



Neutral Citation Number: [2020] EWHC 2850 (Admin)

Case No: CO/6/2020

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

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 27/10/2020

Before:

**JAMES STRACHAN QC**  
**(Sitting as a Deputy Judge of the High Court)**

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Between:

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-on the application of  
BARRY ZINS

**Claimant**

- and -

EAST SUFFOLK COUNCIL

**Defendant**

-and-

(1) PGL TRAVEL LIMITED  
(2) HB PGL HOLDING LIMITED

**Interested Parties**

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Mr David Forsdick QC and Ms Kimberley Ziya (instructed by Sharpe Pritchard LLP) for  
the Claimant

Mr Josef Cannon (instructed by East Suffolk Council) for the Defendant

Hearing dates: 15<sup>th</sup> and 16<sup>th</sup> July 2020

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**Approved Judgment**

*Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30am on 27 October 2020.*

## **James Strachan QC:**

### **Introduction**

1. The Claimant, Barry Zins, challenges the lawfulness of a grant of conditional planning permission to the Interested Parties (“PGL”) by East Suffolk Council (“the Council”) by notice dated 21<sup>st</sup> November 2019 for:

“Creation of a lake for recreational activities such as raft building and canoeing, including excavation the re-use of excavated materials onsite, and the re-organisation of consented Activity Structures within the Bawdsey Manor Estate”.
2. The Claimant advances two grounds of challenge. In short, he contends the officer’s report and update sheet provided to the Council’s planning committee that granted planning permission materially and seriously misled members as to:
  - i) the advice and comments from the Council’s Environmental Health Officer (“the EHO”) about the noise effects of the development – Ground 1;
  - ii) the heritage benefits said to be secured by way of enabling development, but which were not in fact secured by the conditions imposed on the grant of planning permission – Ground 2.
3. Permission to claim judicial review was granted on the papers by the Honourable Mrs Justice Lang DBE on 25 February 2020.
4. The substantive hearing took place by video conferencing with the co-operation of the parties. The Claimant was represented by Mr Forsdick QC and Miss Ziya. The Defendant was represented by Mr Cannon. I am very grateful to them for the clarity and helpfulness of their written and oral submissions. The Interested Parties did not appear and were not represented.

### **Factual Background**

#### Bawdsey Manor Estate

5. Bawdsey Manor Estate is in an area of countryside alongside the River Deben and the coast in East Suffolk. The Estate includes a number of significant heritage assets, including Bawdsey Manor House, a Grade II\* listed building, its formal gardens and Grade II registered parkland, Pulhamite cliffs and, further to the north-east, and a World War II listed radar station. Unfortunately much of the heritage comprised within the Estate fell into a poor state of repair in recent history. A conservation management plan (“CMP”) was produced in 2010 to try and address that issue.
6. Bawdsey Manor House was in use as a private boarding school until 2016. The school activities were focused around the main buildings of the Manor House, rather than the area now proposed for the new lake (“the Lake”). The Lake area is close to a number of other residential properties, including one owned by the Claimant.
7. PGL acquired the Estate in 2017. PGL provides outdoor adventure activity courses for school children. The Claimant states that PGL initially operated its activities at the

Estate in a low key way and there were no complaints about its activities in that initial period. That has changed since its activities have expanded. The Claimant is now particularly concerned about the noise that would be generated from activities associated with the proposed Lake in proximity to the residential properties.

The Outdoor Activity Structures & River Jordan Planning Permission

8. In November 2017 PGL applied to the Council for planning permission (reference number DC/17/4910/FUL) for various outdoor activity structures to be provided within the Estate, along with restoration of a water channel called the River Jordan.
9. The planning application was accompanied by a noise assessment. It contended that in the worst case scenario assessed, the noise from the activities proposed would be acceptable. The application attracted objections from two residents. They contended (amongst other things) that the shouting and screaming of children from the proposed activities had not been properly assessed in the assessment. They considered that the effects of such noise were masked in the assessment by averaging the peak noise over an inappropriately prolonged period.
10. The Council's EHO was consulted about the application. The EHO did not object to what was proposed, but sought the imposition of a condition requiring the provision of a noise management plan to assist in the prevention of any noise nuisance to the residential neighbours.
11. The planning application was determined by the Council's planning officers under delegated powers. A delegated officer's report which resulted in its approval was produced. The officers stated of the proposed use:

“The continued use of this historic estate as a single entity by PGL is welcome because the proposed use appears a reasonably good fit in terms of re-use of existing buildings and utilisation of the landscape for educational and activity purposes. Having a viable business operating from the site will be beneficial in seeking to preserve the historic structures, buildings and parkland and the restoration of the buildings at risk.”
12. As to the impact on designated heritage assets, the report stated as follows:

“Both H[istoric] E[ngland] and the Council's Principal Design and Conservation Officer and Arboricultural and Landscape Manager, welcome the restoration of the River Jordan as it will provide a significant enhancement to the setting of the Manor on approach. All agree that the majority of the activity equipment/structures are located in the less sensitive areas of the landscape and that their design and position will not adversely impact on the setting of the listed buildings/structures. The removal of the rifle range from the cliff garden and the removal of the archery from the front lawn of the manor is welcome. HE regard their re-positioning within the walled garden will cause some harm to its character but that

the harm may be acceptable when balanced against the wider benefits of partial restoration of the axial paths and central water feature, repairs to the walls and gates and restoration of the Lemony. The applicant has agreed to submit a restoration scheme for the lemony and the walls and gates within 6 months of the structures in the walled garden being brought into use. The re-location of one of the abseil tower further from the listed buildings to a less sensitive area of the landscape is also welcome. Seeking a viable use for the site in its entirety is also a public benefit that out-weighs the harm caused by the proposals.

HE have concerns to the lack of a detailed landscape strategy as this is critical to minimising the harm associated with the development and recommends that any consent should be conditional on the submission of a detailed landscape plan and its timely implementation. The applicant has agreed to the submission of a landscape scheme to maintain and further screen the structures within 3 months, and implementation by the end of the 2018/19 planting season. A wider detailed landscape strategy would be sought within 6 months. With such conditions in place it is considered the proposals will not have a significant materially adverse impact on the character and setting of the historic park and garden in line with policy SSP37.”

13. As to the impact on residential amenity, the delegated officer report stated:

“Two objections have been received from nearby residents on the grounds of undue noise disturbance from the use of the various activity structures. The application is supported by a noise assessment which the Council's Environmental Protection Team have assessed, having been made aware of the objections raised. They have undertaken a site visit and are satisfied, subject to a condition requiring the submission of a Noise Management Plan, that the proposals will not cause undue noise disturbance to nearby residents.

There is no doubt that the use will generate some levels of noise as it probably did when in operation as a school. The activity structures will not be used during the evening and all children will be supervised. There will be thus some controlled management by staff.

Having regard to all these factors it is not considered the proposal will cause undue noise disturbance to justify a refusal of planning permission on these grounds.

It is considered the visual impact of the structures could be reduced for residents in Kennelmans Cottage by undertaking some additional planting in the vicinity of this property, which

is positioned quite close to one of the pieces of equipment. This would be sought as part of the landscape condition.”

