

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

Birmingham Civil Justice Centre
Priory Courts, 33 Bull Street, Birmingham, B4 6DS

19/02/2016

B e f o r e :

THE HON. MRS JUSTICE PATTERSON DBE

Between:

**THE QUEEN on the application of SIMON
DUDFIELD** **Claimant**

- and -

FOREST OF DEAN DISTRICT COUNCIL **Defendant**

- and -

TIM SHAYLE, T/A COUNTRYMAN SPORTS **Interested Party**

**Nina Pindham (instructed by Davies and Partners Solicitors) for the Claimant
James Corbet Burcher (instructed by Forest of Dean District Council) for the
Defendant
Sarah Clover (instructed by TLT Solicitors) for the Interested Party**

Hearing date: 10 February 2016

Mrs Justice Patterson:

Introduction

1. On 13 August 2015 the defendant granted planning permission to the interested party for the construction of acoustic barriers, use of the land for the storage of shooting huts and associated landscaping on land at Mount Oliver Meadow, Hartpury, Gloucester.
2. The claimant, Simon Dudfield, lives some 2 miles from the application site. His mother lives some 450 metres from the site.
3. The defendant is the local planning authority for the area in which the application site is located.
4. The interested party was the applicant for planning permission.

5. The application site is located in the open countryside in the parish of Hartpury. The site lies 1.5 kilometres west of the village of Hartpury and about 8 kilometres northwest of the centre of Gloucester. The site is surrounded by a mixture of farmland and wooded areas. Mount Oliver Wood, an area of ancient semi-natural woodland, abuts part of the western boundary of the site. The nearest neighbouring property is about 250 metres to the southwest. Further properties are located over 300 metres away. The application site is part of Mount Oliver Meadow.
6. Lang J granted permission to bring judicial review proceedings on all four proposed grounds of challenge on 9 November 2015.
7. The claimant no longer pursues ground one but maintains grounds two, three and four, ground three of which has been divided into two. The four grounds of challenge as reformulated and renumbered before the court are:
 - i) That the Council failed to consider whether the development was of such a scale and degree as to lead to a permanent change in the use of land, which in the circumstances, was a material consideration;
 - ii) That the Council erred in law in failing to consider whether the development was in accordance with the Development Plan policies seeking to protect and enhance biodiversity as it was required to do by section 70(2) of the Town and Country Planning Act 1990 (“TCPA”) and section 38(6) of the Planning and Compulsory Purchase Act 2004 (“PCPA”);
 - iii) That the Council failed to take into account a material consideration, namely, the nearest “sensitive receptor”, which was the Orchard Centre. Alternatively, the Council failed to give adequate reasons for not so considering;
 - iv) The Council irrationally based its decision on evidence that the shot noise level would be reduced to an acceptable level using low-load cartridges, but then failed to impose a condition requiring that low-load cartridges would be used.

Factual Background

8. The site consists of grassland and a mixture of hedges and trees. The lawful use is for agriculture.
9. During 2013 the interested party commenced clay pigeon shooting on the site. Local residents objected. The Environmental Health Officer (“EHO”) of the defendant, Matthew Kirby, undertook noise monitoring on 11 August and 22 September 2013. From that he identified the shot noise level (“SNL”) measured 76 A-weighted decibels and 84 A-weighted decibels in two locations.
10. The Chartered Institute of Environmental Health (“CIEH”) ‘Guidance on the Control of Noise – Clay Target Shooting (2003)’ notes that “significant annoyance” is highly likely to occur at noise levels above 65 A-weighted decibels but that local circumstances can affect when annoyance occurs.
11. On 30 September 2013 the defendant issued an abatement notice in respect of statutory nuisance under section 80(1) of the Environmental Protection Act 1990 prohibiting “the use and discharge of firearms” within a designated area comprising the application site. That abatement notice remains in place.
12. The CIEH guidelines specify that shooting should generally not take place within 1 kilometre of a residential dwelling and that sensitive receptors should be taken into account.

13. Paragraph 4.5 of the guidelines is headed 'Noise sensitive premises and other noise sensitive locations'. It reads:

"Noise sensitive premises typically include residential properties, churches, offices, hospitals, nursing homes, schools and colleges. The proximity of such noise sensitive premises and any other noise sensitive areas should always be a prime concern when considering suitable site locations.

In addition, farm buildings, particularly those housing young animals, may also be considered to be noise sensitive premises in some situations. The sound of gunfire may be distressing to wild and domestic animals during certain periods (e.g. mares in foal, ewes at lambing). Alternative views have been expressed about whether or not wild birds and animals adjust to the sound of gunfire.

