

Case Name: *Liquid Leisure Ltd, R (On the Application Of) v Royal Borough of Windsor and Maidenhead* [2022] EWHC 1493 (Admin) (16 June 2022)

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Commentary: The High Court refused an application to challenge by judicial review the Royal Borough of Windsor and Maidenhead's ("the Council") issue of a Breach of Condition Notice ("BCN") on 5 October 2021. The BCN required the Claimant to comply with Condition 2 of the planning permission relating to the site operated by the Claimant as a water sports facility ("the Site"). The Site is within the Green Belt and falls within Flood Zone 3a meaning that there is a high probability of flooding.

Condition 2 required that "express further permission" was required for buildings and engineering and the Claimant had been granted permissions for a clubhouse, boathouse, a replacement boathouse and a cable water-skiing system. In November 2020 the Council refused a Certificate of Lawfulness for several existing structures at the Site and in December 2020 the Council issued an enforcement notice ("EN") for purported breach of planning control. The EN required the Claimant to cease the use of the Site as an "Aqua Theme Park". In January 2021, the Claimant appealed against the EN and in October 2021 the Council issued the BCN. The inquiry in relation to the EN appeal was postponed, adjourned and is listed for hearing in November 2022.

The Claimant brought the judicial review on 4 grounds, namely that:

1. The Council took into account two irrelevant considerations in the BCN report being (a) that the should be issued as a "secondary action as a fallback position" and (b) the service of the BCN could operate to "narrow the issues between the parties during the upcoming appeal".
2. The Council unlawfully failed to take into account the benefits of the present use of the Site despite the favourable comments from the public in the EN appeal and that the Council's stated reasons were so inadequate that they were unlawful.
3. The decision to serve the BCN was Wednesbury unreasonable and an abuse of statutory powers applying the well- known case of *Padfield v Minister of Agriculture* [1968] AC 997.
4. The Council failed to discharge the public sector equality duty ("PSED") in section 149 of the Equality Act 2010 when deciding whether to issue the BCN.

The judge, Mrs Justice Lang DBE, found that the Council was entitled to use its discretionary enforcement powers to address suspected breaches of planning control and that there was nothing in the statutory scheme making an EN and BCN mutually exclusive. As to Ground 1, the High Court concluded that the reasons provided in the BCN report for the issue of the BCN were relevant considerations. Ground 2 failed as the High Court found that the BCN report expressly stated that the EN appeal

documents were relevant considerations and therefore it was reasonable to infer that the representations about the benefits of the activities of the Site were taken into account by the Council. Furthermore, the standard of reasoning provided met the familiar South Bucks test. As to Ground 3, the High Court concluded that the Council's decision to issue the BCN was not irrational or disproportionate in the circumstances of the case and that the Council assessment as to whether it was expedient in its discretion to exercise its enforcement powers was careful and thorough. As to Ground 4, the High Court concluded that the Council had unlawfully failed to consider the PSED when deciding whether to issue the BCN. The High Court found that the Council should have been aware from its site visits and responses to the EN appeal that persons with protected characteristics may be making use of the unauthorised facilities and yet there was no evidence that the Council had considered the PSED at all when it decided to issue the EN. However, interestingly applying the 2020 Court of Appeal case of *Gathercole*, the High Court refused relief under section 31(2A) of the Senior Courts Act 1981 on the basis that it was satisfied that it was highly likely that consideration of the PSED by the Council would not have changed the final outcome.

Comment: This case is of interest, among other things, as it is another example of a Council unlawfully failing to apply the PSED when discharging its public functions and yet the decision survives being quashed invoking the statutory discretion not to quash relying on the Court of Appeal's decision in *Gathercole*.

Case summary prepared by Amy Carter