area in which the Site is situated ("the Council"). It has filed summary grounds of defence maintaining that the Decision was lawful, but it was not separately represented at the hearing.

4. The Interested Party ("CPRE") was a "Rule 6" party at the inquiry.

5. Eleven main issues were considered at the inquiry. The Claimant succeeded on nine of those issues. The Claimant's arguments were not accepted on two issues:

   i) Landscape character (the third issue); and

   ii) Air quality (the eighth issue).

   This claim is only concerned with air quality.

The legislative framework on air quality

6. In *Client Earth (No.2) v Secretary of State for the Environment, Food & Rural Affairs* [2016] EWHC 2740 (Admin), Garnham J sets out at paras 6-15 the relevant provisions of the Air Quality Directive (2008/50/EC) ("the Directive") and the Air Quality Standards Regulations 2010 ("the Regulations").

7. The Judge stated, so far as is material:

> "9. The articles of the Directive ... include Article 2, which adopts definitions from earlier Directives, including the following:
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> "'*ambient air' shall mean outdoor air in the troposphere excluding workplaces...*
>
> *'limit value' shall mean a level fixed on the basis of scientific knowledge, and with the aim of avoiding, preventing or reducing harmful effects on human health and/or the environment as a whole, to be attained within a given period and not to be exceeded once attained;*

'air quality plans' shall mean plans that set out measures in order to attain the limit values or target values;

'margin of tolerance' shall mean the percentage of the limit value by which that value may be exceeded subject to the conditions laid down in this Directive;

'target value' shall mean a level fixed with the aim of avoiding, preventing or reducing harmful effects on human health and/or the environment as a whole to be attained where possible over a given period;

'zone' shall mean part of the territory of a Member State, as delimited by that Member State for the purposes of air quality assessment and management;

'agglomeration' shall mean a zone that is a conurbation with a population concentration in excess of 250,000 inhabitants or, where the population concentration is 250,000 inhabitants or less, with a given population density per km to be established by the Member State..."

10. Article 13 imposes limit values and alert thresholds for the protection of human health. It provides:

"*1. Member States should ensure that throughout their zones and agglomerations, levels of sulphur dioxide, PM10, lead and carbon monoxide in ambient air do not exceed the limit values laid down in Annex XI.*

In respect of nitrogen dioxide and benzene the limit values specified in Annex XI may not be exceeded from the date specified therein".

11. Article 22 provided for postponement of attainment deadlines and exemption from the obligation to apply certain limit values.

"*1. Where, in a given zone or agglomeration, conformity with the limit values for nitrogen dioxide or benzene cannot be achieved by the deadlines specified in Annex XI, a Member State may postpone those deadlines by a maximum of 5 years for that particular zone or agglomeration on condition that an air quality plan is established in accordance with Article 23 for the zone or agglomeration to which the postponement would apply; such air quality plan should be supplemented by the information listed in Section B of Annex XV related to the pollutants concerned and shall demonstrate how conformity will be achieved with the limit values before the new deadline*".

12. Article 23 ... provides for AQPs:

> "*1. Where, in given zones or agglomerations, the levels of pollutants in ambient air exceed any limit value or target value, plus any relevant margin of tolerance in each case, Member States shall ensure that air quality plans are established for those zones and agglomerations in order to achieve the related limit value or target value specified in Annexes XI and XIV.*
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> *In the event of exceedances of those limit values for which the attainment deadline is already expired, the air quality plans shall set out appropriate measures, so that the exceedance period can be kept as short as possible. The air quality plans may additionally include specific measures aiming at the protection of sensitive population groups, including children.*"
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> 13. Annex XI sets out limit values for the protection of human health. For nitrogen dioxide the limit value in any given hour is 200ug/m^3, which is not to be exceeded more than 18 times in a calendar year, and 40ug/m^3 which applies to each calendar year.
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> ...
>
> 15. The Directive was brought into domestic law in the UK by means of four sets of Regulations, one for each of the home nations. … Regulation 26 of the Air Quality Standards Regulations (2010/1001) requires the drawing up of AQPs [for England]. It provides, as is material:
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> "*(1) Where the levels of sulphur dioxide, nitrogen dioxide, benzene, carbon monoxide, lead and PM10 in ambient air exceed any of the limit values in Schedule 2 or the level of PM2.5 exceeds the target value in Schedule 3, the Secretary of State must draw up and implement an air quality plan so as to achieve that limit value or target value.*
>
> *(2) The air quality plan must include measures intended to ensure compliance with any relevant limit value within the shortest possible time...*
>
> *(4) Air quality plans must include the information listed in Schedule 8...*" "

The background

8. Garnham J noted in *Client Earth (No.2)* that: (1) in previous proceedings between the parties, in which the Claimant, Client Earth, challenged previous AQPs, produced by the UK Government, the Supreme Court made a declaration that the UK was in breach of Article 13 of the Directive (para 3). (2) On 17 December 2015, in purported compliance with the order of the Supreme Court and the provisions of the Directive, DEFRA published the Government's 2015 Air Quality Plan which addressed the need to reduce nitrogen dioxide emissions (para 4). (3) Client Earth challenges the

lawfulness of that plan (para 5). The judge concluded that it would be appropriate to make a declaration that the 2015 AQP fails to comply with Article 23(1) of the Directive and Regulation 26(2) of the Regulations, and an order quashing the plan (para 95(iv)).