Given the potential sensitivity of wild and domestic animals and birds at sites adjacent to or included within shoot areas, it is advisable that shoot organisers or their representatives discuss with the owner(s) of surrounding land and with wildlife preservation bodies or nature conservation officials the particular times when animals are likely to be unusually sensitive, and arrange for a temporary suspension or reduction in activities as necessary."

14. There are some 20 residential properties within the recommended 1 kilometre distance.
15. The date for compliance with the abatement notice was 2 December 2013.
16. On 14 November 2014 the planning application for the development eventually permitted was submitted with an accompanying noise report from acoustic consultants, Hoare Lea.
17. The planning application was for two large acoustic bunds to be formed on the western boundary of the clay pigeon shooting area with two arms on each acoustic bund. The bunds were to have a maximum length of 360 metres, a width of 28 metres and a height of 3 metres above existing ground level. One firing position was proposed for the northern bund and three firing positions for the southern bund. Each firing position, when in use, would have a movable firing shed on it (to reduce the noise level).
18. The proposed works were to start at the northern end of the site and move southwards. 75,000 tonnes of material would be required for the construction works. Materials were to be sourced from local construction projects.
19. Objectors instructed and obtained a further acoustic report from consultants known as Acoustic Air.
20. The defendant commissioned its own independent noise assessment report, from SLR, to consider the differing conclusions of the two other consultants. SLR reported to the Council in May 2015.
21. By that time a further updated report had been provided by the applicant's noise consultants which SLR considered. SLR concluded that they had no reason to doubt the noise model outputs presented by Hoare Lea.

The Officer Report

22. Given the nature of the challenge the officer report in certain parts needs to be considered in some detail.

23. The report started in a conventional way with a discussion of the application and consultation responses received. The Development Plan was outlined.
24. The key part of the report is within section 7 entitled 'Evaluation'. That started with the background to the application which was to reduce the noise impact from clay pigeon target shooting at Mount Oliver Meadow and lift the section 80 noise abatement notice which had been served upon the applicants in September 2013 as a result of the noise survey conducted over two days taken at Windmill Cottage to the north of the site where a SNL of 76 DbA was measured. The applicant was said to want to continue clay pigeon shooting for only 28 days a year as allowed under the Town and Country Planning (General Permitted Development) (England) Order 2015 ("GPDO").
25. The principle of development was discussed. Clay pigeon shooting was regarded as an appropriate use within open countryside as it was outdoor recreation. It was unable to be carried out on the application site as a result of the noise abatement notice.
26. The site was located in open countryside where the principle of farm diversification was supported. The report made reference to paragraph 28 of the National Planning Policy Framework ("NPPF") which said that policies "should promote the development and diversification of agriculture and other land based rural businesses and support the economic growth in rural areas and sustainable rural tourism and leisure developments which respect the character of the countryside."
27. The report considered the impact on living conditions and noted that there were four properties within a 500 metre radius of the application site boundary which rose to 20 properties within 1,000 metres.
28. It continued with reference to the CIEH 'Guidance on the Control of Noise – Clay Target Shooting 2003'. That said:

"There is no fixed shooting noise level at which annoyance starts to occur. Annoyance is less likely to occur at a mean shooting noise level (mean SNL) below 55 Db(A) and highly likely to occur at a mean SNL above 65 Db(A). The likelihood of annoyance within the range will depend upon local circumstances."
29. The applicant's noise impact assessment and modelling indicated that with the proposed mitigation measures (the proposed bunding, the use of lower weight cartridges of 24 grams rather than the standard 28 gram cartridges and shooting sheds), shot noise from all of the proposed positions could be controlled so that the levels would not exceed 60 A-weighted decibels. Other mitigation measures had been considered. However, acoustic screens on the boundary of the site would have to be impracticably high and they would, therefore, be structurally unsound.
30. The report noted that SLR had considered the submitted information from both other noise consultants and concluded that they had no reason to doubt the noise model outputs presented by the applicant's noise consultant.
31. The first defendant's EHO had confirmed in respect of the revised acoustic report submitted by the applicant that he had no objection and was satisfied with the noise mitigation scheme which he believed was unlikely to lead to significant adverse impacts on health and quality of life. The report continued that it would be reasonable to attach conditions suggested by the EHO in respect of limiting the construction works and associated importation time and impose a condition to provide a scheme of mitigation to ensure that vehicles do not track material from the site onto the highway.

32. The report continued in that section as follows:

“The proposal would result in levels of noise and disturbance which would not have an unacceptable adverse effect on the current amenity levels enjoyed by nearby residents provided the above suggested conditions are attached to any permission granted and would therefore accord with the requirements of the NPPF, policy CSP1 of the Core Strategy and policy AP1 of the Allocations Plan.”

