

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

BETWEEN:

R (on the application of) NICOLE SQUIRE

Claimant

and

SHROPSHIRE COUNCIL

Defendant

and

MATTHEW J BOWER

Interested Party

STATEMENT OF FACTS AND GROUNDS

References: References [CB/n/n] are to the Claim Bundle/Tab no/Page no
Essential Reading: Environmental Statement Sections 8-9 [CB/3/122-125]
Appendix 3 to Environmental Statement [CB/3/136-155]
Manure Management Report [CB/3/161-175]
Officer's Report [CB/3/205-238]

Introduction

1. This is an application for permission to bring a claim for judicial review of the Defendant Council's decision, dated 1 September 2017, to grant planning permission to the Interested Party ("**Decision**") for the erection of four poultry buildings with feed bins, one gate house, one boiler house and circular water tank, associated infrastructure and landscape scheme ("**the Proposed Development**") on land at Taseley, Bridgnorth, Shropshire ("**the Site**"). The Decision will result in an estimated 1,150 tonnes of manure a year being spread on neighbouring arable land in the ownership of the Interested Party and 1,151 tonnes being exported to fields owned by an unspecified neighbouring arable farmer.
2. The Claimant is an individual who lives on the outskirts of Bridgnorth. Her home is 300m from one field and 500m from another field on which the manure will be spread. It is also 690m to the east of the Site. The Claimant made representations objecting to the grant of planning permission for the Proposed Development.

3. The Claimant challenges the Decision on the following grounds:
 - a. Failure to consider the direct or indirect effects of the Proposed Development and operations, contrary EIA Directive 2011/92/EU (“**the EIA Directive**”) and the Town and County Planning (EIA) Regulations 2011 (“**the EIA Regulations**”);
 - b. Failure to take into account material considerations relevant to the grant of planning permission.

STATEMENT OF FACTS

Factual Background

4. The Proposed Development is a facility comprising four steel frame, sheet-metalclad "poultry buildings" for rearing up to 210,000 broiler chickens for meat production and associated outbuildings, infrastructure and equipment. The application site is shown edged red on the Location Plan [CB/2/101]. The Proposed Development, by virtue of its size, fell within Annex I of the EIA Directive and an environmental impact assessment was therefore required.
5. The facility would be operated on a 48-day cycle, with 210,000 day-old chicks brought in, reared in the houses for 38 days, and then removed, with 10 days required to clean and prepare the buildings for the next flock. Based on this 48-day cycle, the facility is planned to rear 7.5 flocks of 210,000 birds per annum.
6. The Proposed Development would create around 1,500 tonnes of manure per annum [CB/3/164]. Of this, approximately 1,171 tonnes will be spread on specified fields owned by the Interested Party, while approximately 1,151 tonnes of manure will be “exported” to fields owned by an unspecified “neighbouring arable farmer.” [CB/3/164-166].
7. A Manure Management Report identifies 178.5 hectares of the Interested Party’s land that are available for spreading manure and provides maps of these fields [CB/3/169-175]. In addition to fields adjacent to the Site (which effectively surround neighbouring houses and lie near residences at Leasowes), these include fields near Brook House Farm that are also near residences, and fields which lie near residences and businesses in or near the village of Alveley. Field 2078 [CB/3/172, which is also identified, directly abuts a residential neighbourhood in Bridgnorth. It would appear that dozens, if not hundreds of homes lie within 100 metres of Field 2078 alone [CB/3/172].

8. The Claimant lives approximately 300 metres from Field 2078 [CB/3/172], and approximately 500 metres from “Prarie Field 4543” [CB/3/170], on both of which manure is proposed to be spread. The Claimant’s house is also within approximately 50 metres of the fields of Laesowes Farm, which owned by the Claimant’s brother. It is not known whether this is the unspecified “neighbouring arable farmer” referred to in the Manure Management Report.
9. On 29 August 2017 the Council’s South Planning Committee met to consider the planning application for the Proposed Development. The Committee was provided with an Officer’s Report recommending granting delegated authority to the Planning Services Manager to grant planning permission for the proposed development, subject to conditions.
10. The Officer’s Report recommended that delegated authority to grant planning permission be granted, inter alia, on the basis that:

“The concerns raised regarding the potential impacts of the proposal, including in relation to residential amenity issues such as odour, have been given due consideration. Officers consider that the technical assessments submitted as part of the Environmental Statement are generally satisfactory. No significant concerns have been raised through consultation with the relevant pollution control bodies to suggest that the proposal is not an acceptable use of land. Officers consider that adverse impacts on residential and local amenity can be satisfactory [sic] safeguarded. In addition the Environmental Permit that has been issued for the operation would provide an additional level of control.” [CB/3/230 §7.1].
11. The Committee resolved to grant delegated authority.