14. Conditional planning permission was granted by the Council by notice dated 15 February 2018. The grant was subject to certain conditions. The conditions included:

“7. Within 3 months of commencement of development, a landscape scheme (including maintenance and management details) that seeks to strengthen the existing woodland structure and provide additional planting to ensure the appropriate screening of the activity structures, shall be submitted to and approved in writing by the local planning authority. Within 6 months of commencement of development a landscape strategy shall be submitted or the remaining parkland including the north of the mansion, the Terraces, Italian Garden, Sunken Garden and the Cliff Garden area.

Reasons: To ensure that there is a well laid out landscaping scheme that will provide appropriate mitigation to reduce the harm caused by the activity structures, in the interests of visual amenity, and to ensure the preservation and enhancement of the Historic Park and Garden.

8. The approved scheme of landscape works shall be implemented by the end of the 2018/19 planting season (or within such extended period as the local planning authority may allow) and shall thereafter be retained and maintained for a period of five years. Any plant material removed, dying or becoming seriously damaged or diseased within five years of planting shall be replaced within the first available planting season thereafter and shall be retained and maintained.

Reason: To ensure the timely implementation of a landscape scheme that will seek to mitigate harm to the Historic Park and Garden.

...

11. Within 6 months of the structures in the walled garden being brought into use a restoration scheme for the lemonery [sic], axial paths and central water feature and flower beds together with a schedule of repairs to the walled garden walls, gates and the stonework to the entrance surrounds, shall be submitted to and approved in writing by the local planning authority, along with a time scale to complete the works. The works shall be completed in accordance with the approved details and within the time frame agreed.

Reason: To ensure the implementation of works that would provide benefits to outweigh the harm to designated heritage assets caused by the proposals.

12. Prior to the equipment first being used a Noise Management Plan shall be submitted to and agreed in writing with the Local Planning Authority.

Reason: To provide a framework to assist in the prevention of nuisance to neighbouring properties in the interests of residential amenity.”

15. It is common ground that the landscape scheme requirements under the first part of Condition 7 were discharged in 2018. A Noise Management Plan under Condition 12 was subsequently submitted to the Council and approved in March 2018. It stated, amongst other things, that it was designed to “prevent exposure of people outside the site to levels of noises which would result in complaints”. The Noise Management Plan included proposed operational controls to reduce noise. It set out a complaints mechanism for complaints from the public to be made to, and resolved by, PGL. The complaints were to be logged and the log-book reviewed by the Council at periodic meetings with the potential to trigger a review of the requirements of the Noise Management Plan.
16. PGL began to use the approved outdoor activity structures in Summer 2018. The Claimant states that regular noise complaints were first made to PGL and increasingly to the Council about the activities that took place. The record of complaints records one from a resident of Dairy Cottage describing the noise as “horrendous”. The EHO conducted a site visit and has a written record that “what was quickly evident was the impact of children shouting, laughing etc... from PGL on the local area”. A local councillor who visited the site stated that she was “shocked at the level of noise coming from the PGL site”. A local resident’s GP informed the Council that the local resident had been hospitalized for stress caused by the noise. Complaint record forms were kept by a resident.
17. The Claimant submits it is clear that it was the nature of the noise (shouting and screaming), rather than the average noise level, which was causing the complaints. The Claimant also relies on the fact that the Council’s Planning Department knew of these complaints, given the log requirements under the Noise Management Plan, and that PGL accepted that noise was an issue.

#### The First Lake Planning Application

18. In 2018 PGL submitted a further planning application to the Council (DC/18/3160/FUL) seeking permission to construct a lake within the Estate. This was intended to enable PGL to provide further raft-building and canoeing activities.
19. The application was accompanied by a Planning Statement and a Noise Assessment. The Planning Statement contended (amongst other things) that the Lake was necessary to enable the success and survival of the Estate. This was identified as being a critical consideration in the determination of the planning application. The applicant argued that it would secure the viability and success of PGL, so being able to secure the continued use of the heritage assets.

20. The Noise Assessment sought to assess “L<sub>Aeq</sub>” noise levels (ie averaged noise levels over a period of time)<sup>1</sup>. It concluded that the noise environment would be acceptable. A Noise Management Plan following the structure of that approved under condition 12 of the Outdoor Activity Structures planning permission was also submitted.
21. The EHO was consulted about this application. The EHO’s consultation response dated 20 November 2018 stated:

“This proposal has the potential to cause noise nuisance to occupiers of neighbouring properties. The potential noise sources are from the children calling out, singing, screaming and laughing while using the lake for the proposed use of kayaking and raft building, along with the ‘leaders’ shouts of encouragement, support or instruction to the children.

The site is located on marsh land between two sets of residential properties and would lie within direct line of sight of the windows of the properties. Subjectively the properties appear to be relatively close to this proposed use, when compared to the distance to the others uses at the PGL site.

Unfortunately I have not had adequate time to discuss the application with the noise consultant or applicant, and would request an extension of time to do so.

If this is not possible then whilst I acknowledge receipt of the noise assessment as produced by SLR (Ref: 406.06654.00005v1; dated June 2018) which concludes that the predicted noise levels are acceptable when compared to the guideline limits, I would have to object to the application due to a lack of information as currently submitted and due to the noise assessment being an objective assessment against guidance that is not appropriate given the type of noise under consideration and the existing noise climate of the area. It should be noted that this was informally discussed during a site visit prior to the application, with the emphasis placed on a noise management plan rather than an objective noise assessment.

The noise assessment is very much an objective assessment based on two sets of guidance which were intended to be used where the noise is from a steady source and where noise does not have a specific character. Noise from children and leaders using the proposed PGL lake is unpredictable and could be considered to be of far more potential to cause a nuisance to neighbours than a steady continuous sound. There is no obvious guidance to compare an objective noise assessment to, and as

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<sup>1</sup> L<sub>Aeq</sub> is defined in the Noise Management Plan as the notional steady sound level which, over a stated period of time, would contain the same amount of acoustical energy as the A-weighted fluctuated sound measured over that period.

such it is my opinion that an assessment based on the likelihood of nuisance and the management of the potential for nuisance would be more appropriate.

In summary my initial concerns are as follows:

- the sheer number of people using the lake (up to 80 children plus instructors at any one time) is excessive and increases the potential for nuisance;
- the number of hours the lake could be used (up to 6 hours per day, 7 days per week) is excessive and has the potential to cause nuisance to neighbours using their gardens in summer or wanting to live with windows wide open or patio doors wide open in the warmer months (which is when use of the lake would be at its peak);
- The use of an Leq does not consider the potential nuisance from this type of proposal. It is not obvious from the noise report what time periods are covered by the Leq.
- The use of BS8233:2014 is inappropriate given the noise source of human voice. This is not a steady source of noise without character;
- WHO guidelines are again generally aimed at steady continuous noise sources, and there is recognition that lower noise levels (than those specified in the document) may be disturbing depending on the nature of the noise.
- It is likely that residents in the area of the proposed lake, will notice noise of this type as being more obvious based on the fact that this piece of land has not historically been used in conjunction with the school use/children playing etc. During a visit to the site it was noticeable that whilst children and instructors could be heard on the main body of the PGL land, it was a more distant sound and use of this part of the site would be more direct.”