33. There then followed a section dealing with the character, appearance and landscaping which concluded:

“It is considered that in character, appearance and landscaping terms the proposed bunding would be in keeping with the site and surrounding countryside and will not cause any unacceptable visual amenity concerns in line with the aims and objectives of guidance of the NPPF, policy CSP1 of the Council’s Core Strategy and policy AP1 of the Allocations Plan.”

34. On biodiversity it was noted that the applicant had submitted an Ecology Addendum (dated March 2015) which “... resolves previous concerns relating to the adequacy of baseline data and impact assessment. However, concerns remain that the measures proposed to avoid, mitigate and compensate for biodiversity impacts were insufficiently comprehensive or detailed.” To address that it was recommended that any permission be granted in accordance with suggested pre-commencement conditions the Sustainability Team had recommended which it was said would not seem unreasonable to protect the biodiversity of the site.

35. On other matters the report said:

“It is acknowledged as stated previously in this report that there have been objection letters received from neighbouring properties in regard to the proposed noise levels generated by the use as a clay pigeon site and/or the noise created during the construction phase of this proposal being detrimental to people living in the surrounding area and users of the open countryside and therefore being unacceptable and that the proposed works to create the bunds would be detrimental to the highway safety of the surrounding areas. It is also acknowledged that one of these neighbours has also commissioned their own assessment of the applicant’s submitted Noise Assessment and Landscape details. These assessments raise concerns in regard to controlling the direction of fire, that the proposal would be detrimental to the users of Orchard Centre (which lies to the east of this site), that the figures presented do not take into account changing wind conditions.

However, the use of the site as a clay pigeon site is not under consideration in this application as 28 days a year clay pigeon shooting operation on this site is allowed under the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended). In regard to the concerns about noise the proposed works have addressed this in that the submitted details indicating that a 60 dB(A) noise level can be achieved 1 Kilometre from this site. If this cannot be achieved and it exceeds 65 dB(A) then Environmental Health Legislation would address this, and appropriate action could be taken. In regard to the construction phase of the proposed works this is addressed in the issues above and considered acceptable by all the consultees.”

36. The report concluded:

“It is considered that the construction of acoustic barriers, use of land for the storage of shooting huts and landscaping are in line with the requirements of National Planning Policy Framework, Policies CSP.1 and CSP.7 of the District Council’s Core Strategy and Policies AP.1, AP.3, AP.4 and AP.7 of the Allocations Plan that seek to encourage appropriate farm diversification activities in the countryside provided that it does not detract from its character

and appearance and is not detrimental to the living conditions of neighbouring dwellings. Therefore the recommendation to Planning Committee is one of approval subject to the following conditions being attached to any permission granted.”

37. The vote on the application was carried with ten members in favour of a grant and four against, with one abstention.
38. The Orchard Centre is a publically accessible wildlife reserve and wetland located some 210 metres from the application site at its closest point. Management of the reserve commenced in 2002 and continues with assistance of grants from Gloucestershire Environmental Trust and Natural England.
39. Acoustic Air, noise consultants for the objector, specifically identified the centre as a sensitive receptor and SLR confirmed that the centre could be considered to be a sensitive receptor “if animals reside there”.

Legal Framework

40. There is no dispute about the legal approach to planning officer’s reports. They should be read in good faith, as a whole and not legalistically. When they are the subject of a challenge they are not to be subjected to the same exegesis that might be appropriate for the interpretation of a statute. The test is whether 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: see *Oxton Farms, Samuel Smith Old Brewery (Tadcaster) v Selby District Council* [1997] WLR 1106.
41. In construing reports it must 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”: see *R v Mendip District Council ex parte Fabre* [2000] 80 P&CR 500 per Sullivan J (as he then was). How much information should go into an officer report to enable it to perform its function is itself a matter for the officers exercising their own expert judgement.
42. The approach of officer reports has recently been confirmed by the Supreme Court in *R (Morge) v Hampshire County Council* [2011] UKSC 2 at [36] where Baroness Hale said:

“Some may think this an unusual and even unsatisfactory situation, but it comes about because in this country planning decisions are taken by democratically elected councillors, responsible to, and sensitive to the concerns of, their local communities. As Lord Hoffmann put it in *R (Alconbury Developments Ltd and others) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2003] 2 AC 295, para 69, ‘In a democratic country, decisions about what the general interest requires are made by democratically elected bodies or persons accountable to them.’ Democratically elected bodies go about their decision-making in a different way from courts. They have professional advisers who investigate and report to them. Those reports obviously have to be clear and full enough to enable them to understand the issues and make up their minds within the limits that the law allows them. But the courts should not impose too demanding 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. It is their job, and not the court’s, to weigh the competing public and private interests involved.”

Ground One: Whether the Council Erred in Law by Failing to Consider Whether the Development was of Such a Scale as to Lead to a Permanent Change in the Use of Land?