The Environmental Statement (“ES”), Odour and Dust

12. The Environmental Statement (“ES”) for the proposed project notes that the proposed development is expected to generate: “Airbourn (sic) emissions in the form of odour, ammonia, nitrogen, and dust” as well as create “waste in the form of poultry manure and dirty water.” [CB/3/111].
13. Section 8 of the ES sets out the Odour Impact Assessment. It makes clear the assessment refers to the “application site” [CB/3/122] – ie it assesses the odour from the sheds and the broiler house within the site edged red. This is made clear

in §§8.2 and 8.3, which refers to odour emission “from the proposed broiler rearing unit” and odour emission rates “from the proposed poultry houses” [CB/3/122]. It does not assess any odour caused by the spreading of manure on the fields.

14. The Assessment in the ES relies on a technical appendix: “A Dispersion Modelling Study of the Impact of Odour from the Proposed Poultry Houses at Footbridge Farm, Tasley, Bridgnorth, Shropshire”, amended and dated 25 April 2017 (“**the Odour Impact Assessment**) [CB/3/136-155].
15. The Odour Impact Assessment makes clear at the outset that its author, AS Modelling and Data Ltd was instructed to “assess the impact of odour emissions from the proposed broiler rearing unit” [CB/3/137]. The assessment was therefore limited to odour impact caused within the Site edged red. This is made clear in Section 4.2 [CB/3/149], which lists the “emissions sources” which were assessed as:
 - a. The chimneys of the uncapped high speed fans that would be used for primary ventilation on the new poultry houses;
 - b. Gable end fans which would be used to provide supplementary ventilation in hot weather conditions.
16. The Odour Impact Assessment did not assess any odour emissions source other than the four poultry buildings. In particular no assessment was made of the odour impacts likely to arise from manure storage or spreading.
17. Paragraph 9.11 of the ES deals with “Manure Disposal”. It only records the following:

“The proposed poultry units will operate on a floor litter basis and will generate poultry manure. The manure will be disposed of through use as a sustainable agricultural fertiliser. The applicants [sic] manure management plan is attached to this statement as Appendix 4.” [CB/3/125]
18. No mention is made of the amount of manure. Nothing is said of where the manure will be spread or what the effects of the spreading will be.
19. The Manure Management Report at Appendix 4 to the ES is dated 17 October 2016 [CB/3/161-175]. It does not address odour or dust from the spreading of the

manure. It states explicitly in its first paragraph that the purpose of the Plan is to ensure that the “broiler litter” is exported and spread in a way that falls “under the maximum application of 170kg/ha under the [Nitrate Vulnerable Zone] area farmed and 250kg Nitrogen/ha per annum under the Good Code of Agricultural Practice” [CB/3/163].

20. The Manure Management Report thus seeks to manage the spread of manure in relation to nitrogen. Its key concern is that some of the land on which the manure is proposed to be spread is within a “Nitrate Vulnerable Zone” on NVZ, which is a designated area of land that drains into nitrate polluted waters, or waters which could become polluted by nitrates. The NVZ regulated the amount of nitrogen caused by agriculture to enter any such waters: see Government’s Guidance on Nitrate Vulnerable Zones [CB/4/nn]. Records are thus required to be kept on the amount of manure exported to land, both inside and outside the NVZ.
21. The Manure Management Report does not address the odour or dust impact of the manure, nor does it seek to address or “manage” that impact. Its focus is solely on nitrates.
22. In relation to dust, the ES summarises a DEFRA research project related to dust emissions from poultry housing units, stating that the finding of the project show that “emissions from poultry units in terms of particulate matter reduced to background levels by 100m downwind of even the highest emitting poultry houses.” [CB/3/123-124].
23. No assessment is made nor any information provided in the ES concerning the potential dust-related impacts of manure storage or spreading.