22. PGL subsequently submitted a revised Noise Management Plan (draft Version 3) in October 2018. This set out further detail of proposed noise management. The EHO was consulted on this and responded as follows:

- “1. The submitted document is Version 3 of a Noise Management Plan for the site. It is important that we are made aware of Version 2 and that a clear list of changes for both versions are submitted to us to enable us to fully comment on the document;
2. It appears that in addition to information on the use of the lake, activity times have been changed in Version 3



when compared to the first version – namely a finish time of 17.30 rather than 17.00. This needs an explanation and agreement;

3. Very little information is in the Noise Management Plan on how noise from the use of the Lake will be controlled. As such our previous comments still stand, and we would stress that we are still of the opinion that the proposed use of the lake is excessive and that it has the potential to cause noise nuisance to occupiers of neighbouring properties. The proposal is to use the lake 7 days a week – 5 days of which will see up to 80 participants at any one time. Even with a 75% reduction on a Saturday there would be up to 60 participants, and a 50% reduction in use on a Sunday would still involve up to 40 participants at any one time. It is our opinion that this is excessive and when combined with noise from the other uses of the PGL site, would be unreasonable;
4. The noise and disturbance from this type of activity cannot be assessed purely on decibel levels. The duration, frequency and type of noise should be considered, as it would be when assessing statutory nuisance;
5. The Noise Management Plan commits to ‘no activity sessions on the Lake after 17.30pm – staff coaching and development only. To further safeguard the noise environment of the nearby residential properties there will be no activity sessions on the Lake out of the operating season’. Use of the lake by staff for coaching and development could also be intrusive with instructors shouting, people laughing and screaming etc. in the same way as that during the day;
6. It is likely that residents in the area of the proposed lake will notice noise from the lake as being more obvious based on the fact that this area of land has not historically been used in conjunction with the school use/children playing etc.

In conclusion, the Noise Management Plan does not provide us with enough information to be confident that noise from the use of the lake for canoeing and raft building will not cause nuisance to occupiers of neighbouring properties.”

23. Historic England (“HE”) was also consulted on the application. It provided consultation responses by letter dated 2 September 2018 and 13 November 2018. In summary, HE was supportive of the applicant’s strategy for development a sustainable future for the Bawdsey Manor Estate, particularly where combined with

sustaining and enhancing the significance of various heritage assets on site and putting them to viable uses. However, HE had concerns about the particular proposals. It considered they had the potential to enhance some parts of the registered park and garden, but also to cause some degree of harm to its significance through the proposed development in the Northern Park and areas around Kennelman's Cottage and the Manor Dairy complex. HE found it difficult to assess the mitigation proposed in the application and sought further information about the proposals, along with demonstration of why the proposed lake was necessary to achieve the sustainable future of the Estate as compared with less harmful alternative options. It recommended seeking further information from the applicant by way of clear and convincing justification for what was proposed, with details of "how proposed development will contribute to a strategy for the implementation of the CMP and future investment in restoring, sustaining and/or enhancing the significance of various heritage assets many of which are in a poor state of repair." In the absence of such information, it asked for its response to be treated as an objection.

24. In the event, this planning application was withdrawn by PGL before determination by the Council. A revised application was subsequently submitted (as described below).

#### The Second Lake Planning Application

25. On 9 March 2019 PGL submitted a new planning application for the Lake, along with relocation of some of the outdoor activity structures (reference DC/19/1022/FUL). This contained changes to what had originally been proposed. It also sought to provide further justification for what was proposed in terms of effect on the heritage assets
26. The Second Lake planning application was accompanied by the same Noise Assessment and a draft Noise Management Plan. The Council's EHO was consulted and responded on 2 April 2019 as follows:

"In terms of the amendments to the activity stations other than the lake I have no adverse comments.

In terms of the lake I continue to have concerns in respect of its location and implementation particularly as the noise management plan submitted with this application appears to be the same as that already commented on in DC/18/3160/FUL, therefore our comments will remain the same and are repeated below for consistency;

" ... " [The contents of the 6 numbered paragraphs of the consultation response of November 2018 were then repeated, before the EHO continued as follows:]

However I note the planning statement makes significant further reference to the use of the lake and I would have the following comments in that respect;

The planning statement puts significant emphasis on the previous use of the site as a school and military installation, particularly the former in the context of this application and to some degree this is accepted.

The site currently has C2 use and there is an expectation that a reasonable amount of noise will be produced from the site under that use. There has been significant cooperation from the site manager since the centre has been open to make concessions in respect of noise and to fine tune the management of noise on site to ensure that it stays within the bounds of what is reasonable. We have received complaints about noise from the site but have so far not substantiated them. We have previously identified areas where we have considered a problem could exist which have been addressed by the site.

That said noise currently comes from the parts of the site where these historic uses have always been taking place and therefore the precedent has been set that there will be a reasonable level of noise in the context of the lawful activity being undertaken. The area where the lake is proposed has not historically been used as part of the school activities and therefore the addition of the lake, and the significant use of it, represents a new noise source where one previously did not exist, therefore it is difficult to reconcile this reasonable C2 associated noise argument.

Further to this having now seen the raft building activity in action on the River Jordan it appeared to me to be probably the noisiest activity I have witnessed on the site and very little in the way of instructor intervention was noted in terms of noise reduction as claimed will occur in the planning statement. It is entirely accepted that children make noise when enjoying an activity and particularly water based activities but this only makes it more important when considering a new site for this activity type especially where that noise has not previously existed.

It is noted that comment has been made in terms of the noise impact assessment and that this state's only minor impacts on neighbouring properties. As has been discussed at length in the past with PGL and their consultants it is important to understand the use of averaged noise levels ( $L_{Aeq}$ ) does not accurately portray the potential for nuisance from the sounds of people screaming and shouting and cannot be relied upon as a way of mitigating for disturbance.

Ultimately we have made comments and concerns known on the noise management plan in respect of previous applications, this application has not addressed those concerns and I remain

unconvinced that the addition of the lake will not be a source of significant disturbance in its currently suggested form.”

27. PGL’s noise consultants, SLR, subsequently submitted a further version of the Noise Management Plan (draft Version 4) dated June 2019 and a letter dated 10 July 2019 responding to the EHO comments. The letter included an updated noise impact assessment. This was based upon operational noise survey measurements made at the Estate in April 2019 during a raft building activity session on the River Jordan and elsewhere. In that letter SLR stated (amongst other things):

“4. In relation to the proposed activities planned for the Lake it is stated in your response that “...this type of activity cannot be assessed purely on decibel levels and that the duration, frequency and type of noise should be considered, as it would be when assessing statutory nuisance.” However in SLR’s opinion, it is most appropriate that we present our findings via a quantitative approach and an analysis of the decibel levels, as this is concordant with the guidance that we have previously stated, such as: BS8233:2014, WHO Guidelines and Sport England Guidance. We have no knowledge of any guidance that states that we should assess the impact based on your proposed methodology, however if there is relevant guidance that you are aware of which implements your suggested methodologies could you please direct us to this so that we can base any reassessment on the stated criteria. Therefore, in this Letter, we have not assessed noise nuisance; rather SLR has based the assessment on the predicted  $L_{Amax}$  sound levels<sup>[2]</sup> at the nearest noise sensitive receptors due to the raft building activities on the Lake, and compared them to the existing baseline  $L_{Amax}$  sound levels for these receptors.