9. His reasons for so concluding are set out at para 95(i)-(iii):

> "(i) that the proper construction of Article 23 means that the Secretary of State must aim to achieve compliance by the soonest date possible, that she must choose a route to that objective which reduces exposure as quickly as possible, and that she must take steps which mean meeting the value limits is not just possible, but likely;
>
> (ii) that the Secretary of State fell into error in fixing on a projected compliance date of 2020 (and 2025 for London);
>
> (iii) that the Secretary of State fell into error by adopting too optimistic a model for future emissions."

10. The Government published its new draft National Air Quality Plan on 5 May 2017, with public consultation running until 15 June 2017.

The Decision Letter ("DL")

11. The Inspector dealt with issue 8 at DL90-106.

12. At DL90 he referred to Local Plan policy SP2 which requires adverse environmental impacts of development to be avoided or minimised and mitigated where development needs are greater. He also referred to NPPF paragraph 120 which requires the effects of pollution and the potential sensitivity of the area to its effects to be taken into account in planning decisions, and to NPPF paragraph 124 which advises that any new development in Air Quality Management Areas ("AQMAs") should be consistent with the local air quality management plan.

13. At DL91 he identified the relevant pollution limit values, based on the Directive, which as set out in the Air Quality Standards Objectives Regulations 2010, include a limit value of 40 micrograms per cubic metre for the annual mean concentration of nitrogen dioxide ("NO_2"). He noted that while the Government is responsible for ensuring that these limit values are met, in practice most of the actions necessary to achieve this are devolved to local authorities.

14. At DL92 he noted the added emphasis to the urgency of meeting the limit values for air pollutants given by the decision in *Client Earth (No.2)* where the court found that:

> "the plan should have sought to achieve compliance by the earliest possible date rather than selecting 2020 as its target date. It also found that the Government had adopted too optimistic a model for future vehicle emissions".

15. At DL93 he noted that the Council had declared two AQMAs, and that the latest available monitoring data from 2015 shows that one of the limit values for nitrogen dioxide was exceeded at monitoring sites for both AQMAs.

16. At DL94-95 he explained that the Claimant's air quality assessments predicted, of the sixteen receptors sites that were assessed, "moderate adverse" impacts at one receptors site, and two other receptors sites received "slight adverse" impacts.

17. At DL96-97 he said that it seemed optimistic on the face of it to expect that NO_2 concentrations will fall by the substantial amounts predicted because they assumed substantial reductions in the background concentration of nitrogen dioxide.

18. At DL98 he said that in the light of this the Claimant had undertaken sensitivity tests based on emission factors that remain unchanged between 2015 and 2020. They showed there would be "substantial adverse" impacts at three receptor sites, and "moderate adverse" and "slight adverse" impacts of between three and five further receptor sites. That being so "in each case the limit value for annual mean NO_2 concentrations will be exceeded at five receptor sites, in some cases by a considerable amount".

19. At DL99 he said that "the sensitivity scenarios are probably too pessimistic".

He said:

> "as the appellant's witness pointed out, tightening of emission standards for new vehicles should over time, bring about substantial further reductions in NO_2 emissions from traffic. But I was given no firm data on the rate at which this is likely to occur. In the absence of any conclusive evidence on this point, I consider it would be unsafe to rely on emission levels falling between 2015 and 2020 to the extent that informed the modelling of original Scenarios 2 to 5. My view is reinforced by the High Court's finding on the excessive optimism of further emissions modelling. This means that original Scenarios 3 and 5 cannot be taken as reliable projections of the likely impacts of the appeal proposals on air quality".

20. He continued:

> "100. In my view the likelihood is that the impacts of the appeal proposals will fall somewhere between the best case original Scenarios 3 and 5 and the worst case sensitivity versions of those scenarios. Without further modelling it would be unwise to try to assess those impacts too precisely, but it seems safe to say that the possibility of 'substantial adverse' impacts on receptors in Newington cannot be ruled out, and that 'moderate adverse' impacts and exceedance of the limit value at a number of receptors in both Newington and Rainham are almost certain. This would be the case whether or not the cumulative impacts of other developments are factored in.