The Permit Issued by the Environment Agency

24. The Permit issued to the facility by the Environment Agency is designated EPR/YP3932DT and dated 12 April 2017 [CB/3/180-199]. The permit installation boundary is shown at Schedule 7 of the permit and is limited to within the Site boundary [CB/3/198]. It does not encompass any of the fields on which manure storage and spreading will take place. The Permit does not set out to, nor does it purport to, regulate the spreading of manure.

The Officer’s Report and Environmental Information

25. The discussion of dust impacts in the Officer’s Report begins by stating that “Dust can be emitted into the atmosphere through the ventilation systems of the

proposed buildings. The Environmental Statement provides an assessment of potential impacts from dust emissions.” [CB/3/230 §6.8.15]. The Report then summarises the ES summary of the DEFRA research project.

26. In the following paragraph, the Officer’s Report states:

“An Environmental Permit for the operation has been issued and the Environment Agency has confirmed that, through this, issues such as odour, noise and dust will be addressed. Officers consider that this will provide an effective system for controlling emissions from the facility. Furthermore it is concluded that the proposal is in an acceptable location and would not give rise to adverse impacts on residential and local amenity, including that of residents of Bridgnorth. As such it is not considered that the proposal would adversely affect tourism in the area.” [CB/3/230 §6.8.16].

27. No discussion or information is provided as to the dust-related impacts from manure storage or spreading.

28. The Officer’s Report also sets out the comments received from the Environment Agency. In relevant part, these state:

“Environmental Permitting Regulations: The proposed development will accommodate up to 210,000 birds, which is above the threshold (40,000) for regulation of poultry farming under the Environmental Permitting (England and Wales) Regulations (EPR) 2010. The EP controls day to day general management, including operations, maintenance and pollution incidents. In addition, through the determination of the EP, issues such as relevant emissions and monitoring to water, air and land, as well as fugitive emissions, including odour, noise and operation will be addressed.

Based on our current position, we would not make detailed comments on these emissions as part of the current planning application process.

...

...

For the avoidance of doubt we would not control any issues arising from activities outside of the permit installation boundary. Your Public Protection team may advise you further on these matters.

..

Manure Management (storage/spreading): Under the EPR the applicant will be required to submit a Manure Management Plan, which consists of a risk assessment of the fields on which the manure will be stored and spread, so long as this is done so within the applicants land ownership. It is used to reduce the risk of the manure leaching or washing into groundwater or surface water. The permitted farm would be required to analyse the manure twice a year

and the field soil (once every five years) to ensure that the amount of manure which will be applied does not exceed the specific crop requirements i.e. as an operational consideration. Any Plan submitted would be required to accord with the Code of Good Agricultural Policy (COGAP) and the Nitrate Vulnerable Zones (NVZ) Action Programme where applicable.

The manure/litter is classed as a by-product of the poultry farm and is a valuable crop fertiliser on arable fields.

Separate to the above EP consideration, we also regulate the application of organic manures and fertilisers to fields **under the Nitrate Pollution Prevention Regulations.** [CB/3/209-210 §4.1.4] (emphasis added).

29. It is clear, therefore, that the Environment Agency did not, in its permitting role, consider any impact outside of the boundary of the Site. Although the Agency went on in its consultation response to address the spreading of manure, its assessment was limited to the nitrate impact of the spreading and ensuring the requirements of the NVZ would be complied with. The Environment Agency specifies that the only basis on which it regulates the application of manures and fertilisers is under the Nitrate Pollution Prevention Regulations.
30. The Officer's Report also summarises the findings of the Odour Impact Assessment. [CB/3/228-229 §§6.8.8 - 6.8.11]. It then notes that members of the public raised the concern that the "[o]dour report is fundamentally flawed as it takes no account of the odour from the manure which would be spread on adjacent fields." [CB/3/229 §6.8.12].
31. However, in the following paragraph, in which the Report sets out its responses to the public's concerns, the Report implies that the Council was not required to consider the effects of manure spreading, stating:

"The proposal does not seek permission for manure spreading. This is an agricultural activity and any permission granted for the broiler operation would not seek to control the location for manure spreading. This matter is controlled by other regulations." [CB/3/229-230 §6.8.13].
32. Separately, the Report records comments of the Shropshire Council Public Protection Officer, including:

"The site will be regulated under an Environmental Permit issued and regulated by the EA. As a result it is not the place of the planning system to condition aspects that the permitting regime will address which included odour and noise"

...