43. It is the claimant's case that the first defendant, which had concerns about the scale of the development, was obliged to consider the effect of such a scale of development on the character of the land. In other words, whether a change of use would take place as a result of the development was a material consideration which the defendant failed to address.
44. The claimant relies on the case of *Ramsey v Secretary of State for the Environment, Transport and the Regions* [2002] EWCA Civ 118. In particular, reliance is placed on the judgement of Keene LJ which stated that, in principle, physical changes to the land which made it difficult or impossible for the land to revert to its former use after the temporary use were relevant to whether there was, in fact, a material change of use which required planning permission. The High Court had not dealt with the fact that the land could revert to its former agricultural use and, accordingly, the appeal was allowed.
45. The claimant submits that the critical factors are the duration of the temporary use and the ability of the land to revert to its natural use in between temporary uses. If operational development in connection with a temporary use would make it difficult for the land to revert to its normal use, then that may lead to a conclusion that a change of use would have taken place.
46. Here, the claimant submits that the development involved the importation and permanent disposal of some 75,000 tonnes of inert waste, the construction of a pond and extensive landscaping on a relatively level 3.24 hectare agricultural site thereby occasioning the creation of large landforms. In those circumstances whilst the application was not seeking planning permission for the change of use of the land from agricultural to clay pigeon shooting that may well have been its effect.
47. The claimant further submits that whilst not precluding the use of the land for grazing in the intervening period between the temporary clay pigeon shooting use the development would preclude the use of the land for the planting of crops in perpetuity. That placed a significant and permanent limit on the agricultural use of the land and economic flexibility of any future land owner.
48. The defendant submits that the case of *Ramsey* is not applicable to the case before the court. In *Ramsey* the High Court and Court of Appeal were tasked to identify whether the inspector had erred in law in refusing to grant a Lawful Development Certificate ("LDC") for "use of agricultural land for the purpose of vehicular sports and leisure activities for a period not exceeding 28 days in any calendar year." An LDC had already been granted for the creation of a circuit or track by mechanical excavation and raising of banks and jumps on a formerly level or graded field or meadow. The nub of the issue was whether the proposed use of the site for the purpose of vehicle use and leisure activities would be development because it involved a material change of use.
49. Here, the application was for full planning permission with three components:
 - i) Operational development: the construction of acoustic barriers;
 - ii) Change of use: use of the land for the storage of shooting huts; and
 - iii) A further category of limited operational development for associated landscaping.
50. The defendant submits that this part of the challenge is essentially to the adequacy of the explanation of the physical nature of the development within the report itself and thus a reasons challenge.
51. The defendant also invokes section 31(2A) of the Senior Courts Act 1981. If any error of law is identified then the section would apply as it was highly unlikely that, had the Committee

considered the claimant's argument on the basis of *Ramsey* (which was not raised at the time), they would have reached a different decision, namely the refusal of planning permission.

52. The Committee minutes make reference to the late material that was circulated before the meeting. They note that an objector and the agent for the applicant spoke to their written representations which had already been submitted. The minutes record Councillor Burford asking whether the mitigation put forward would guarantee that the noise would be reduced. The minutes continue:

“The development manager advised that this could not be guaranteed but that the methodology used and the mitigation proposed had resulted in the consultants reaching the conclusion that noise would be reduced. If the applicant did not implement any of the measures Environmental Health could take further action.”

53. In the minutes of the Committee debate the group manager advised the members that they were only considering the provision of bunds and that there was no control over shooting as this was classed as permitted development.

Discussion and Conclusions

54. The case of *Ramsey* is at the heart of the claimant's submissions. That was a case which involved the use of agricultural land for motorcycle scrambling from the late 1980s. Enforcement notices were served relating to the use of land for vehicular purposes and operational development consisting of ongoing operations. An LDC was granted in September 1998 for the creation of a circuit or track by mechanical excavation and the raising of banks and jumps on formerly level or graded field or meadow. The appellants sought a further LDC specifying, “The use of agricultural land for the purpose of vehicular sports and leisure activities for a period not exceeding 28 days in any calendar year.”
55. The appellants' case was that while the proposed use of the appeal site for the purpose of vehicular sports and leisure activities would be “development” because it would involve a material change of use it did not require express planning permission because permission for such use of up to 28 days in any one calendar year had already been granted by the GPDO, article 3(1) and part 4 class B of schedule 2. If that was right then the use was lawful and could not be enforced against. The inspector at the appeal recorded that the appellants' case was that between the proposed events the site would revert to agricultural use involving the grazing of animals, with the physical appearance of land remaining unaltered. She described the issue as being whether the proposed use would have the attributes of a temporary use or a permanent, though intermittent, use. In determining that issue she emphasised that the appeal site had the appearance of a facility created for vehicular sports and she regarded the proposed use as being a permanent one falling outside part 4 class B of the GPDO. She dismissed the appeal. That decision was upheld in the High Court.
56. On appeal, giving the leading judgement Keene LJ said at [43]:
- “What then is the relevance of physical changes to the land where those changes facilitate a use which is to take place on no more than 28 days in a year? I accept the emphasis placed by Mr Bird on the significance of the distinction in planning law between operational development and change of use development. Nonetheless, the carrying out of operations on the land, either in anticipation of the proposed use or accompanying it, may in some cases be relevant on the issue of whether the proposed use is a temporary one within the GPDO or is instead a permanent change of use of the land. That would arise if the operations make it difficult or impossible for the site to revert realistically to its previous normal use (such as agriculture) in between the occasions when the land is used for the new use. If the physical changes have that effect, then one would be dealing with a material change of use from the previous use, which

