



Neutral Citation Number: [2022] EWHC 1493 (Admin)

Case No: CO/3980/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 June 2022

Before :

MRS JUSTICE LANG DBE

Between :

THE QUEEN

Claimant

on the application of

LIQUID LEISURE LIMITED

- and -

**ROYAL BOROUGH OF
WINDSOR AND MAIDENHEAD**

Defendant

Rowan Clapp (instructed by **Tozers LLP**) for the **Claimant**
Asitha Ranatunga (instructed by **Legal Services**) for the **Defendant**

Hearing dates: 25 May 2022

Approved Judgment

Mrs Justice Lang :

1. The Claimant applies for judicial review of the decision of the Defendant (“the Council”) to issue a Breach of Condition Notice (“BCN”) under section 187A of the Town and Country Planning Act 1990 (“TCPA 1990”), on 5 October 2021. The BCN required the Claimant to secure compliance with Condition 2 of a planning permission dated 21 March 1988, relating to land at Sunnymeads Lake, Horton Road, Datchet (“the Site”).
2. The Claimant leases the Site and has operated a water sports facility there since 2002. The Council is the local planning authority.
3. The issue is the lawfulness of the Council’s decision to issue a BCN at a time when an enforcement notice (“EN”) had already been issued in respect of substantially the same matters, and an appeal against the EN was pending.
4. I granted permission to apply for judicial review, on the papers, on 20 December 2021.

Factual background

5. The Site includes a lake which was formerly a gravel pit. It is within the Green Belt, which is protected against inappropriate development, in national and local policy. The majority of the Site falls within Flood Zone 3a High Probability.
6. On 21 March 1988 the local planning authority granted permission for the “use of Sunnymeads Lake for waterskiing and windsurfing.” Condition 2 of the permission states:

“The development hereby permitted is for the change of use of the area edged red on the 1:2500 scale plan submitted with the application to use for waterskiing and windsurfing and no building and engineering or other operations including the layout of parking and turning space shall be carried out on the site without express further permission under part III of the Town and Country Planning Act 1971.”

7. Since then, further permissions have been granted for a clubhouse and boathouse; a replacement boathouse, and a 2009 cable water-skiing system.
8. In November 2020, the Council refused a Certificate of Lawfulness in respect of several existing structures at the Site.
9. On 21 December 2020, the Council issued the EN, following an enforcement report (the “EN report”) by its planning officer. It alleged the following breach of planning control:

“Without planning permission the material change of use of the land from a water-skiing and windsurfing use, to a mixed use that comprises an aqua theme park (including water skiing), caravan and camping site, party venue and a child’s play centre;

with associated operational development comprising extension to existing buildings, new buildings, kiosks and other structures that are integral to the mixed use.”

10. The EN required the Claimant to cease the use of the land as an “Aqua Theme Park”, including associated activities such as open water swimming and aqua jungle climbing. It included 23 individual requirements.
11. On 29 January 2021 the Claimant appealed against the EN on grounds (a), (b), (c), (d), (f) and (g) of section 174(2) TCPA 1990. The Claimant sought, *inter alia*, to separate the operational development from the material change of use, and submitted that different time limits for enforcement applied.
12. On 5 October 2021 the Council issued the BCN, alleging a breach of Condition 2 of the permission arising from alleged “building, engineering and other operations” which had occurred at the Site without planning permission. The enforcement report preceding the BCN (“the BCN Report”) stated that the Council considered it expedient to serve the BCN. The BCN contained 23 individual requirements, which repeated many of the requirements of the EN.
13. The period for compliance with the BCN was originally 4 months (i.e. to 5 February 2022). It was then extended to 9 months (i.e. to 5 July 2022).
14. The Inquiry in the EN appeal was originally listed in November 2021. It was then postponed to March 2022 to allow for relevant ecological survey work to be undertaken. It was adjourned again from March 2022, and is now listed for hearing in November 2022.