> 101. It might well be that, on this analysis, the limit values for NO_2 concentration levels would be exceeded in Newington and Rainham in 2020 even without the proposed developments. But this would not justify the further worsening of air quality that the modelling indicates would arise were either development to go ahead.
>
> 102. Both 'moderate adverse' and 'substantial adverse' impacts are considered likely to have a significant effect on human health, according to the 2015 publication *Land-Use Planning and Development Control: Planning for Air Quality*. In accordance with guidance in that publication, the appellants propose to fund measures to mitigate the adverse impacts of the developments on both Newington and Rainham AQMAs. Contributions to fund those measures are calculated using DEFRA Emission Factors Toolkit and secured by the unilateral undertakings.
>
> 103. However the level of contribution for each appeal scheme is based on 2020 emission factors. As I have found, on the evidence before me it would be unsafe to rely on emission levels falling between 2015 and 2020 to the extent assumed in the modelling of original Scenarios 2 to 5. Consequently the contributions may well not reflect the true impacts of the developments.
>
> 104. Proposed mitigation measures are outlined in the unilateral undertakings and the final mitigation scheme is subject to the approval of the Council. The proposed measures include electric vehicle charging points for each dwelling, green travel measures and incentives to encourage the use of walking, cycling, public transport and electric or low emission vehicles. No specific evidence has been provided, however, to show how effective those measures are likely to be in reducing the use of private petrol and diesel vehicles and hence in reducing forecast NO_2 emissions.
>
> 105. Drawing all this together, I find that it is more probable than not that both appeal procedures would have at least a moderately adverse impact on air quality in the Newington and Rainham AQMAs and thus a significant effect on human health. While measures are proposed to mitigate those adverse impacts, there is no clear evidence to demonstrate their likely effectiveness and it may well be that the contributions to fund the measures fail to reflect the full scale of the impacts".

21. At DL106 the Inspector concludes on this issue that:

> "even after taking into account the proposed mitigation measures, the appeal proposals are likely to have an adverse effect on air quality particularly in the Newington and Rainham

> AQMAs. I reach this conclusion for the reasons set out above, notwithstanding that the Council raise no objection to the proposals on air quality grounds. Both proposals would thereby conflict with the guidance in NPPF paragraphs 120 and 124".

22. In his overall conclusions on Appeal A at DL116-134, the Inspector said at DL128:

> "Against all these social benefits, however, must be set the strong likelihood that, notwithstanding the proposed mitigation measures, the appeal proposals would contribute to at least 'moderate adverse' impacts on air quality in both the Newington and Rainham AQMAs. Thus they would be likely to have a significant adverse effect on human health. These effects of the proposals would conflict with the guidance in NPPF paragraph 124".

In relation to his overall conclusions on Appeal B set out at DL135-148 the Inspector reached the same conclusion at DL143.

Grounds of Claim

23. The Claimant contends that in respect of the air quality issues, the Inspector erred as follows:

i) In respect of future changes in air quality and in respect of the mitigation—

a) a failure to apply the outcome of *Client Earth (No.2)* in his understanding of the effectiveness of air quality action plans;

b) a failure to give effect to the principle that the planning system presumes that other schemes of regulatory control are legally effective;

c) a failure to explain why application of the DEFRA damage cost analysis and associated contribution was not likely to be effective;

d) a failure to consider the imposition of a *Grampian* condition requiring a higher contribution to the mitigation fund, and;

e) a failure to give an opportunity to the Claimant to address the above, the Inquiry or prior to issuing the appeal decision.

ii) The air quality action plan – a failure to explain how the proposal is in conflict with the action plan, read as a whole; and

iii) The emerging Development Plan – a failure to consider a material consideration, namely the allocation of residential development within the AQMA.

I shall consider each ground of claim in turn.

Ground 1(a)

24. The Claimant contends that the Inspector failed to apply the outcome of *Client Earth (No.2)* in his understanding of the effectiveness of air quality action plans.

25. Mr Richard Kimblin QC, for the Claimant, accepts that the Inspector accurately summarises the *ratio* of the judgment in *Client Earth (No.2)* that "the plan should have sought to achieve compliance by the earliest possible date rather than selecting 2020 as its target date" (DL92).

26. However, Mr Kimblin submits that the Inspector did not engage with the judgment, the true import of which is that the Government must change its plan, make progress and hit the target. The essence of what should have been addressed is that the Government has undertaken to put in place measures to ensure that the limit values are met within a short timeframe, and there were measures that could have been put in place. The Inspector should, Mr Kimblin submits, have proceeded on the basis that the Government would comply with the law, but he did not, rather he proceeded on the basis that the breaches of the Directive would continue.