had to all intents and purposes ceased, to the new use, even though the latter only in practice involved activity on 28 days or less a year. It is duration and reversion to normal use which is of importance.”

He continued in [46]:

“In my judgement, the inspector and the judge below went wrong in attaching the significance which they did to the existing physical changes to the site. It is the duration of the proposed use and the reversion in between times to the normal use of the land which are the critical factors. If this appeal site is used for the proposed use on no more than 28 days a year and it reverts after each occasion to agricultural use for the rest of the year, then the deemed permission in Part 4 Class B covers the proposed use. Those conditions seem to me to be met in this case.”

57. As is evident that was a decision dealing with the use of land. The basic distinction between changes of use development and operational development is set out in section 55(1) of the TCPA which defines development.
58. The application before the Committee which they had to consider was for development of a hybrid nature, namely operational development in relation to the construction of the bunds as acoustic barriers, change of use involving use of the land for the storing of shooting huts and further limited operational development by way of associated landscaping. No determination was sought as to whether the proposed use of the land for clay pigeon shooting was lawful as none was required given the existence of permitted development rights under part 4 of class B of the GPDO. As it was the Committee had to determine the acceptability or otherwise of the application before them. That meant that the defendant was obliged to consider the effect of the proposed development before it on the character of the land. That is what the Committee did.
59. The case of *Ramsey* was not dealing with whether a hybrid permission, as was sought in the circumstances of the instant case, could or would have the ancillary effect of converting a temporary use into a permanent use. *Ramsey* was dealing with whether a temporary but repeated use was in fact permanent and in need of further planning permission. That is an entirely different issue to that which arises in the instant case.
60. If the interested party wishes to pursue clay pigeon shooting on the land for any period longer than 28 days that will require a further planning application. A busy Planning Committee is under no obligation to consider applications which are not before it. It has to consider and determine each application as presented to it upon its own merits. The application before it was not seeking, as the claimant contends in its skeleton argument, “Planning permission for the change of use of the land from agricultural to clay pigeon shooting which may well have been its effect”.
61. The permission sought and approved facilitated a temporary permitted shooting use. That was its purpose; to mitigate the noise arising from such a use. The permission granted could not have any direct effect on the lawfulness or the extent of the shooting use. That could have continued lawfully without the planning permission for bunds and huts. The abatement notice was, and remains, in effect to deal with any environmental annoyance from the clay pigeon shooting use.
62. But, on any view, the permission granted did not prevent the land from reverting to its normal use. Its normal use was as a maintained scrub and grassland which is capable of lawful grazing use. That is conceded in terms in the claimant’s skeleton arguments as follows:

“Whilst not precluding the use of the land for grazing in the intervening periods between the temporary clay pigeon shooting use (although the considerable landscaping proposed –

described as ‘woodland planting’ would affect such a use) the development would preclude the use of the land for the planting of crops in perpetuity.”

There are no subcategories within agricultural use. It follows on the claimant’s own case that, if it is relevant to do so, and in my judgement it is not, the permission granted allowed agricultural use to continue between periods of shooting. On their own analysis there was no omission of a material consideration by the defendant.

63. However, the key point is what was before the Committee. That was a hybrid application the main part of which was the construction of bunds within the landscape to constitute acoustic barriers for the temporary clay pigeon shooting use. Issues arising from that proposed development were addressed appropriately within the officer report. It can be deduced therefore that the Committee adopted that reasoning. Conditions attached related to the acceptability of the development proposed before it. There was no omission of any material consideration. The claimant has misdescribed and/or misunderstood the nature of the application that was before the Committee such that this ground is misconceived and fails.
64. Although in the circumstances I am not obliged to do so, if I had to consider section 31(2A) of the Senior Courts Act, as the defendant dealt with the application before it appropriately it is, in my judgement, highly unlikely that they would have reached a different decision, namely the refusal of planning permission.

Ground Two: Whether the Council Erred in Law by Failing to Consider Whether the Development was in Accordance with Development Plan Policies Seeking to Protect and Enhance Biodiversity?