Legal framework

15. By section 171A(1) TCPA 1990, a breach of planning control occurs where there has been development without the required planning permission, or failure to comply with a condition of a planning permission. By subsection (2), enforcement action includes the issue of an EN and a BCN.
16. A local planning authority may issue an EN where it appears to them there has been a breach of planning control and that it is expedient to enforce against it (section 172(1) TCPA 1990). Appeals against ENs may be brought on the following grounds in section 174 TCPA 1990:
 - “(a) that, in respect of any breach of planning control which may be constituted by the matters stated in the notice, planning permission ought to be granted or, as the case may be, the condition or limitation concerned ought to be discharged;
 - (b) that those matters have not occurred;
 - (c) that those matters (if they occurred) do not constitute a breach of planning control;

(d) that, at the date when the notice was issued, no enforcement action could be taken in respect of any breach of planning control which may be constituted by those matters;

(e) that copies of the enforcement notice were not served as required by section 172;

(f) that the steps required by the notice to be taken, or the activities required by the notice to cease, exceed what is necessary to remedy any breach of planning control which may be constituted by those matters or, as the case may be, to remedy any injury to amenity which has been caused by any such breach;

(g) that any period specified in the notice in accordance with section 173(9) falls short of what should reasonably be allowed.”

17. Where an appeal is brought under section 174 TCPA 1990, the EN shall be of no effect pending the final determination or the withdrawal of the appeal: section 175(4) TCPA 1990.
18. A local planning authority may serve a BCN where a condition of a planning permission is not complied with, under section 187A TCPA 1990. There is no statutory requirement to consider whether it is expedient to issue a BCN, although the Council chose to do so in this case.
19. A BCN must specify the steps which the authority considers ought to be taken, or the activities the authority consider ought to cease, to secure compliance with the conditions specified in the notice (subsection 187A(5)). It must specify a period for compliance of not less than 28 days beginning with the date of service of the BCN (subsection 187A(7)(a) TCPA 1990). If, after the compliance period, a requirement of a BCN is not complied with, the person responsible will be in breach of the BCN and guilty of an offence (subsections 187A(8),(9) TCPA 1990).
20. Unlike an EN, there is no right of appeal against a BCN, and no opportunity to challenge the planning merits. The assumption underlying the legislation is that the planning merits will already have been considered through the grant of planning permission subject to conditions. The validity of a BCN and its requirements may be challenged in the Magistrates Court proceedings, and by way of a claim for judicial review.
21. The Planning Practice Guidance (“PPG”) provides: (at paragraph 047)

“A breach of condition notice is mainly intended as an alternative to an enforcement notice for remedying a breach of condition – but it may also be served in addition to an enforcement notice, perhaps as an alternative to a stop notice, where the local planning authority consider it expedient to stop the breach quickly and before any appeal against the enforcement notice is determined.”
22. The time limits for enforcement action are set out in section 171B TCPA 1990, as follows:

“171B.— Time limits.

(1) Where there has been a breach of planning control consisting in the carrying out without planning permission of building, engineering, mining or other operations in, on, over or under land, no enforcement action may be taken after the end of the period of four years beginning with the date on which the operations were substantially completed.

(2) Where there has been a breach of planning control consisting in the change of use of any building to use as a single dwelling house, no enforcement action may be taken after the end of the period of four years beginning with the date of the breach.

(2A) There is no restriction on when enforcement action may be taken in relation to a breach of planning control in respect of relevant demolition (within the meaning of section 196D).

(3) In the case of any other breach of planning control, no enforcement action may be taken after the end of the period of ten years beginning with the date of the breach.

(4) The preceding subsections do not prevent—

(a) the service of a breach of condition notice in respect of any breach of planning control if an enforcement notice in respect of the breach is in effect; or

(b) taking further enforcement action in respect of any breach of planning control if, during the period of four years ending with that action being taken, the local planning authority have taken or purported to take enforcement action in respect of that breach.”

23. Thus, the time limits do not apply in respect of the further enforcement action described in subsection (4).
24. The relevant time limits in this case may be summarised as follows:
 - i) the time limit for enforcement against carrying out operational development without planning permission is 4 years (section 171B(1) TCPA 1990);
 - ii) the time limit for enforcement against a material change of use is 10 years (section 171B(3) TCPA 1990); and
 - iii) the time limit for enforcement against a breach of condition (which comes within “any other breach of planning control” in section 171B(3) TCPA 1990) is 10 years.
25. Enforcement by local planning authorities must be proportionate: see the National Planning Policy Framework (“the Framework”), at paragraph 59; the PPG, at paragraph

011; and *R (Community Against Dean Super Quarry Ltd) v Cornwall Council* [2017] EWHC 74 (Admin), at [21].