27. I do not accept the submission that the Inspector proceeded as Mr Kimblin suggests. The Inspector's reference to the added emphasis to the urgency of meeting the limit values for air pollutants given by the decision of the High Court (DL92) makes clear that he understood that the Government had to achieve compliance by the earliest possible date.

28. That in itself though does not meet Mr Kimblin's point that what is required by the judgment is that in order to achieve compliance by the soonest date possible the Secretary of State must choose a route to that objective which reduces exposure as quickly as possible, and she must take steps which mean meeting the value limits is not just possible, but likely (para 95(i)). As to how compliance can be achieved Mr Kimblin refers, in particular, to para 65 of the judgment where the Judge noted that "[t]he evidence demonstrates clearly that Clean Air Zones, the measure identified in the plan as the primary means of reducing nitrogen dioxide emissions, could be introduced more quickly than 2020".

29. However, as Mr Richard Moules, for the Secretary of State, and Mr Ashley Bowes, for CPRE, submit, the Inspector was not required to assume that local air quality would improve by any particular amount within any particular timeframe.

30. In the recent decision in *R (Shirley) v Secretary of State for Communities and Local Government* [2017] EWHC 2306 (Admin) Dove J said at para. 63:

> "… the question of air quality and exceedance of any limit values or thresholds is clearly and obviously a material consideration in the decision as to whether or not to grant planning permission. It is also material to the determination of whether mitigation measures are required and the affect of any mitigation measures that are proposed."

As Mr Moules observes, there is no suggestion in *Shirley* that the duty to produce and implement an air quality plan means local planning authorities should presume that the UK will become complaint with the Directive in the near future.

31. The key question, Mr Moules submits, is what the decision in *Client Earth (No.2)* actually meant for the decision maker given that the latest available monitoring data from 2015 showed that the annual mean objective of 40ug/m^3 for NO_2 was exceeded in Newington and Rainham AQMAs (DL93). The Claimant's proposals would indirectly result in additional NO_2 through vehicle emissions. It was not known what measures the new draft National Air Quality Plan would contain, let alone what the final version would contain following public consultation. It follows that the Inspector did not know how any new national measures would relate to local measures; nor did he know what would be "the soonest date possible" that the new National Air Quality Plan would aim to achieve compliance by. In those circumstances I agree with Mr Moules that the Inspector could not reach any view as to whether the measures in the new National Air Quality Plan would be likely to be effective in securing compliance by any particular date.

32. I consider that the Inspector properly engaged with the *Client Earth (No.2)* decision. He understood what the judgment required, and carefully analysed the evidence that was presented before him (DL99-106). He formed a judgment as to what the air quality is likely to be in the future on the basis of that evidence. He was entitled to consider the evidence and not simply assume that the UK will soon become compliant with the Directive.

Ground 1(b)

33. Mr Kimblin submits that the Inspector failed to give effect to the principle that the planning system presumes that other schemes of regulatory control are legally effective.

34. He contends that the regime of measures to meet the requirements of the Directive as soon as possible is partially in place and is being further developed.

35. In support of this submission Mr Kimblin relies on para 122 of the NPPF which states that:

> "In doing so, local planning authorities should focus on whether the development itself is an acceptable use of the land, and the impact of the use, rather than the control of processes or emissions themselves where these are subject to approval under pollution control regimes. Local planning authorities should assume that these regimes will operate effectively. Equally, where a planning decision has been made on a particular development, the planning issues should not be revisited through the permitting regimes operated by pollution control authorities."

36. Mr Kimblin acknowledges that paragraph 122 is concerned with pollution control regimes as now found in environmental permits. However he submits it is not confined to such regimes. The Inspector should, he submits, have directed himself to

the principle which paragraph 122 contains and he should have read NPPF paragraphs 122-124 as a whole.

37. Mr Kimblin referred to the decision of the Court of Appeal in *Gateshead MBC v Secretary of State for the Environment* [1995] Env LR 37. That case concerned a decision in which the regimes of control under the Town and Country Planning Act and the Environmental Protection Act overlapped. The Court of Appeal approved the judgment of Mr Jeremy Sullivan QC, then sitting as a deputy judge, who held that emissions to atmosphere were material to a planning decision. Glidewell LJ said at page 44:

> "Mr Mole submits, and I agree, that the extent to which discharges from a proposed plan will necessarily or probably pollute the atmosphere and/or create an unacceptable risk of harm to human beings, animals or other organisms, is a material consideration to be taken into account when deciding to grant planning permission. The Deputy Judge accepted that submission also. But the Deputy Judge said at page 17 of his judgment, and in this respect I also agree with him,
>
> > 'Just as the environmental impact of such emissions is a material planning consideration, so also is the existence of a stringent regime under the EPA for preventing or mitigating that impact for rendering any emissions harmless. It is too simplistic to say, "The Secretary of State cannot leave the question of pollution to the EPA"."