65. The claimant contends that as the purpose of the application was to facilitate the use of the land for clay pigeon shooting the Council was obliged to consider whether that use would be in accordance with the Development Plan which included policies to protect and enhance biodiversity as well as local amenity.
66. As part of the assessment, it is submitted, no account was taken of any impact or disturbance to nesting birds as a result of the proposed shooting activity. Although the defendant had commissioned its own independent report to consider the impact of noise on local residents it should also have considered the noise impact on animals such as nesting birds.
67. Under the Development Plan policy CSP1 (design and environmental protection core strategy) and emerging policies AP1 (sustainable development) and AP7 (biodiversity of the allocations plan) the defendant was obliged to consider the effects of the development on biodiversity which it did not do. In particular, the officer report should have considered the impact on animals residing at the nearby Orchard Centre Wildlife Reserve. The implications of directing shooting noise towards a protected woodland and taking place 210 metres from an important local wildlife reserve containing several species of breeding birds were relevant to the question of whether the Development Plan would be complied with as a result of the development.
68. The defendant has filed various witness statements including that from Mr Chapman who is the lead officer of the Sustainability Team with the defendant. He confirmed that the application site did not lie within 1 kilometre of any nationally designated nature conservation site and was not a Key Wildlife Centre. The Orchard Centre/National Perry Pear Centre has no full protected status.
69. The only Development Plan policy in force at the relevant time was CSP1 headed ‘Design, Environmental Protection and Enhancement’. AP1 and AP7 were both emerging policies in the Allocations Publication Plan document.

70. Policy CSP1 is a general policy requiring the design and construction of new development to take into account important characteristics of the environment and conserve, preserve or otherwise respect them in a manner that maintains or enhances their contribution to the environment including their wider context. To achieve that objective the impact on any protected sites is to be taken into account. The supporting text of the Core Strategy at 6.4 reads:
- “The Forest of Dean has a large number and variety of protected sites and landscapes. They include areas protected by European and national legislation and development within them is strictly controlled. Examples include the Special Areas for Conservation, Ancient Monuments and sites of Special Scientific Interest. There are also locally protected Key Wildlife Sites and other areas of local interest. In addition it is essential to take proper account of the need to safeguard certain protected species which may be present throughout the district. As a general principle development in these areas or development which adversely affects protected species is very unlikely to be permitted. Semi natural habitats such as ancient woodland will be protected from development. Enhancement will be sought either independently or as part of a new development. Combinations of sites forming larger general areas are of great importance in nature conservation and it is therefore important to assess the impact of proposals on the wider area using such considerations as the Gloucestershire Nature Map. All protected areas and others can form part of particularly important networks of “green infrastructure”. This can be multi functional so for example recreational routes can be useful wildlife corridors.”
71. In the emerging policies policy AP1 is headed ‘Sustainable Development’. Its purpose is recorded to illustrate how the sustainable development aims of the Core Strategy can be achieved and to provide a policy expressing these aims in a manner which is in keeping with the NPPF. Policy AP7 is headed ‘Biodiversity’ and is to ensure that there is a net gain in biodiversity through implementation of the Plan in keeping with the NPPF.
72. The claimant contends that none of those matters were taken into account.

Discussion and Conclusions

73. Section 6 of the officer report itemises relevant policies for consideration. Policy CSP1 and policies AP1 and AP7 are referred to. They are referred to also in the evaluation section of the report dealing with impact on living conditions, character and appearance of the land, landscaping and in the final conclusion. It is unarguable that the policies were not taken into account.
74. Further, in the discussion in the officer report there is express reference to the issue of biodiversity and comments received from the Sustainability Team which scrutinised the Ecology Addendum dated March 2015. The report continues:
- “However, concerns remain that the measures proposed to avoid mitigating compensate for biodiversity impacts are insufficiently comprehensive in detail. Therefore in order to address this it is recommended that any permission be granted in accordance with the suggested pre-commencement conditions that the Sustainability Team have requested in this regard, which would not seem unreasonable to protect the biodiversity of this site.”
75. Under ‘Other matters’ the report referred to neighbour representations including allegations of harm to amenity and detriment to the users of the Orchard Centre. The report continued:
- “However, the use of the site as a clay pigeon site is not under consideration in this application as a 28 days a year clay pigeon shooting operation on this site is allowed in accordance with the Town and Country Planning (General Permitted Development) (England) Order 2015.”