Grounds 1 and 3

26. It is convenient to consider Grounds 1 and 3 together.

Submissions

27. Under Ground 1, the Claimant submitted that the Council took into account two irrelevant considerations in the BCN Report. First, that the BCN should be issued as “secondary action as a fallback position”. Second, that service of the BCN could operate to “narrow the issues between the parties during the upcoming appeal”. Under Ground 3, the Claimant submitted that the decision to serve the BCN was *Wednesbury* unreasonable and an abuse of statutory powers (*Padfield v Minister of Agriculture* [1968] AC 997).
28. In response, the Council submitted that the considerations identified by the Claimant under Ground 1 were material and relevant for the Council to take into account. Under Ground 3, the decision to issue the BCN was well within the range of reasonable responses for the Council to take, in a permissible exercise of its statutory powers, and was not irrational.

Conclusions

29. A wide discretion is afforded to a local planning authority in deciding how to take enforcement action, including the issue of a BCN. There is nothing in the statutory scheme which makes an enforcement notice and a BCN mutually exclusive. The reasons for issuing a secondary BCN will vary according to the facts of the case.
30. The issue of the EN was considered to be expedient because the unauthorised change of use to an “Aqua theme park”, which introduced unauthorised buildings, hard surfacing, beach areas, inflatable circuits and party buses, was believed to be inappropriate development in the Green Belt. It had a detrimental urbanising impact on the openness of the Green Belt, the appearance of the land and the character of the surrounding area, contrary to the Local Plan and the Framework. Further, the cumulative development was likely to increase the risk of flooding in an area liable to flood.
31. The Council issued the EN on the basis that the operational development was integral to the unauthorised use. On that basis, the applicable time limit for enforcement and immunity under section 171B TCPA 1990 was 10 years (for change of use) not 4 years (for operational development), following the case of *Kestrel Hydro v Secretary of State for Communities and Local Government* [2016] EWCA Civ 784, per Lindblom LJ, at [28].
32. In the appeal, the Claimant challenged this approach and sought to separate the operational development from the alleged unauthorised use, contending that a 4 year time limit applied to the operational development.

33. In the light of the Claimant's stance, the Council considered it was expedient to issue the BCN. The BCN Report stated:

“Notwithstanding the Council's position in the appeal, the Enforcement Team conclude that it is expedient for the Council to consider its fallback position in a timely manner to ensure the appointed Inspector does not decide the appeal under grounds (c) and (d) without having the benefit of hearing evidence regarding the Breach of Condition Notice as a fallback position even if, which is denied by the Enforcement Team, there were any merit in the Appellant's argument that the operational development is caught by the four-year rule. This is not a new or unknown position for the Appellant as the refused certificate of lawfulness clearly referenced the extant condition. Pursuing the breach of condition will also assist to narrow the issues between parties during the upcoming appeal, since it will put beyond argument that enforcement action against the operational development has been brought in time. It is in the public interest that these issues are considered at the same appeal hearing, rather than being considered piecemeal at different times.

5. Further, and again notwithstanding the Council's position in the appeal, the Enforcement Team consider it expedient to take further action against the breach of condition as the works of operational development when considered against local and national policy are not considered to be acceptable. It is important to assess the works against the relevant condition and the lawful use of the land, and the effect of seeking to remedy the breach, namely an application for planning permission to be granted under s.73A (2) (c). The landowner has been invited to seek planning permission but has declined to do so.

6. It is also a logical approach for enforcement to decide to take enforcement action following the refused application for a Certificate of Lawfulness (see above). That is a material consideration carrying weight in favour of issuing this notice. The Council are perfectly entitled to consider enforcement action in the light of any application that has been refused and the time limits are a material consideration. It is not considered expedient to wait for a decision on the enforcement notice appeal as some component parts of the breach of planning control may gain immunity if action is deferred until summer 2022 – see the Certificate application.”

34. In my judgment, these were relevant considerations which the Council was entitled to take into account. The Council's primary case was that the operational development was part and parcel of the material change of use, and therefore subject to the 10 year time limit in section 171B(3) TCPA 1990. However, if the Inspector did not accept the Council's primary case, there was a risk that certain parts of the operational development could be immune from enforcement under the 4 year time limit in section 171B(1) TCPA 1990. If a BCN notice was issued in respect of the operational

development which was in breach of condition, the 10 year time limit under section 171B(3) TCPA 1990 would be applicable. This would be a fall-back position which would prevent the Claimant from successfully claiming immunity under the 4 year time limit. It would, therefore, narrow the issues at the appeal.