38. Mr Kimblin accepts that paragraph 122 is concerned with pollution control regimes, as now found in environmental permits. However he contends it is not confined to such regimes. He submits that the principle contained in paragraph 122 is even stronger in the present case than in cases on pollution control. This is so for a number of reasons, most significantly, Mr Kimblin suggests, because we are concerned with a regime in which the Government is legally bound to achieve a particular outcome, quickly. That is only achievable by the use of non-planning measures.

39. I reject this submission. Paragraph 122 is clear. I agree with Mr Moules that the principle referred to in paragraph 122 concerns situations where a polluting process is subject to regulatory control under another regulatory scheme in addition to the planning system. It is directed at a situation where there is a parallel system of control, such as HM's Inspectorate of Pollution in *Gateshead MBC*, or the licensing or permitting regime for nuclear power stations in *R (An Taisce) v Secretary of State for Energy and Climate Change* [2013] EWHC 4161 (Admin). The point being that the planning system should not duplicate those other regulatory controls, but should instead generally assume that they will operate effectively. The Directive is not a parallel consenting regime to which paragraph 122 is directed. There is no separate licensing or permitting decision that will address the specific air quality impacts of the Claimant's proposed development.

Ground 1(c)

40. The Claimant contends that the Inspector failed to explain why application of the DEFRA damage cost analysis and associated contribution was not likely to be effective.

41. Mr Walton, in his first witness statement at paras 9-13, explains how he undertook calculations of the sum required to mitigate the effects of the proposed developments, using the standard DEFRA Cost Damage Calculation which was accepted by the two local planning authorities affected.

42. Mr Kimblin submits that the Inspector erred in discounting the result of the Cost Damage Calculation on the basis that he did not have specific evidence of effectiveness (DL104) because the principles which underlie the calculation have been determined by the relevant Secretary of State. CPRE contended that the mitigation was unclear, which Mr Kimblin observes of course was true. The Claimant does not contend that the mitigation is automatically presumed to be effective. The problem here, Mr Kimblin submits, is first, that the Inspector presumed that the appropriately calculated funding was not robust without specific evidence of effectiveness, and without dealing adequately or at all with the range of calculations in the Claimant's September 2016 Air Quality Addendum Assessment. The Inspector seems to have required something definite. Second, he did not explain what was wrong with the mitigation. Given that the undertakings provided precisely what the Government's own method required, much more explanation was required before it could be set aside. It was not the role of the Inspector to question the agreed methodology, and none of the parties had invited him to do so. In the alternative, Mr Kimblin contends the Inspector misunderstood the mitigation and its basis, which was not in dispute.

43. In considering this ground of challenge it is necessary to look at the evidence and how the parties presented their cases.

44. Paragraph 9.2.7 of the Claimant's Addendum Assessment under the heading "Recommendations for Mitigation" states: "The impact of the proposed development is predicted to be significant for human receptors within the Newington and Rainham AQMAs. Therefore, mitigation measures will be required and an air pollution damage cost assessment has been carried out to determine the impact of the proposed development in both the SBC and MC administrative areas". What follows is two sets of calculations using 2020 and then 2015 emission factors. At paragraph 9.2.4(1) it is said under the heading "Potential Mitigation Strategies":

> "Determination of appropriate mitigation measures associated with the proposed development site is ongoing but cannot be specified at this time. However, Gladman Developments Ltd are agreeable to entering into a planning agreement in the form of a mitigation statement which commits them to contributing towards mitigation measures which will equal or exceed the value determined by the damage cost calculation using the 2020 Emission Factors (£311,018.80 – based on a value of £197,267.70 for the Newington AQMA and £113,751.10 for the Rainham AQMA), and will focus on mitigating pollutant

> concentrations, particularly within the Newington and Rainham AQMA's, as a result of development generated traffic."

45. The Addendum Assessment continues:

> "9.2.4(2) The 2020 Emission Factors calculation cost is the appropriate figure on which to base the cost of mitigation…
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> …
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> 9.2.4(3) Based on the above evidence, we believe it would be unreasonable for our client to be required to commit to mitigation based on emission factors which are six years prior to the development's opening year, as it is highly unlikely that there would not be a significant improvement in vehicle emissions over this period."

46. It was on that basis the Claimant offered the undertakings that they did.

47. In his evidence-in-chief, Mr Walton, on behalf of the Claimant, said:

> "Difficulty with air quality mitigation is identifying measures that aren't measurable; very difficult to say if we do 'x' this will take off 'x' micrograms – quantification of effect very difficult. Number of guidance documents; refer to planning for air quality guidance which refers to good practice measures developers can put in place, for example charging points, travel plan… Difficult to specify in detail at this stage and may not come to fruition if not bus operator."