“Professor Lockerbie correctly states the odour assessment does not take into consideration spreading of manure. This is a common agricultural practise taking place in the UK and can occur on the land currently. Although spreading of manure does cause localised odour it is short lived where agricultural best practice e.g. ploughing in asap, takes place. Stockpiled manure produces odour for a time until a crust forms at which point little to no odour is emitted. Again this could occur without the development and is not considered relevant. Should manure be stockpiled inappropriately close to receptors legislation exists to address this.” [CB/3/215-216 §4.1.10].

33. On this basis, it appears that odour from manure storage and spreading was not considered by the Council, its officers, or the Committee in determining the application.

LEGAL PRINCIPLES

34. EIA Directive 2011/92/EU (“**the EIA Directive**”) provides the framework for environmental impact assessment, ensuring that the environmental implications of a proposed development are taken into account before any decision on the grant of planning permission is made. The EIA Directive was transposed into English law by the Town and County Planning (EIA) Regulations 2011 (“**the EIA Regulations**”).
35. Article 1 of the EIA Directive defines a project as “the execution of construction works or of other installations or schemes, [or] other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources;...”
36. Article 3 provides that the environmental impact assessment must identify, describe and assess the direct and indirect effects of a project in relation to, inter alia, the “population”; “land, soil” and “air” and the “interaction between” these factors. Accordingly, the impact on people arising from an indirect effect of a project (for example from odour caused by spreading manure) is an indirect environmental effect which must be assessed.
37. Article 5(1)(b) of the EIA Directive obliges the developer to supply in an appropriate form the information specified in Annex IV inasmuch as the Member States consider that a developer may reasonably be required to compile this

information having regard, inter alia, to current knowledge and methods of assessment.

38. Annex IV mandates the inclusion of a description of the main characteristics of the production processes as well as a: “description of the likely significant effects of the proposed project on the environment resulting from ... the existence of the project” including “the direct effects and any indirect, secondary, cumulative, short, medium and long-term, permanent and temporary, positive and negative effects of the project”.
39. “Environmental information” is defined under Regulation 2(1) as “the environmental statement, including any further information and any other information, any representations made by any body required by these Regulations to be invited to make representations, and any representations duly made by any other person about the environmental effects of the development”.
40. The information in Part 2, Schedule 4 of the EIA Regulations 2011 that must be included in the environmental statement includes “the data required to identify and assess the main effects which the development is likely to have on the environment” and “a description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects”.
41. An environmental statement has to include such information as is reasonably required to assess the impacts of the development and which the applicant could reasonably be required to compile having regard to current knowledge: *R(Khan) v Sutton LBC* [2014] EWHC 3663 (Admin), per Patterson LJ at §121.
42. The CJEU has held that the term “*indirect effects*” is to be “*construed broadly*”: §31 of AG Kokott’s opinion in *Abraham v Wallonia* [2008] Env LR 32 (“**Abraham**”) [CB/5]. This includes the environmental impacts “*liable to result from the use and exploitation of the end product of works*”: *Abraham* at §43.
43. The Court of Appeal addressed indirect cumulative effects in the case of *Brown v Carlisle City Council* [2011] Env LR 5 (CA) (“**Brown**”) [CB/5], where planning permission was sought for a Freight Distribution Centre at Carlisle Airport, and also for upgraded airport facilities and repair/renewal of the runway. Sullivan LJ set out the correct in principle approach to indirect cumulative effects at §21, finding that “*there may be a cumulative effect notwithstanding the absence of a functional link*” between two developments. The instant matter is stronger in that

there is a clear functional link between the Proposed Development, the production of the manure and its spreading on surrounding fields.