35. I do not accept the Claimant's submission that this was an improper use of the Council's powers to issue a BCN. The Council was entitled to use its statutory powers to achieve the statutory objective of effective enforcement against breaches of planning control. It clearly viewed these breaches as serious, and it was justifiably concerned at the prospect of part of the unauthorised operational development acquiring immunity from enforcement.
36. As to the scope of the BCN, that was a matter for the discretionary judgment of the Council. It was not required to tailor the requirements so as to reduce any overlap with the EN and it would probably have been risky for it to do so, without knowing what evidence would be given at the Inquiry about the dates when the operational development occurred.
37. The Council was also entitled to issue the BCN now, rather than defer issuing it until after the conclusion of the EN appeal. The EN was of no effect pending the appeal (section 175(4) TCPA 1990). That meant that time continued to run and so some parts of the development might gain immunity from action for breach of condition because the BCN had not been issued. This concern has proved to be well-founded given the lengthy delay in the listing of the EN appeal.
38. The Claimant submitted that the Council should have relied upon the "second bite" provision in section 171B(4)(b) TCPA 1990, and issued a further enforcement notice. That was a matter for the Council's exercise of judgment. I was referred to the cases of *Sanders v First Secretary of State* [2004] EWHC 1194 (Admin); *Jarmain v Secretary of State for the Environment* [2000] 2 PLR 126 and *Fidler v First Secretary of State* [2004] 1 PLR 1. I accept the Council's submission that the enforcement action must be in respect of the same breach and, as the current EN is a material change of use notice, it would not be open to the Council to widen the breach to include operational development in a further EN. The Council would face a similar problem in issuing a further BCN for a different breach.
39. I accept the force of the Claimant's submission that it would be unfair to the Claimant if the date for compliance with the BCN was prior to the date of the EN Inquiry, as that would prevent it from benefiting from any success at the appeal. It would also be highly unsatisfactory for the Magistrates Court to be seized of a prosecution for breach of the BCN when the EN Inquiry had not yet been concluded. Although the EN Inquiry was previously scheduled to take place before the date for compliance with the BCN, the adjournments mean that is no longer the position. The date for compliance is July 2022 and the Inquiry is not until November 2022. In those circumstances, I consider that the Council was right to offer an undertaking to the Court, if required, that the date for compliance would be extended until after the final resolution of the EN appeal.
40. For these reasons, I do not accept the Claimant's submission that the Council's decision to issue the BCN was irrational or disproportionate. The Council's assessment of expediency was careful and thorough. In my view, it was entitled to exercise its enforcement powers in the way in which it did, in the exercise of its discretion.

41. Therefore Grounds 1 and 3 do not succeed.

Ground 2

Submissions

42. The Claimant submitted that the Council failed to take into account the benefits of the present use of the Site, despite the favourable comments from members of the public in the EN appeal. The Claimant further submitted that the Council's stated reasons were so inadequate as to be unlawful.
43. In response, the Council submitted that it had regard to the EN and the appeal documents in reaching its decision. The reasons given met the standard set out in *South Bucks DC v Porter (No. 2)* [2004] 1 WLR 1953. In any event, section 31(2A)(a) of the Senior Courts Act 1981 applied.

Conclusions

44. The Council's consideration as to whether or not to issue a BCN ought not be treated as if it were the determination of an application for planning permission, in which benefits have to be weighed against harm when applying the planning balance. The Council was considering the appropriateness and expediency of taking enforcement action against the apparent breaches of planning controls.
45. The EN and the EN appeal were central to its deliberations. 35 members of the public submitted comments in respect of the decision to issue an EN at the Site. 34 of those comments supported the Site's present use, asserting benefits to local schools, care homes and leisure users. These were available to the Council when they were considering the issue of a BCN. The Council also had available to it the Claimant's Statement of Case describing the use of the facilities; the Council's Statement of Case which referred to the third party comments on the appeal; and the Council's letter of 4 May 2021 to the Inspector.
46. The BCN Report expressly stated that the appeal documents were relevant considerations. In those circumstances, I consider it is reasonable to infer that the representations about the benefits of the activities at the Site were taken into account, as part of the overall consideration of the appropriateness and expediency of taking the recommended enforcement action.
47. In my view, the reasons met the standard set out in the *South Bucks* case. The benefits of the facilities at the Site, which were the subject of favourable comments from third parties, did not give rise to a principal controversial issue requiring specific reasons in the BCN Report, over and above the considerations given to them in the Council's comments in the EN appeal.
48. Therefore Ground 2 does not succeed.