76. The conditions referred to in the Committee report included at condition 10 a construction environmental management programme and at condition 11 a landscape and ecological design strategy for the site.
77. In the late representations directly referred to the Committee there was one from the Hartpury Heritage Trust on behalf of the Perry Pear Centre. The defendant's officer confirmed that the recommendation remained the same as in the report in the light of that representation.
78. The report is absolutely clear that clay pigeon shooting could take place under permitted development rights for a period of 28 days. As a result it did not consider the impact of 28 days shooting on wildlife at the Orchard Centre nor was it required to do so.
79. In my judgement, the report dealt clearly and fairly with the Development Plan and with biodiversity issues. Members were correctly directed as to the nature of the application and appropriate conditions that were to be attached to the planning permission. The direct concern on behalf of the operators of the Orchard Centre was noted in the late representations and so brought to the attention of the Committee but did not cause officers to change their recommendation to grant planning permission. In reality this ground amounts to a challenge to the planning merits of the development.
80. Accordingly this ground fails.
81. Again, section 31(2A) of the Senior Courts Act is invoked by the defendant. Again, it is my judgement that on this ground had there been an error it is highly unlikely that the decision would have been any different.

Ground Three: Was there a Failure to Take into Account the Effect on the Orchard Centre as a Material Consideration and/or Failure to Provide Adequate Reasons?

82. The claimant contends that the Orchard Centre was not taken into account as a material consideration. On the basis of the CIEH guidance alone the Council was required to have regard to all "sensitive receptors". The defendant did not do so. Consideration of the SNL at the Orchard Centre Wildlife Reserve was important because it was nearly one third closer to the site than the nearest residents and, at certain times of the year, was unusually sensitive to shooting noise.
83. Although it is accepted that the Committee minutes disclosed consideration of the Orchard Centre as a sensitive receptor the claimant contends that that refers to the location of the centre's building at 250 metres distant and, therefore, cannot be referring to the wildlife reserve which is closer to the application site. The omission to take the centre into account constitutes a failure to take into account a material consideration and/or the decision demonstrates a failure on behalf of the defendant as to how it came to a conclusion on a principal important controversial issue.
84. The defendant contends that there is considerable overlap between grounds two and three and that the claimant has merged the environmental health/statutory nuisance regime with the planning regime and misled itself in terms of the appropriate approach.

Discussion and Conclusions

85. The defendant is correct in that there is considerable overlap between grounds two and three. Many of the conclusions reached under ground two are equally apposite here.
86. The officer report did not explore in any detail the impact of clay pigeon shooting upon wildlife in the Orchard Centre. It was not required to do so due to the fact that the clay pigeon use could

lawfully take place under permitted development rights. It did, however, expressly consider the Orchard Centre/Perry Pear Centre as it was raised initially by objectors and then in late representations. The Committee was thus well aware of issues being raised in relation to the Centre, how those issues did not change the officer recommendation and the reason for that.

87. The challenge in reality amounts to a challenge to the quality and standard of reasons. As the issue was not material and/or was not a main controversial issue there was no requirement to consider the matter further or to give any further reasons than those which were contained within the report.

Ground Four: Whether the Council Irrationally Based its Decision on Evidence that the SNL Would be Reduced to an Acceptable Level Using Low-Load Cartridges but then Failed to Impose a Condition Requiring that Low-Load Cartridges be Used?

88. Miss Pindham, on behalf of the claimant, submits that as the mitigation modelling conducted by the noise consultant included low-load cartridges that should be required by way of a condition on the planning permission. Condition 10 requires a Construction Environmental Management Plan but deals only with the construction period for the bund. The claimant's concern is in relation to the period post construction when the land is used for clay pigeon shooting.
89. The officer report was based on the fact that an acceptable reduction in SNL included the use of low-load cartridges. The defendant was clearly aware that the noise mitigation package which demonstrated an acceptable reduction in noise required such cartridges to be used but did not consider that it could impose a condition as evidenced from the Committee minutes which, where relevant, read:
- “Councillor Burford asked whether the mitigation put forward would guarantee that the noise would be reduced. The development manager advised that this could not be guaranteed but that the methodology used and mitigation proposed had resulted in the consultants reaching the conclusion that noise would be reduced. If the applicant did not implement any of the measures, Environmental Health could take further action.”
90. In the debate Councillor Burford is recorded as adding, “that the shooting position and low-load cartridges could lower the noise but there was no guarantee that these would be implemented and commented that the shooting position and use of low-load cartridges alone, without the use of bunds, could be enough to reduce the noise levels.”
91. The claimant submits that the Council was entitled to impose conditions relating to the use of the cartridges as the unlawful level of noise arising from the use of the land for clay pigeon shooting was the very basis for the application.
92. Exceptional cases may require the use of conditions to restrict the future use of permitted development rights. As such there is nothing in national planning policy or guidance which precludes the imposition of conditions which restrict the manner in which permitted development rights may be used in the future. As the acceptable reduction of SNL was premised on the basis that low-load cartridges would be used it was irrational to have determined that the development would achieve an acceptable reduction in SNL if any cartridges were to be used when the acceptable noise package before the Council included the use of low-load cartridges.
93. The defendant submits that it was a matter for its discretion guided by the respective NPPF and National Planning Policy Guidelines (“NPPG”) provisions as to whether it would exercise its planning judgement to impose a planning condition.