5. PGL have agreed to operating a “no using the lake after 17:30 rule”. This concession would restrict the use of the lake for staff development time and alternative arrangements for staff training will be made.

6. Further to your comment on whether the report will “...consider the impacts of noise on the nearest noise sensitive receptors from the activities considering the area of land has not historically been used in conjunction with the school use/children playing”. Again, there is no guidance that we are aware of which would specifically allow for the assessment of a noise sensitive receptor based on the fact that historically adjacent land had not been used for school use/children playing and any associated noise impact. Therefore in SLR’s professional opinion it is appropriate that we assess the noise

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<sup>2</sup>  $L_{Amax}$  was defined in the Glossary to the Noise Management Plan as “the maximum A-weighted sound pressure level recorded over the period state.  $L_{Amax}$  is sometimes used in assessing environmental noise where occasional loud noises occur, which may have little effect on the overall  $L_{Aeq}$  noise level but will still affect the noise environment. Unless described otherwise, it is measured using the ‘fast’ sound level meter response.”

impact based upon nationally recognised guidance by the analysis of the measured and predicted LAmax sound levels at the proposed development.”

28. Section 3 of the letter set out the results of the further noise impact assessment, looking at maximum noise levels from raft building and canoeing activities. Additional mitigation measures were proposed, including the prohibition of raft building and associated water-based activities on the northern section of the lake within a specified exclusion zone.
29. The EHO was consulted about this further information and responded on 16 July 2019:

“These comments relate to the additional noise information recently submitted, and our previous comments should still be taken into consideration.

#### Amendments to Activity Stations

In terms of the amendments to the activity stations, other than the lake, I have no adverse comments.

#### Position and Use of the Proposed Lake

In terms of the lake I continue to have concerns in respect of noise from its location and use. Whilst the proposed lake itself is not noisy, the use of the lake for raft building and canoeing introduces a significant new noise source into an area currently relatively unaffected by the noise from PGL. By introducing the lake onto the marsh area, this has the potential to cause nuisance to residents of houses that are currently either a little affected by the existing noise from PGL, or not affected at all due to the distance to the existing PGL use area. Some of the residential properties in the middle complex of houses are currently likely to be screened from the existing noise by the neighbouring buildings (Farm Cottages, The Old Laundry). If the lake is given permission, the new noise source is placed in a direct line of sight to the properties or their gardens, and as such has the potential to be more of a nuisance than the existing noise from PGL. Marsh Cottages will have a new noise source directly placed beside them, where they are relatively unaffected at the moment, and it will be closer to the cottage at the first entrance to the park.

We are concerned that the lake is very close to Marsh Cottages and the middle complex of cottages (Farm Cottages, The Old Laundry etc.), with the raft building area and canoeing jetties being very close to Marsh Cottages. As we have said previously, noise and disturbance from this type of activity cannot be purely judged on decibel levels, and particularly not as an LAeq. The duration, frequency and type of noise should be

considered, as it would be when assessing Statutory Nuisance. Although activity use of the existing equipment has been submitted showing that the equipment is not used to full capacity, and in some cases for a low percentage of the time, PGL have admitted that water sports are a very popular activity and it is likely that the raft building and canoeing will be extremely popular with visitors when choosing their list of activities for their stay. As such we feel that it is difficult to predict the likely activity levels of the lake and our comments must be based on use up to that being applied for unless PGL wish to commit to a lower level of use in line with that they currently predict. It is our opinion that the proposed use of the lake is excessive and that there is a need for residents of the houses to have ‘days off’ from the noise, particularly some time at weekends.

It is likely that residents in the area of the proposed lake will notice noise from the lake as being more obvious based on the fact that this area of land has not historically been used in conjunction with the school use/children playing etc. We feel that alternative positions for a lake should be further considered in locations where the noise from use of the lake will not significantly impact on private residents of neighbouring properties. We recognise that some locations have already been discounted in terms of heritage but these locations may be more appropriate in terms of impact on amenity. The lake could be linked to the existing River Jordan and potentially be smaller in size so that the existing water course can be utilised in the activities.

The Noise Management Plan identifies ‘noise sensitive areas’ which are shown on figure 02-2 where noise control measures are in place. The proposed raft building area and canoe jetties seem to be within the noise sensitive area surrounding Marsh Cottages.

#### Noise Management Plan

It appears that in addition to information on the use of the lake, activity times have been changed when compared to the first version – namely a finish time of 17.30 rather than 17.00. Whilst we have concerns about this, and received a number of complaints about noise from the activities at PGL in 2018, we have not witnessed Statutory Nuisance and as such cannot object to this change.

The Noise Management Plan commits to: ‘no activity sessions on the Lake after 17.30pm. To further safeguard the noise environment of the nearby residential properties there will be no activity sessions on the Lake out of the operating season’. Restricting activity sessions on the lake does not automatically

restrict staff use in the evening or early morning. As previously commented, use of the lake by staff could also be intrusive in the same way as that during the day.

While we feel that use of objective noise levels in the assessment of the potential for nuisance from this type of activity is of limited use, it should be noted that the Raft Building and Canoeing noise levels used in Table 1.3 of the NMP use the low figures as measured at Bawdsey PGL as opposed to the arguably more relevant but higher figures from Caythorpe. Bawdsey raft building is currently low key, whereas Caythorpe may be seen as more representative of what is proposed at Bawdsey.

We are unclear at what distance the noise levels in Table 1.2 for Marchants Hills and Caythorpe were measured. It is therefore difficult to compare with that is stated for Bawdsey. The sentence from the previous version of the NMP 'There would certainly be no further activity taking place in outside areas after 21.30 hours' should be left in the document in section 2.1.

At the end of Table 2.1 a commitment is in place for East Suffolk Council to review the control measures on an annual basis. This should be removed, but could be replaced with a commitment for PGL to submit their review to us for comments, or to discuss a review with us.

Within the Noise Management Plan there is reference to 'Noise monitoring protocol and Significance of Impacts'. It should be noted that the Council would not use objective noise measurements to investigate or determine Statutory Nuisance and as such this section of the Noise Management Plan is very much for PGLs internal use and in our opinion is of limited benefit.

### General

The planning statement puts significant emphasis on the previous use of the site as a school and military installation, particularly the former in the context of this application and to some degree this is accepted.

The existing activity area of the site currently has C2 use and there is an expectation that a reasonable amount of noise will be produced from the site under that use. There has been significant cooperation from the site manager since the centre has been open to make concessions in respect of noise and to fine tune the management of noise on site to ensure that it stays within the bounds of what is reasonable. We received complaints about noise from the site in 2018 but they were not

substantiated. So far during 2019 we have been made aware of a few concerns from residents that have been submitted to planning, but we have not received any direct noise complaints to environmental health. We have previously identified areas where we have considered a problem could exist which have been addressed by the site.

That said noise currently comes from the parts of the site where these historic uses have always been taking place and therefore the precedent has been set that there will be a reasonable level of noise in the context of the lawful activity being undertaken. The area where the lake is proposed has not historically been used as part of the school activities and therefore the addition of the lake, and the significant use of it, represents a new noise source where one previously did not exist, therefore it is difficult to reconcile the reasonable C2 associated noise argument.