Ground 4

Submissions

49. The Claimant submitted that the Council failed to discharge the public sector equality duty (“PSED”) when deciding whether or not to issue the BCN.
50. The Council submitted that there was insufficient factual information available to it to indicate that persons with protected characteristics used the Site or would be affected by the enforcement action proposed, as the Site would remain open for its permitted use.

Conclusions

51. Section 149 of the Equality Act 2010 provides:

“149 Public sector equality duty

(1) A public authority must, in the exercise of its functions, have due regard to the need to—

(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;

(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;

(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

(2) A person who is not a public authority but who exercises public functions must, in the exercise of those functions, have due regard to the matters mentioned in subsection (1).

(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—

(a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;

(b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;

(c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.

(4) The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.

(5) Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—

(a) tackle prejudice, and

(b) promote understanding.

(6) Compliance with the duties in this section may involve treating some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act.

(7) The relevant protected characteristics are—

age;

disability;

gender reassignment;

pregnancy and maternity;

race;

religion or belief;

sex;

sexual orientation.

...”

52. The duty was considered in the leading case of *R (Bracking) v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345, per McCombe LJ at [26]. It has been applied in a number of planning cases, including *R (Buckley) v Bath and North East Somerset Council* [2018] EWHC 1551 (Admin) and *R (Gathercole) v Suffolk County Council* [2020] EWCA Civ 1179, [2021] PTSR 359.

53. The PSED was engaged when the Council exercised its statutory functions under the TCPA 1990. Council officers had conducted site visits and would have been aware that

the unauthorised facilities were popular with sections of the public, particularly in warm weather. Two of the third party responses to the EN appeal should have alerted the Council to the possibility that disabled persons were making use of these facilities. Those responses were as follows (emphasis added):

“my family and work colleagues and our care home residents all use and enjoy the facilities ... it’s without doubt the best thing to have in our area....”

“Liquid Leisure has been an integral part of our half term provision for our young people.... Ages range from 6 – 18, and many have had emotional and behavioural difficulties.....”.

54. In my judgment, the Council was required to consider the PSED when deciding whether to issue the BCN. It appears that it did not do so. There was no evidence that the Council had considered the PSED when it issued the EN either.
55. In the course of the EN appeal proceedings, evidence was submitted by the Claimant which referred to disabled users of the amenities at the Site. This evidence was not available at the date when the BCN was issued, on 5 October 2021, as it was only served in March 2022.
56. The Claimant served a proof of evidence of Mr. Nicholas Cobbald, the Claimant’s planning witness, dated March 2022, which noted that the Site provides health and wellbeing benefits to users, including: “Accessible design features including disabled parking and accessible shower changing/toilet facilities are important to make this an inclusive facility”. He produced letters from members of the public in support of the present use of the Site which referred to the protected characteristics of disability and age:
 - i) “I am a parent of a child with a severe mental impairment and the problems I have faced trying to access any leisure facilities have been huge. Luckily, I heard of Liquid Leisure a few years ago ... if you take this away from him ... I feel that it is bordering on an exclusion ... my son who suffers severely is extremely fond of the main aqua park, he loves to spend hours on there watching the waves and sitting on top of the obstacles ... This is the only place in the Royal Borough where my son feels comfortable to interact with staff members and engage.”
 - ii) “I am a huge believer of keeping active at my age (being an older gentleman above 60 years old)... After my most recent bereavement, I have found Liquid Leisure for Water Skiing and its hot room use ... enables me to continue to exercise throughout the colder months ...the hot room has played a large part in making friends and socialising ... once again, I want to express how much of a loss it would be to lose the hot room”.
57. The Managing Director also served a statement in March 2022 in which he referred to “adaptive wakeboarding for people with disabilities”. Wakeboarding falls within the scope of the existing permission, so it is unaffected by the enforcement action. However, access arrangements and changing facilities are affected by the enforcement action. The Managing Director listed a large number of organisations that use the facilities at the Site.