94. All members were aware that there was no condition imposed requiring the use of low-load cartridges and that mitigation measures considered as a whole could not guarantee any reduction in noise.
95. It was a matter for the defendant's officers in the first instance, exercising their planning judgement, to recommend which conditions to impose applying the six tests in paragraph 206 of the NPPF and it was then a matter of ultimate judgement for the defendant's Planning Committee to consider whether additional conditions should be imposed.
96. There is no statutory obligation or national policy/policy guidance requirement on a local planning authority to specify why any specific conditions are not imposed. Faced with that obstacle the claimant has no option but to describe the decision not to include such a condition as irrational. The threshold for irrationality is very high and has not been made out.
97. In any event if any error of law is to be identified section 31(2A) of the Senior Courts Act 1981 would apply.

Discussion and Conclusions

98. The claimant concedes that whether a condition satisfies the tests under the NPPF is a matter of planning judgement. In the officer report there is clear and extensive reference to the impact on residential living conditions. The independent consultants instructed by the defendant concluded that they had no reason to doubt the noise model outputs presented by the applicant's noise consultant. The defendant's EHO confirmed, in respect of the revised acoustic report, that he had no objection and was satisfied with the noise mitigation scheme as outlined. The issue of conditions was clearly before the Committee in the report where it said:

"It would be reasonable to attach the conditions suggested by the EHO in respect of limiting the construction works and associated importation times; and a condition in respect of a scheme of mitigation to ensure that vehicles do not track material from the site onto the highway. This would protect the living conditions of neighbours during the proposed construction of the proposed bunds. The proposal would result in levels of noise and disturbance which would not have an unacceptable adverse effect on the current amenity levels enjoyed by nearby residents providing the above suggested conditions are attached to any permission and granted and would therefore accord with the requirements of the NPPF, policy CSP1 of the Core Strategy and policy AP1 of the Allocations Plan."

99. In that part of the report the officer is exercising his judgement as to the necessity for conditions on the development proposed before the Committee. He is under no duty to consider conditions on an activity which was lawful under the GPDO.
100. In the NPPG on the use of planning conditions the following text appears under the question "Is it appropriate to use conditions to restrict the future use of permitted development rights or changes of use?":

"Conditions restricting the future use of permitted development rights or changes of use will rarely pass the test of necessity and should only be used in exceptional circumstances. The scope of such conditions needs to be precisely defined, by reference to the relevant provisions in the Town and Country Planning (General Permitted Development) (England) Order 2015, so that it is clear exactly which rights have been limited or withdrawn. Area wide or blanket removal of freedoms to carry out small scale domestic and non-domestic alterations that would otherwise not require an application for planning permission are unlikely to meet the tests of reasonableness and necessity. The local planning authority also has powers under Article 4 of the Town and Country Planning (General Permitted Development) (England) Order 2015 to enable them to withdraw permitted development rights across a defined area."

There has been no suggestion by the claimant here that it is appropriate for the defendant to exercise its powers under article 4. Rather, the claimant submits that, although conditions restricting the future use of permitted development rights will rarely pass the test of necessity, such a condition should be imposed here. Nothing was put to the defendant by the claimant at the time of determination of the application as to why the circumstances here were exceptional. Indeed, from all the noise consultants' reports it did not seem that it was. None, including Acoustic Air, suggested that to be the case.

101. Mr Kirby, the EHO with the defendant, makes it clear from his witness statement that he never requested that the use of low-load cartridges should be enforced by condition. If the site were operated in a way that gave rise to a statutory nuisance then a further investigation would take place at that time. The abatement notice remains in force.
102. In those circumstances it cannot be said to have been irrational on the part of the Committee to have concluded that the development in the application was suitable to achieve noise mitigation without a condition relating to gun cartridges if one could be appropriately drafted. It may be a matter for professional disagreement but that falls well short of the test for irrationality.
103. The noise reports made it plain that a range of measures could be used to reduce noise and that the bunds, in themselves, could be very effective. It was a matter entirely for the planning judgement of the Committee to decide whether the application before them was acceptable in policy terms and what package of conditions was required to make the application before them acceptable in planning terms. Their conclusions were entirely reasonable in the circumstances before them. This ground therefore fails.
104. In light of the evidence before the Committee at the present time even if an error of law had been demonstrated I would have held that the same decision would have been reached in relation to the conditions imposed on the planning permission.
105. Accordingly this claim fails. I invite the parties to agree an appropriate Order and costs.