Mr Walton gave further evidence on mitigation measures in cross-examination and he was then asked questions by the Inspector. Referring to paragraph 6.17 in the addendum to Mr Walton's proof of evidence where there is a list of potential mitigation measures, the Inspector noted that the first is contribution to highway measures. The Inspector asked whether there were any "specific improvements?" Mr Walton replied:

> "No, this very much follows the traffic assessment and TA already indentified steps somewhat more remote from the site but these are general suggested mitigation measures to be put forward to local authority and highways authority for their consideration."

The Inspector then asked:

> "Would it be fair to say that if highway improvements were to have an impact in improving air quality would need to be local…?"

Mr Walton answered:

> "Would have to be very focused. But if you were able to identify improvements which improved congestion which caused change in traffic movement patterns… can have knock on effect of relocating traffic i.e. reducing traffic in AQMA…"

It seems clear that in asking these questions the Inspector was going beyond the generic list to see if Mr Walton had anything specific in mind by way of mitigating improvements.

48. The Claimant's contentions also disregard the evidence of Professor Peckham, called by CPRE, who gave evidence on air quality. He said:

> "It is not clear how the effects of increased pollution levels are to be mitigated. Proposals for mitigation have been calculated as a financial contribution in line with DEFRA's national guidelines but there is no indication how such financial mitigation is to be used to reduce pollution levels." (Proof of evidence, para 15)

Professor Peckham's evidence, in-chief and during cross-examination, challenged the Claimant's air quality modelling and the adequacy of the mitigation it proposed.

49. In its closing statement CPRE said;

> "The air pollution mitigation 'contribution', however large, does nothing for the adults and children being affected by air pollution now together with the greater harm that would result if the development(s) were granted permission."

50. It is, in my view, plain from the evidence of Mr Walton and from the questions asked by the Inspector, and from the evidence of Professor Peckham and the closing submissions of CPRE that the likely effectiveness of the mitigation measures was a live issue at the inquiry. That being so, the Inspector was required to reach his own judgment on the matter. I agree with Mr Moules that the Inspector was entitled to consider "the effect of any mitigation measures that are proposed" (see *Shirley* at para 14; and also by analogy *Secretary of State for Communities and Local Government v Wealden District Council* [2017] EWCA Civ 39, per Lindblom LJ at para 30, where "the Inspector did not explain how he thought the financial contributions in the Section 106 obligation were in fact going to be translated into practical measures to prevent or overcome the possible effects of Nitrogen deposition to which he had referred…").

51. I consider that at DL104-106 the Inspector reached a conclusion that on the evidence he was entitled to reach and that he explained what was wrong with the mitigation. The contributions had not been shown to translate into actual measures likely to reduce the use of private petrol and diesel vehicles and hence reduce the forecast NO_2 emissions (DL104).

Ground 1(d) and Ground 1(e)

52. The Claimant contends that the Inspector was obliged to consider whether the issue which concerned him in relation to mitigation could be overcome by the imposition of a *Grampian* condition (Ground 1(d)); and that he failed to give the Claimant an opportunity to address the matter at the Inquiry or prior to issuing the appeal decision (Ground 1(e)).

53. The Claimant never suggested it would agree to be bound by a *Grampian* or any such condition. Nevertheless Mr Kimblin submits that a condition which required the submission of a scheme of mitigation measures could have been drafted and imposed in a manner which precluded development until the planning authority accepted that the scheme would address the air quality impacts. That, he submits, would have been a reasonable condition (see *British Railways Board v Secretary of State for the Environment* [1993] 3 PLR 125, per Lord Keith at 128 & 132; NPPG on *Grampian* Conditions; and witness statement dated 22 February 2017 of Mr John McKenzie, the Claimant's planning director, at para 5). It is irrelevant, Mr Kimblin submits, that such a condition was not canvassed by any party before the Inspector.

54. I reject these submissions. An Inspector does not have an obligation to cast about for conditions that are not suggested to him. It was not suggested by the Claimant that if the Inspector were unpersuaded by its evidence he should consider imposing a *Grampian* condition. I agree with Mr Moules that the Claimant having presented the Inspector with two unilateral undertakings, he was entitled to take them as the Claimant's settled position in respect of mitigation. Further, in the light of the Inspector's finding as to the lack of evidence as to the effectiveness of the proposed mitigation measures, I agree with Mr Bowes that the reasonableness of the condition that the Claimant now suggests it would have accepted is questionable.

55. In *Top Deck Holdings v Secretary of State for the Environment* [1991] JPL 961 at 964-965 Mann LJ, when considering the question as to what the Inspector was to do in regard to a condition that was neither requested nor, more significantly, offered, referred to the decision of Forbes J in *Marie Finlay v Secretary of State for the Environment and London Borough of Islington* [1983] JPL 802. The issue before the court, was described by Forbes J as follows:

> "The notice of motion took two broad points. The first was that the Secretary of State failed to take into account a material consideration being, in effect, the possibility of attaching conditions to any planning permission which might get rid of some or all of the objections raised to this particular change of use."