58. The PSED is a continuing duty. In my judgment, this further evidence should also have alerted the Council to the need to consider the PSED, especially as it had not done so when the BCN was issued, nor when the EN was issued. However, the Council did not do so.
59. The Council submitted that, if the Court found that it had not paid due regard to the need to advance equality of opportunity under the Equality Act 2010, section 31(2A)(a) of the Senior Courts Act 1981 should apply.
60. The Council relied upon the case of *Gathercole*, in which after the grant of planning permission for the construction of a new school on a village site near a military air force base, the claimant brought a challenge arguing that there had been a failure to have due regard to the PSED in relation to the effect of outdoor noise levels on children with protected characteristics. The Court of Appeal held that the claimant was right to say that there had been a failure to have due regard to the PSED, but refused relief under section 31(2A) of the Senior Courts Act 1981. Coulson LJ said:

“38. It is important that a court faced with an application for judicial review does not shirk the obligation imposed by Section 31 (2A). The provision is designed to ensure that, even if there has been some flaw in the decision-making process which might render the decision unlawful, where the other circumstances mean that quashing the decision would be a waste of time and public money (because, even when adjustment was made for the error, it is highly likely that the same decision would be reached), the decision must not be quashed and the application should instead be rejected. The provision is designed to ensure that the judicial review process remains flexible and realistic.

39. In my view, this case is a good example of the type of situation for which Section 31(2A) was designed. For the reasons set out below, I consider that, if there had been a paragraph in the officer’s report flagging the point, explaining that the use of the outdoor areas was subject to all possible noise mitigation measures but that there was a potential residual issue for children with protected characteristics, it would have made absolutely no difference to the planning decision that was taken.

40. First, following the guidance in [55] – [56] of *Goring*, this court should undertake its own objective assessment of the decision-making process. That takes the focus right back to the officer’s report. On any objective view, that was a clear and thorough report leading to the planning decision that was made. There is no basis for any suggestion that, if due regard had been had to the PSED in the report in the limited way explained above, the result would or could have been different.

41. Secondly, the officer’s report points unequivocally to the conclusion there is no site for a school in Lakenheath which would not be subject to noise from aircraft. The problem of noise for all children, including those with protected characteristics,

cannot therefore be wished away: the only thing that can be done is to locate and design the school in a way that ensures that the effect of such noise is mitigated as well as it can be. The documents show that that is what has happened here: there can be no doubt that the issue of noise was carefully considered, first in the ES, and then in the officer's report.

42. As to the location of the proposed school, paragraph 163 of the officer's report expressly stated that "the application site is in a relatively favourable noise environment". As to the outdoor mitigation measures, they were the subject of the officer's report, and included noise mitigating huts and sound-limiting pods. And as the report made clear, the design/specification means that the internal noise environment for the new school will be superior to that in the existing school. As a result, it is highly likely that the missing sentence or paragraph in the officer's report addressing the PSED and noise, would not have made any difference to the decision.

43. As a result, I consider that Mr Ground QC was right to say that, for any children with protected characteristics who can be accommodated in mainstream education, the disadvantages that they may suffer will be minimised at the new school. It will be a considerably better noise environment than the existing school.

44. Finally, the factual context summarised at paragraph 21 above makes it highly likely – if not inevitable – that the same decision would have been reached in any event. The officer's report demonstrates that, from the planning perspective, this is the best location for a much-needed new school. No-one has been able to suggest any improvement to the proposed design/specification of noise mitigation measures, either inside or out."

61. In my judgment, section 31(2A) of the Senior Courts Act 1981 applies in this case too. It was highly likely that consideration of the PSED would not have changed the outcome, and that a BCN would have been issued in October 2021, and not withdrawn in 2022 in the light of the Claimant's evidence in the EN appeal. It would have been obvious to the Council that the enforcement action envisaged would not result in the complete closure of the site, and that it could and would remain accessible to persons with protected characteristics. As the Council considered that the unauthorised activities and structures were inappropriate development in the Green Belt, it is highly unlikely that it would have decided not to take enforcement action on the basis of the representations made by and on behalf of disabled and elderly people. The Council's thinking was demonstrated in its letter of 4 May 2021 to the Inspector, which stated:

"3rd Party comments

The Council are concerned by many of the representations setting out that the Council are looking to close the facility. This is not the case, and the Council recognise that the lawful use of

land is for water-based activity. Additionally, the Council has made it clear to the landowner in 2019 that the Council would always encourage the development of outdoor leisure facilities, however their growth cannot go unchecked and consideration of their acceptability will need to be assessed against national and local planning policy.” (*emphasis added*)

62. Therefore, although there was a breach of the PSED, no relief will be granted because section 31(2A) of the Senior Courts Act 1981 applies.

Final conclusions

63. For the reasons set out above, the claim for judicial review is dismissed on Grounds 1,2 and 3. The claim for judicial review is allowed on Ground 4, but relief is refused, because section 31(2A) of the Senior Courts Act 1981 applies.