Further to this having now seen the raft building activity in action on the River Jordan it appeared to me to be probably the noisiest activity I have witnessed on the site and very little in the way of instructor intervention was noted in terms of noise reduction as claimed will occur in the planning statement. It is entirely accepted that children make noise when enjoying an activity and particularly water based activities but this only makes it more important when considering a new site for this activity type especially where that noise has not previously existed.

In the noise submissions from the applicant, both activity levels and noise management are influenced by use of figures from the quiet season or out of season commitments (such as no use of the lake out of season). The likely noise nuisance from the use of the lake is of most relevance in the summer months when residents want to use their outdoor space and to have windows and doors open for ventilation. The cold winter months when windows and doors are shut, and residents are not likely to be resting or enjoying their gardens is of less relevance when considering the potential for nuisance from the site.

In conclusion we have made our comments and concerns known on the noise management plan in respect of previous applications, and the recently submitted information has not significantly reduced those concerns and I remain unconvinced that the addition of the lake will not be a source of disturbance in its currently suggested form.”

30. Following receipt of this response, the Council’s planning officer sent an email to the EHO asking if the EHO was aware of the revised plan reducing the size of the Lake and increasing the distance from Marsh Cottages to the raft building stations. The email also asked what level of use would the EHO be happy with and whether he



would accept the Lake only being used for canoeing and with no raft building and in terms of days off, whether the EHO would be happy with no use on Sundays. Information was also sought about as to whether the EHO would dismiss use of the northern part of the lawns to the front of the Manor on the basis of proximity to residential proposed and what would be used to investigate or determine statutory nuisance if not objective measurements.

31. The EHO responded to this email on the 17th July 2019 as follows:

“We have seen the attached documents and even though raft building has been placed in a less obtrusive area we still believe that use of the activity lake in it’s [sic] current form has the potential to unreasonably disturb neighbours.

We have assessed the application as submitted and considered information provided by PGL post submission as a result of our discussions with them. PGL have been made aware of our concerns and have had ample opportunity to suggest amendments to the management and operation of the site in the vein that you suggest but have not done so, if they wish to alter their submission in this respect we will of course give it due consideration.

We would not dismiss the northern part of the lawns in front of the manor, this has been disregarded purely on the grounds of heritage and has not been assessed for it’s [sic] appropriateness in terms of impact on people. Furthermore this area is part of the already operational site where noise of this nature is generated as part of the already granted C2 use, the current proposal represents extension of the sites activities beyond that which has previously occurred and thus extends the sites impact on neighbours accordingly [sic]. I should say we are not proposing any particular area as appropriate for this activity only that the currently proposed location is the only one that has been assessed and that there may be other locations subject to assessment.

Statutory nuisance is determined by subjective assessment of the noise taking into account such factors as the nature of the noise, the nature of the area, the frequency, duration and volume of the noise as well as the actual material impact of that noise on residents. This is the crux of our concern, that is to say the belief that, subjectively, exposure to this type of noise in an area where previously this noise did not exist (although we appreciate that it does at the neighbouring site) on a daily basis for the entire duration of the summer months where people will be outside or have windows and doors open will have a significant potential to have a negative material impact on residents use of their properties, whether this would be a matter of statutory nuisance is not possible to say at this point.

I would say at this point it is the nature of the noise that is likely to be the most significant factor in impact, that being children screaming and shouting, this type of noise is very intrusive particularly when adding the frequency and duration factors. It is interesting to note that the noise consultants are comparing the noise climate in 2017 (pre-children) to the predicted noise climate and suggest that the LAmax (maximum noise level) for the 2 periods are broadly the same which is why there will be no impact. If working on a purely objective noise level basis this appears quite true until you add the subjective factors in to the consideration of this potential impact. For example, the predicted max levels have been stated in the assessment as being things as Coaches shouting, Groups shouting and singing, Kicking of barrels, Whistles being blown and equipment being dropped (measured at bawdsey from the river Jordan). However, these noises did not exist in 2017 so the max noise levels are likely to have [b]een generated by such things as Traffic, Farm activity (machinery, shooting, bird scarers etc), Boat noise, Wildlife (birds calling, deer barking etc) and the Sea, so whilst the Max levels appear similar the noise climate will be very different. This is why we have not been satisfied by a purely objective argument of impact and why we consider the use of objective assessment inappropriate for this matter (which is supported by the guidance used as it is out of scope for this situation), although I appreciate subjectivity is difficult to quantify.

Ultimately our comments are based on subjective assessment of the noise in this location which has been undertaken based on our professional experience, presumably in a similar way to how you will have assessed any impact on amenity. We do not believe objective assessment is appropriate and there is no guidance available for the objective assessment of this type of noise in this type of situation which supports our approach. That said we have had no complaints this year and the complaints we received last year were not substantiated by officers of this team, the site management has been receptive to our suggestions where issues have been identified and currently we have no evidence to suggest the site in its current form is being managed poorly or causing levels of noise beyond that which you would expect from it's lawful C2 use [sic].

There are obviously many other aspects that have to be considered in the decision to grant or refuse this planning application and we appreciate if some of those are further up the hierarchy than our subjective concerns in respect of noise.”

32. HE was also consulted on the Second Lake Planning Application. By letter dated 9 April 2019, it repeated that it remained supportive of the applicant's strategy for developing a sustainable future for the Bawdsey Manor estate, particularly where that

is combined with sustaining and enhancing the significance of various heritage assets on site and putting them to viable uses consistent with their conservation. However, it considered that some degree of harm would arise from what was proposed, albeit there was some mitigation. It considered the supporting information provided with the second application was an improvement on the withdrawn application and did provide further justification for the harm caused. Nevertheless, HE set out some areas where HE recommended seeking further clarification and safeguards. These were then set out. They included things such as details of the proposals for storage of equipment outside of the season and a minimisation of the number of shelters to be used. HE recommended the imposition of conditions to address these matters.

33. HE went on to state:

“Finally, the proposed activities lake is presented within this application as an important part of the applicant’s overall strategy to provide a sustainable use for the whole estate and to substantially improve the historic buildings and landscape, essentially by ensuring a solid business model that allows continued investment in the management of the site and restoration of its key features. While the supporting information includes some description to this effect, it also makes clear that this is to be set out in a Landscape Strategy for the site -- as required to discharge condition 7b of the development consented under planning application for the activities structures (planning application reference DC/17/4910/FUL). The Planning Statement indicates (on page 17) that this Landscape Strategy ‘will be submitted shortly for consideration alongside this planning application’; however, it does not appear to be included within any of the information supporting this application made available as part of this consultation. The Landscape Strategy is an essential part of the justification, demonstrating how the activities lake will contribute to implementation of the CMP and future investment in restoring, sustaining and/or enhancing the significance of the various heritage assets across the site.”

34. At around this time PGL sought discharge of condition 5 of a permission DC/17/4908 FUL, which would also have discharged the second part of Condition 7 of DC/17/4910/FUL in terms of a landscape strategy for the park and garden at Bawdsey Manor. HE were consulted on this. HE responded by letter dated 3 May 2019 in detail. Whilst again remaining supportive of the strategy for a sustainable future for the Estate and generally supportive of the restoration proposals set out in the Landscape Strategy, they considered that the application lacked certain information, including the lack of a “clear action plan or programme” for delivery of the Strategy “to demonstrate how (and in what timeframe) the applicant’s commercial operations enabled by such development will contribute to implementation of the CMP” and which lay behind the reasons for the imposition of the conditions in question.