44. The relationship between the planning regime and other regulatory regimes was discussed in *R(Frack Free Balcombe Residents Association) v West Sussex CC* [2014] EWHC 4108 (Admin) ("**Frack Free Balcombe**") [CB/5], where Mr Justice Gilbert stated at §100 that there is "*ample authority*" to the effect that planning decision-makers have a discretion which permits them to assume that matters of regulatory control can be left to the statutory regulatory authorities. The obvious corollary is that there is a discretion to consider relevant matters which cannot be left to the regulatory authority, particularly where there is evidence that matters of concern cannot or will not be addressed by the regulator.

Standing

45. The Council indicated in pre-action correspondence that it challenged the Claimant's "precise standing" to bring the claim [CB/4/260]. It did so on the basis that the Claimant only lives 690 metres from the Site. That is wrongheaded – proximity to the boundary of an application site is not the sole marker of whether an individual will be affected by the grant of planning permission, particularly where the Proposed Development will cause environmental effects. The Claimant is directly affected by the Decision, given her home is surrounded by the fields on which over 1000 tonnes of manure a year, created by the Proposed Development, will be spread. The Council's approach to standing reflects its failure to acknowledge the indirect effects of the Proposed Development.
46. Furthermore, the Supreme Court in *Walton v Scottish Ministers* [2013] Env LR 16 pointed out that the courts have moved away from an unduly restrictive approach to standing which presupposed that "the only function of the court supervisory jurisdiction was to redress individual grievances and ignored its constitutional function of maintaining rule of law" (§90 of Lord Hope's judgment). The Claimant is plainly an individual who has a "reasonable concern" about the Proposed Development, as described in *Walton* §92. She objected to the Proposed Development and has demonstrated a real and genuine interest in the decision under challenge: *R(Kides) v South Cambridgeshire District Council* [2003] 1 P&CR 19 (CA) §§132-133.

GROUNDS OF CLAIM

Ground 1 – Failure to give reasons for accepting the Unilateral Undertaking as an appropriate mechanism for securing affordable housing

47. The manure is clearly an “effect of the operation of the project”, as understood by the CJEU in *Abraham* [CB/5] and the Court of Appeal in *Brown* [CB/5]. The CJEU in *Abraham* emphasised at §45 that EIA requires assessment of effects where the impact of a project will lead to a foreseeable increase in something that will have an impact on the environment – for example, railway works leading to an increase in trains and thus in noise and emissions from more trains or airport works leading to an increase in intensity of air traffic, and thus more noise and emissions from the air traffic. Similarly, in the instant matter, the Proposed Development will foreseeably lead to an increase in manure, which is to be spread on the surrounding fields. The environmental impact arising from that increase, particularly in terms of odour, must therefore be assessed.
48. It appears the Council does not take issue with the fact that the spreading of manure is an indirect effect of the Proposed Development [CB/4/260-266]. Instead, the Council claims in its pre-action response that the effect was assessed, but that was not the case. As set out above, the Environmental Assessment only assesses the impact of manure and odour on the Site and does not assess the spreading of the manure on surrounding fields at all. The Odour Assessment assesses the odour from the proposed poultry houses only. The Odour Consultant did mention in later correspondence the odour from the spreading of manure and slurries “to land”, but does not assess this impact – instead the correspondence dismisses the spreading as a “normal part of arable farming practice” [CB/3/156-157]. The Manure Management Plan aims to manage nitrates and does not assess or manage odour or dust from the spreading of manure. There is simply no assessment of the odour from the spreading on the fields.
49. The Council and Odour Consultant also both rely on the fact that manure spreading is a lawful use of the surrounding agricultural land. But that is not relevant, as the approach of the CJEU in *Abraham* and the Court of Appeal in *Brown* makes clear. The fact is that the Proposed Development will cause 1,500 tonnes per annum more manure than is presently caused, and that will be spread on surrounding land where there is no evidence any such spreading presently takes place. In the same way that it was irrelevant that an increase in rail traffic or an

increase in air traffic was an existing “lawful use” in the examples cited by the CJEU in *Abraham* §45, the fact of the lawfulness of the spreading of manure on the surrounding fields is irrelevant in assessing the environmental impacts arising from dust and odour caused by that spreading. That impact has simply not been assessed.