Upon that point Forbes J said this:

> "It was one thing to say that where the question of conditions was being canvassed it might be sensible for the Secretary of State to consider making a slight alteration to the condition if that would deal with the problems that might arise … It was a wholly different thing to suggest that where there had been no canvassing of any possible condition, the Secretary of State was

> bound to look around and consider whether there was or was not some possible condition which might be attached which might save this planning application.
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> …
>
> If a party to an appeal wanted the appeal to be considered on the basis that some condition could cure the planning objection put forward, then it was incumbent on the appellant to deal with that condition at the inquiry. Unless such a condition has been canvassed the Secretary of State was not at fault in not imposing such a condition. For those reasons … the attack on this decision on the grounds of failure to consider the application of conditions failed."

Mann LJ agreed with the view expressed by Forbes J. He said that:

> "Such an approach had to work sensibly in practice. An Inspector should not have imposed on him an obligation to cast about for conditions not suggested before him."

56. I do not accept Mr Kimblin's submission that the decision in *Top Deck Holdings* is confined to its own facts, being concerned with offering a condition involving the demolition of buildings, which, he suggests, is certainly something which an applicant would need to offer. I consider that in *Top Deck Holdings* the Court of Appeal was stating a general principle. In *National Anti-Vivisection Society v First Secretary of State* [2004] EWHC 2074 (Admin) Collins J commented at para 32:

> "As a general proposition, it is not for an Inspector or for the Secretary of State to identify conditions which neither the local planning authority or the appellants consider to be appropriate. Authority for that proposition is to be found in the decision of the Court of Appeal in *Top Deck Holdings*… The details of the condition that it was suggested the Inspector should have indentified in that case are perhaps of no real importance. The principle is what matters."

57. Mr Kimblin has further suggested support for the Claimant's case can be drawn from the NPPG Costs Guidance: refusing planning permission or a planning ground capable of being dealt with by conditions risks an award of costs. However that guidance is directed to a planning authority determining planning applications and its conduct in determining such applications. Different considerations apply when considering the obligations of an Inspector seized of an appeal.

58. I also reject the contention that the Claimant did not know what case it had to meet.

59. In *Hopkins Developments Ltd v Secretary of State for Communities and Local Government* [2014] PTSR 1145 at para 62, Jackson LJ summarised the relevant principles of fairness. They are, so far as material:

> "(1) Any party to a planning inquiry is entitled to (i) to know the case which he has to meet and (ii) to have a reasonable opportunity to adduce evidence and make submissions in relation to that opposing case… (4) a rule 7 statement or a rule 16 statement identities what the inspector regards as the main issues at the time of his statement. Such a statement is likely to assist the parties but it does not bind the inspector to disregard evidence on other issues. Nor does it oblige him to give the parties regular updates about his thinking as the Inquiry proceeds. (5) The Inspector will consider any significant issues raised by third parties, even if those issues are not in dispute between the main parties. The main parties should therefore deal with any such issues, unless and until the Inspector expressly states that they need not do so…"

Beatson LJ added at para 90:

> "The authorities on planning inquiries considered by my Lord show that in this context what is needed is knowledge of the issues in fact before the decision maker, the inspector, and an opportunity to adduce evidence and make submissions on those issues…"

60. It was Professor Peckham's evidence that it was not clear how the financial mitigation proposal (in line with the agreed methodology) is to be used to reduce pollution levels (see para 48 above). He was saying that the contributions had not been shown to translate into actual measures likely to reduce NO_2 emissions. In his evidence Mr Walton accepted that it was difficult to quantify the effects of mitigation measures (see para 47 above). I consider it sufficiently clear that the effectiveness of mitigation measures was an issue as far as emission factors were concerned. The Claimant in its evidence, through Mr Walton, attempted to answer the points that were raised on this issue.

61. I am satisfied from the evidence to which I have referred that the Claimant knew the case which it had to meet and had an opportunity to adduce evidence and make submissions in relation to mitigation measures (which included suggesting a *Grampian* condition if he had wished to do so). I consider that the principle of fairness was satisfied in this case.

Ground 2

62. The Claimant contends that the Inspector erred in failing to explain how the proposal is in conflict with the air quality action plan, read as a whole. It is the Claimant's case that its proposed mitigation measures were consistent with the local action plan, and that the Inspector ought to have explained where the inconsistency with the plan arose.