35. PGL subsequently submitted an updated Landscape Strategy. This was also submitted in conjunction with the Second Lake Planning Application. This included an Appendix B: “Emerging Strategy Details and Landscape Programme”. The Claimant

submits that Sections 3 and 4 of that Landscape Strategy make clear that what the Claimant characterises as the most important works – coastal defence and the Pulhamite cliffs – could not be funded by PGL but were dependent on grant funding. For example, paragraph 3.9.1 begins by stating that: “A strategy for repairing and/or rejuvenating the Pulhamite Cliffs is recognised to be beyond the abilities of a private owner or PGL alone.” The document noted that PGL were in the early stages of discussions over grants/funding to assist in the upkeep and restoration of the cliffs. The conclusions Section 4 also referred to the need for external funding. Appendix B identified the provision in due course of a detailed scheme for works to the Pulhamite Cliffs to be commenced within Winter 2019/20.

36. HE was consulted on this Landscape Strategy. HE’s officer provided comments by email dated 12 July 2019 as follows:

“... I have not been able to review in detail, but a quick look at Appendix B. It certainly seems to be a step in the right direction, presenting a clear list of deliverables and timeframes for their progress and implementation. Item xi looks like the catch-all for elements like the Sunken Garden, Italian Garden, Terraces, etc. not specifically mentioned in any of the other actions. Appendix B proposes to deliver all 11 of the strategies and detailed schemes prior to the proposed activities lake being used for any recreation or other uses by PGL. Using this as the basis for a Condition attached to the activities lake application should help to address our concerns for all three applications (DC/17/4908/FUL, DC/17/4910FUL and DC/19/1022/FUL).”

37. On 15 July 2019 members of the Planning Committee conducted their own site visit of the Estate in light of the Second Lake Planning Application. This fact is recorded in the Minutes of the Planning Committee meeting that subsequently took place on 23 July 2019.

#### The Officer’s Report for the Second Lake Planning Application

38. The officers produced a report on the Second Lake Planning Application on the 17th July 2019. The Claimant infers that this version of the report had yet to reflect the updated information that had been received from the applicant on noise and the EHO’s comments on that that information. I agree with this inference.
39. The Executive Summary at the front of the Report stated as follows:

“The application seeks planning permission to provide a lake within the grounds of Bawdsey Manor Estate for use by the applicant (PGL) who run a children’s outdoor activity/educational centre on the site. The lake would provide opportunities for canoeing and raft building by guests. The material excavated for the lake is proposed be re-used on the estate. It is also proposed to re-position activity equipment previously consented within the grounds.

The application has been referred to Planning Committee because of the sensitive nature of the site, the finely balanced nature of the recommendation and level of public interest.

The recommendation is Authority to Determine with Approval being recommended subject to the satisfactory resolution of ecological impacts, noise impact and ensuring that the heritage benefits that form part of the justification are implemented within a reasonable time frame.”

40. Part 2 of the Report set out a Site Description. As part of that, paragraph 2.8 referred to the grant of previous consent for the Outdoor Activities Structures. Paragraph 2.9 identified the withdrawn Lake application in 2018 which had raised issues of, amongst other things, noise disturbance.

41. Part 3 of the Report summarised the nature of the proposal as a revised scheme to address previous concerns about the previous planning application. Paragraph 3.2 stated that:

“3.2 The applicant has explained, in their letter of 8 March 2019, that these activities are attractive and expected by guests and are an essential element if PGL is to remain competitive in the market.”

42. Paragraph 3.3 stated that the PGL letter in question also explained why the option of using the River Deben, and/or other off site facilities for water based activities was inappropriate due to identified safety risks. Paragraphs 3.3-3.5 provided a summary of the reasons why the necessary licences could not be obtained and the consequential need for a lake given the nature of the PGL participants (including primary school children).

43. Paragraph 3.6 drew members’ attention to the ability to review that letter, along with the application documents and representations on the Council’s website. Paragraph 3.7 stated as follows:

“3.7 The applicants have explained they consider the proposed lake as the only safe option to provide canoeing and raft building activities to guests. The proposed siting of the lake is on grazing marsh in the north western part of the parkland. It would lie between Ferry Road and properties that adjoin the northern drive, which currently have a rear outlook over the grazing marsh. These properties, known as the Manor Dairy complex, were formally ancillary estate building and cottages, comprising a Dairy, Byre, Laundry and Stables. They were sold off from the estate by the previous owners and are now in residential use independent from the Bawdsey Manor Estate. A pair of cottages on Ferry Road (Marsh Cottages) adjoin the north west corner of the site. Woodland tree belts separate the lake site from the more formal gardens around the Manor.”

44. Part 4 dealt with consultations and comments received on the application. Paragraph 4.1 set out the objections of Bawdsey Parish Council in full. This included recitation of the Parish Council's objections based on noise and loss of amenity for residents:

“ii. Noise and Loss of Amenity for residents

The [parish] council appreciates PGL's recognition that noise is a major factor in the opposition to this planning application. Its noise-monitoring protocol and prevention data is particularly welcome although definitions of “time on the water” might be more flexible in practice than is stated.

The East Suffolk Council Environmental Health Officer has already posted her consultation response on the website objecting to the application on the basis that it will create a statutory noise nuisance from day one of use. This will lead to considerable loss of amenity on behalf of the residents in addition to the loss of their open views across marshland as a result of the proposal to plant trees around the lake.

It should be stressed this is a unique site quite different from other PGL sites in having private freeholds within the site rather than outside where residents are naturally more distant from the source of noise. The activities of PGL have already had a major impact on residents' lives because of the contrast before the arrival of PGL and planners may not have appreciated the full extent of the disruption. Noise factors have led to lower house valuations for residents as well as serious health implications.

There is no doubt that this development will cause an incremental spread of noise over the whole area, causing a loss of wider amenity for private residents. Raft building and canoeing are inherently noisy activities due to interactions between children and between children and their instructors.

As stated in our original submission, the issue of loss of amenity has featured in all of the letters from residents objecting to this proposal. We refer planners to NPPF, DM 123 which requires that planning policies and decisions should identify areas of tranquillity which have remained undisturbed by noise and are prized for their amenity value for this very reason.

Both the elements of tranquillity and the uninterrupted views across the marshes to the estuary and beyond are the elements which residents have identified as being most precious to them, not to mention the natural habitat of the marshland.”

45. It is evident from the second paragraph of this extract that the Parish Council itself was aware of the nature of concerns being expressed by the EHO, based on the consultation response that appeared on the Council's website.
46. Paragraph 4.4 of the officer's report summarised the consultation response from the EHO as follows (from which it is evident that the report was not seeking to deal with the most recent supply of noise information and the EHO's response to it):

“4.4 East Suffolk Council Head of Environmental Health are not convinced from the information submitted that the lake will not be a source of significant disturbance to neighbours given the extent of activity proposed (up to 80 participants) and the inevitable noise that children will make when enjoying the water based activities. There is insufficient detail in the submitted Noise Management Plan to how the noise from the lake will be controlled.