50. The Council also relies on the fact that the Environment Agency did not object to the Proposed Development. However, the environmental effect of the manure from spreading on surrounding fields was not something the Environment Agency would or did take into account in consulting on the Proposed Development. So the lack of objection from the Agency is irrelevant to the point under challenge. Furthermore, the Environment Agency’s consultation did not consider the adequacy of the Environmental Impact Assessment in relation to odour or dust from spreading manure on the surrounding fields. The Council cannot therefore properly rely on any assessment by the Environment Agency as to the direct or indirect effects arising from that spreading.
51. In any event, the mere fact that the Environment Agency did not object is not determinative of the issue. While the views of statutory consultees are material planning considerations, there is no obligation on an objector to a development to show that her view is “corroborated” by the statutory consultee: *O’Connor v SSCLG* [2014] EWHC 3821 (Admin) at §§34-37. The planning determination to be made by the Council is not dictated by the Environment Agency’s lack of objection. The planning decision maker is entitled to refuse permission despite a lack of objection by the Environment Agency, where there is a proper basis for refusal. This is particularly so where the Agency’s assessment either did not deal with an issue (as in the instant matter) or was not up to date in relation to an issue. This is exemplified by *O’Connor*, where the High Court held that an Inspector was entitled to uphold a refusal of planning permission, despite a lack of objection from the Environment Agency.
52. In *R(Palmer) v Herefordshire Council* [2015] EWHC 2688 (Admin) [CD/5], the High Court considered a challenge based on a failure to assess the spreading of manure caused by a chicken farm development. The instant matter is clearly distinguishable, because:
 - a. The court in *Palmer* believed that the Environment Agency permit would regulate the odour from the spreading of the manure. That is, however, not the case. In the instant matter and the Agency’s consultation response,

set out in the Officer's Report, made it plain that the Environmental Permit did not address matters outside the boundary of the Site and the only regulatory power of the Agency over the spreading of manure is in relation to nitrates.

- b. The Council in the instant matter relies on references to documents which it contends carried out the requisite assessment, but when those documents are read, it is plain that the impact of odour and dust arising from the spreading of the manure was not in fact assessed. That is different from the situation in *Palmer*.

53. Accordingly, the Claimant asks that permission be granted to bring her claim on this ground, as it is plainly arguable that there has been a failure to assess an important indirect effect of the Proposed Development, in breach of the EIA Directive and the EIA Regulations.

Ground 2 – Failure to Take Material Considerations into Account

54. The Council does not appear to dispute the materiality of the environmental effects of spreading the manure produced by the Proposed Development on surrounding fields [CB/4/260-266]. Instead, it Council relies on various references in the decision-making process to the ES, the Odour Assessment, the Manure Management “Plan” and the Environment Agency’s consultation response [CB/4/262-263]. For the reasons just outlined, that does not assist, as those documents did not take into account the effect of odour and dust arising from the spreading of manure caused by the Proposed Development. There is therefore no evidence that the Council took into account that material consideration.
55. The Council also relies on the environmental permitting regime to control to effects of the manure and the fact the Environment Agency has not objected. This is misguided. In the instant matter, the permitting regime does not purport to regulate the effect of odour and dust from the spreading of the manure. This is an example of where the planning system is required to take account of an effect that falls outwith the permitting regime. Accordingly, in line with §100 of the *Frack Free Balcombe* decision, the Council should have taken the issue into account.
56. The Claimant therefore asks that permission be granted to bring her claim on this ground, as it is also arguable that there has been a failure to take into account a material consideration.

Protective Costs

57. The claim is an Aarhus Convention claim under CPR 45.41(2), as it falls within the scope of Article 9(2) of the Aarhus Convention, given it raises matters concerning the environmental impact of an agricultural development and the consequential impact on individuals. The Claimant seeks a costs capping order under CPR 45.43 and that the costs limit in CPR 45.43(2)(a) be applied.
58. The Claimant's statement of financial resources is at **CB/1/21-23**.

Remedy

59. The Claimant seeks an order quashing the Decision and an order for her costs of making the claim.

13 October 2016

ESTELLE DEHON