63. The Newington Air Quality Action Plan deals generally with a wide range of matters. On page 4 it states that:

> "**The most realistic/financially achievable and environmentally sound options to reduce air pollutants in the High Street at Newington AQMA are:**
>
> 1. Continuous Monitoring, Modelling, Further Assessments.
>
> 2. Continued liaison between Planning and Environmental Health colleagues regarding the LDF process and on application for planning permission, resulting in development which should not materially affect air quality in the AQMA.
>
> 3. Supporting reduction in traffic impact projects and campaigns e.g. tyre inflation, fuel efficiency, smart driving courses, etc.
>
> 4. Promotional work with industry to encourage consideration of alternative fuels and vehicles, routes/times for traffic.
>
> 5. Work with local rail, green taxi and bus companies, car share schemes.
>
> 6. Work with schools re School Travel Plan and other projects.
>
> 7. Investigate NOx absorbing materials.
>
> 8. Work with the Co-op and shops in the High Street regarding lorry deliveries and emissions and use of parking.
>
> 9. Community trees and plants project."

(See also item 10 in Medway Action Plan where the focus is on avoiding worsening air quality).

64. Mr Kimblin submits that the Claimant does not know how or why the proposal is said to be inconsistent with the Action Plan, the Inspector having said nothing about consistency or otherwise with the Action Plan.

65. Mr Kimblin refers to the proposed forms of mitigation under the heading "Potential Mitigation Strategies" in the Claimant's September 2016 Air Quality Addendum Assessment. At paragraph 9.2.40 it states:

> "Mitigation measures which could be implemented include:
>
> - Contributions to highway improvements in order to reduce local traffic congestion;
>
> - Provision of electric vehicle charging points on the proposed development site;

- Contributions to low emission vehicle refuelling infrastructure;
- Provision of enhanced public transport serving the site;
- Provision of incentives for the uptake of low emission vehicles;
- Financial support to low emission public transport options; and
- Improvements to cycling and walking infrastructure."

66. The Inspector properly directed himself as to NPPF paragraph 124. He referred to the Newington and Rainham Air Quality Action Plans. The Newington plan notes at section 7.1 on proposed Borough-wide Measures to improve air quality that:

> "The Local Planning Authority will continue to liaise closely with Environmental Health on applications for planning permission, and will carefully consider whether mitigation measures are required relating to development which could affect the air quality within the Newington AQMA. Where these can be secured either through planning conditions or obligations, in accordance with government guidance, legislation and planning policy, the Local Planning Authority will seek to ensure they are provided. Where such measures cannot be secured, and harm to the air quality in the AQMA is significant, planning permission may be refused."

67. The Inspector found that the proposed development would be likely to have an adverse effect on air quality, particularly in the AQMAs. That being so, I agree with Mr Moules that it is obvious why the Inspector concluded that the proposed development was inconsistent with the local air quality action plans that sought to ensure development did not harm air quality. The decision letter read as a whole makes it clear to the parties (*Bloor Homes East Midlands Ltd v Secretary of State for Communities and Local Government* [2014] EWHC 754 (Admin) at paragraph 19, per Lindblom J (as he then was)) that the inspector followed national policy, found there to be a breach of the air quality action plans, and accordingly concluded at that both proposals would conflict with the guidance in NPPF paragraph 124.

Ground 3

68. The Claimant contends that the Inspector failed to have regard to the fact that the emerging development plan contained an allocation for 115 dwellings in Newington within the AQMA.

69. Mr Kimblin submits that the Inspector failed to address that the planning authority has accepted the balance of considerations, including air quality impacts, which results in this allocation. He submits that if the Inspector did seek to grapple with this material consideration, and applied the same reasoning as he applied to the appeal proposals, he would have had to conclude that the allocation within the Newington AQMA was

contrary to NPPF paragraph 124. He would have had to, and should have, addressed the fact that his finding was contrary to relevant policy/allocation in the emerging local plan.

70. I reject these submissions. First, it is clear that the Inspector did deal with the emerging plan (DL21-22) and he considered that little weight should be given to it. He noted that over 400 main modifications to the emerging local plan ("ELP") had been published for consultation in response to the Inspector's Interim Findings, and that some 2,220 representations had been made on the main modifications that will need to be considered by the Inspector (DL22). Further hearings were held before the Inspector completed her report and recommendations. In those circumstances the Inspector was entitled to conclude, as he did, that "substantial uncertainty remains about exactly which site allocations will appear in the adopted ELP and at what scale" (DL22).

71. Second, whilst emerging Policy AX6 proposes an allocation of 115 dwellings in Newington, it provides that the development must "Address air quality impacts arising in the Newington AQMA, including the implementation of innovative mitigation measures" (Main Modification 161, para 5). New development must thus be judged on its merits according to its air quality impacts. I consider that is what the Inspector did in relation to the Claimant's proposal.

Conclusion

72. For the reasons I have given none of these grounds of claim succeed. Accordingly, this claim is dismissed.