Whilst acknowledging the permitted use of the site is a school so there is an expectation that a reasonable amount of noise will be produced, the area in which the lake is sited has not historically been used by the previous school. It is noted that there has been significant co-operation from the site manager since the centre has been open, to make concessions in respect of noise and to fine tune the management of noise on site to ensure it stays within the bounds of what is reasonable. Noise complaints have been received but these have not been substantiated to date.”

47. Paragraph 4.15 of the report dealt with third party representations. It recorded that 15 letters of objection had been received. It summarised the points made. This included the following summary of the objections based on noise and disturbance:

“• Noise and Disturbance:

- Cause intolerable noise nuisance from guests and instructors shouting, particularly at weekends when most residents will be in their properties all day, causing severe loss of amenity. Noise from the existing occupation of the site (hysterical screaming and chanting) has caused health problems to some residents.
- The path to the lake is at the bottom of adjacent properties gardens.
- More of the existing equipment should be removed to avoid overlooking and loss of privacy to neighbours. The zip wire was not installed in accordance with the approved drawings
- The submitted noise assessment is flawed and the Noise Management Plan useless.

- If noise nuisance claims are made and private nuisance claims against PGL will inevitably follow the costs to PGL could be significant and “eat up quite a bit of heritage asset restoration funding.”

48. Section 7 of the report summarised the relevant planning policy context for determination of the planning application. Section 8 set out the planning officer’s assessment of the proposal under the heading “Planning Considerations”. In paragraphs 8.1-8.7 the officer dealt with the principle of the proposed development first, concluding that the proposal was in accordance with identified policies. The benefits of keeping the Estate intact and in use were considered in paragraphs 8.3-8.4. Paragraph 8.5 identified some estate enhancements that were being delivered by PGL, including “the reinstatement of the River Jordan, to the front of The Manor, a key objective of the Conservation Management Plan (CMP)” and work in progress on restoring the Lemonary as well as repairing the walls and gates to the walled garden. It also stated that a landscape strategy “is also being formalised providing details of the maintenance and management of the formal garden areas such as the Italian garden, the sunken garden the terraces.”
49. Paragraphs 8.6 and 8.7 stated as follows:
  - “8.6 Other significant work is required to maintain and protect the Estate include urgent repairs to the coastal defences, including the replacement of corroded sheet piling, the restoration of the Pulhamite cliffs (Grade II listed structure), replacement of a water supply pipe and replacement of outdated electrical supply.”
  - “8.7 All these works are at a substantial cost to the applicant, particularly the works required to prevent the estate being destroyed by coastal erosion. It is recognised that the lake is an important component to deliver its business objectives by providing water based activities to guests allowing the business to remain competitive in the market. The ability to provide water based activities by other means and elsewhere on the estate has been ruled out for a number of reasons as stated elsewhere the report and in the applicants letter appended to the report. These reasons are not considered unreasonable. Retaining a viable use for the Estate is imperative to securing its use and long term preservation of the designated heritage assets. This is one of a number of material considerations that needs to be weighed in the balance having regard to other issues raised below.”
50. One of Mr Forsdick’s submissions under Ground 2 is that members were being told in these paragraphs that the Lake permission would secure those essential and expensive works. I address this submission below.
51. The officer then turned to consider the impact on heritage assets, including the historic parkland in paragraphs 8.8-8.17. This analysis was self-evidently prepared



before consideration of the Landscape Strategy that had been submitted and HE's comments on it. Thus, for example, at paragraphs 8.12-8.13 the officer stated:

“8.12 Whilst Historic England note that the submitted supporting information has provided some further justification for the lake as part of an overall strategy to provide a sustainable use for the whole estate and describes how ensuring a solid business model allows continued investment in the management of the site and restoration of key features, but they consider that the justification put forward has failed to adequately address how this will be done.

8.13 The applicants confirm how the lake will form part of an overall strategy for the whole estate, will be set out within the Landscape Strategy that has been submitted under the discharge of conditions for the activity structures. However, the Strategy so far submitted does not sufficiently set out a clear action plan of what will be done and when. This needs to be done before issuing any planning consent for the lake is issued, so that planning conditions can be added requiring key restoration work to be done within a certain time frame. Whilst it has been raised by some objectors, such work should be secured by a S106 agreement, officers are satisfied conditions would be appropriate given the applicants have already commenced restoration of the Lemonary and walled garden and given that the restoration of the River Jordan, one of the objectives of the CMP, has been done.

8.14 Therefore in the absence of an agreed Landscape Strategy demonstrating how the activities lake will contribute to the implementation of the CMP and future investment in restoring, sustaining and/or enhancing the significance of the various heritage assets across the site the proposal would not meet paragraphs 194 and 196 of the NPPF. The applicants are currently in the process of amending the Landscape Strategy to reflect the requirements of Historic England and members will be updated on this matter ...”

52. The officer continued at paragraph 8.17 as follows:

“8.17 Thus in the event that an appropriate soft and hard Landscape Strategy can be agreed and its implementation controlled by condition, it is considered the harm caused to the historic parkland by the lake would be outweighed by the public benefits of securing the preservation of heritage assets, in accordance with the NPPF. The proposals would also accord with Development Plan policy SSP37 and supplementary planning guidance relating to Historic Parklands. It would also fulfil the requirements of the Act, in that it would form part of an ongoing program of works, which seek to preserve and enhance the heritage assets within the wider site.”

53. In relation to impact on residential amenity, the reported stated as follows:

“Impact on residential amenity

8.32 Paragraph 127, adopted Local Plan Policy DM23 and emerging Planning Policy SCLP11.2, seek to ensure all new development does not result in significant harm to the amenity of residents living nearby.

8.33 There have been a considerable number of objections raised from those living in and around the estate. A key concern raised is the potential noise and disturbance from the activities on the lake and the change in character of this part of the estate, which has always been in agricultural use, and never been used by the former school use.

8.34 There are also concerns from Environmental Services on the issue of noise in that insufficient information has been submitted to be confident that nuisance to neighbouring residents would not occur. Last year there was some complaints made by nearby residents to the noise generated by the guests on site and when using the activity equipment. None of these complaints were substantiated and there has been significant cooperation from the site manager to fine tune the management of noise.

8.35 The applicant is collating more information on this aspect which will be submitted for review by Environmental Services, the outcome of which will be confirmed on the Members update sheet.

8.36 At the closest point, the boundary of the curtilages of residential properties closest to the lake would be approximately 13-15m away. Therefore there would be potential for noise generated by activities on the lake to be heard within the gardens of nearby residential properties. However, in determining this application, the Local Planning Authority must consider whether the potential levels of noise and disturbance would be of significant to cause sufficient material harm or otherwise.

8.37 The applicants in an attempt to address potential noise problems have sought to limit the number of participants on the lake to 80 at any one time, and to limit this by half on Sundays and 75% on Saturdays. Use of the lake will be restricted to daytime (9am to 5pm) and there would be a maximum of four sessions a day. The morning sessions are between 9am and midday and the afternoon sessions are between 2pm and 5pm. The number of sessions will drop outside peak periods, which total 13 weeks of the year. Access to the lake will be restricted to prevent use beyond the periods specified. Furthermore

around half of the raft building sessions will take place on the River Jordan to reduce the amount of activity taking place on the lake.

8.38 The applicant has submitted details of a noise management plan setting out how noise on the site will be managed and monitored by staff. When the lake is being used staff will be on the lake with the guests so will not be shouting instructions from the banks of the lake. Access to the lake from the rest of the site will be routed away from the residential properties and singing restricted. Staff will make participants aware of noise sensitive zones.

8.39 As explained in the applicant's letter of 8 March 2019, given the need for a certain amount of instruction on canoeing, teaching the technique of paddling and basics of canoeing as well as the safety aspects, to be given by instructors on the water rather than the banks, the potential for noise is not as great as some of the other activities on offer. With raft building a significant proportion of the time on the activity is spent constructing the rafts on land, with only 15 minutes spent on the water.

8.40 Whilst acknowledging that this proposal will no doubt cause some noise intrusion the level of disturbance can hopefully be further assessed on receipt of the additional information, and having regard to the level of usage and the nature and timing of the noise. The applicants intentions to re-position some of the activity structures already consented, but not yet installed, further from residents properties is to try and distance potential noise disturbance to neighbouring residents. They will also mean the structures are less visible to neighbours.

8.41 In terms of residential amenity issues such as outlook and visual impact, it is considered the proposed lake, given it is low lying nature, will not cause harm to residents amenity, as it will not block any outlook currently experienced, some of which are already filtered by existing trees.

8.42 Therefore, subject to the additional noise information being considered acceptable by the Head of Environmental Services, and the inclusion of appropriate conditions to control the use of the lake, the scheme would accord with the NPPF, adopted and emerging planning policy in terms of residential amenity."

54. Again, it is evident from this that the report was not dealing with the most recent information on noise provided by the applicant and the EHO's response, but anticipated that this would be dealt with by way of an update.

55. Section 9 set out the officer's 'Conclusions' as follows:

“9 CONCLUSION

9.1 The purchase of the Bawdsey Manor Estate by the applicant has protected it from piecemeal disposal. The fact that the owner is putting most of the buildings to a beneficial use is fundamentally positive. The application provides the context for PGL's ongoing investment and justification for the lake proposals. Providing the benefits accruing from the commercial success of the business is linked to actual restoration projects and implementation of the CMP set out in an agreed Landscape Strategy it is considered the heritage benefits would outweigh the harm that would be caused by the lake.

9.2 It is important to ensure that the proposals will not cause a direct or indirect affect on the integrity of European sites and priority habitat. Clarification of this is still outstanding until further assessment is made of the additional ecological reports and shadow HRA.

9.3 The impact on the amenity of neighbours is also an important consideration. Further noise assessments have been submitted and are currently under review. Planning conditions controlling the numbers using the lake and timing will also help to address amenity issues.”

56. Section 10 set out a recommendation that officers be given authority to approve the planning application subject to resolution of outstanding matters relating to, amongst other things, noise being satisfactorily resolved and the imposition of conditions.

Subsequent Events and The Update Sheet

57. The Claimant refers to the following entry in the Council's Environmental Service PGL Log on 19 July 2019:

“Friday 19th July I went to the planning office and found REDACTED and discussed bawdsey Manor in particular the application to construct the lake

REDACTED had told me earlier in the day that REDACTED had exchanged words with him which appeared to indicate they were still wanting some conditions from us to enable the application to be considered positively by members at the committee meeting next week and REDACTED had interpreted REDACTED demeanor as as quite insistent that we should be doing this to assist the approval of the proposed development

I explained to REDACTED that I did not know of any conditions which could be drafted in a sensible practical reasonable and enforceable way which could control the noise

that would arise from children indulging in activities such as raft building canoeing etc. at a facility such as this

I said that I was not aware of any specific accepted standards we could rely on to control noise arising from such activities

I told that that we had discussed PGL's own acoustic consultant's assessment of the impact and methods to quantify it but did not agree with their methodology

We had a brief discussion about nuisance and the difference between this and detriment to the amenity. REDACTED said she had been researching nuisance online and had come to realise that it was very subjective I explained that assessment of nuisance was based on

several factors including  
time of day  
duration  
type of noise  
nature and character of the location  
how it affected the people it affected  
whether there was any Malice involved  
actual level

I also explained that a nuisance could exist without the noise being quantifiable by conventional measurement techniques

I also said that REDACTED and REDACTED had discussed noise levels with PGL and their consultants and we disagreed with their approach of applying certain standards which we believe to be inappropriate and these circumstances and incapable of assessing or preventing statutory nuisance

I told her that our view had not changed at all on this point and was unlikely to however if she wanted conditions she could always write down in the form of conditions the limitations on these activities which the applicants themselves were suggesting

In other words PGL had suggested that they were not going to have amplified music or public address systems or to carry out activities on Sundays etc and it might be that she could achieve some control over creep beyond the limits of the application in its current form by documenting those promises by applying conditions

I said again that we had not changed our position and we felt that nuisance legislation would be an unreliable method of controlling perceived transgressions in the future since the

approval of this with the granting of planning consent would change the character of that part of the site thus changing the character of the location and thus the determination of nuisance

It would also be difficult to use nuisance law since the noise would be arising from lawful activities carried out in pursuance of a trade or business hence they would have available to them the best practicable means defence

I do not know of any best practicable means to control noise from children enjoying themselves in these circumstances

REDACTED made one or two notes while I was speaking and seems content with what I had said and I left her to ponder on these points”

58. As is evident, the names of individuals have been redacted. This was presumably intended to be for data protection purposes. Mr Forsdick submitted that the person in paragraph 2 whose demeanour was interpreted as being quite insistent that the Environment Services Team should be identifying conditions to assist in approval of the proposed development was the planning case officer. Mr Cannon stated on instructions at the hearing that was not the case, but rather the Council’s Head of Planning.
59. Mr Forsdick relied upon this note as evidence of a desire on the part of the Council’s planning department to approve the scheme notwithstanding the EHO’s advice. I will return to this point in due course. I simply observe at this stage that there is nothing inherently inappropriate about planning officers seeking assistance from a consultee on conditions that might be imposed upon the grant of planning permission if permission were to be granted against the advice of the consultee. As the EHO himself had correctly pointed out in his consultation responses, the decision as to whether or not to grant planning permission involved weighing up a number of considerations of which noise was one element. It is commonplace for consultees to provide guidance on conditions that might be imposed on a planning permission to mitigate the effect of a proposal, but to do so without prejudice to their overall view that planning permission should not be granted because of the effects the proposal would cause.
60. The Council’s planning officers produced an “Update Sheet” which was circulated to members on 22<sup>nd</sup> July 2019. This document is intended be read alongside the corresponding paragraphs of the Report to Committee. It references relevant paragraphs in the Officer’s Report.
61. In relation to the Landscape Strategy that had been submitted and HE’s response to it, paragraph 8.17 was updated as follows:

“8.17. An amended Landscape Strategy (LS) has been submitted that provides confirmation of the works to be undertaken to deliver the discussed landscape enhancements. The LS also outlines the next phase of detailed documents/plans for matters such as the Estate Fencing etc. It

offers a commitment to submit for approval of this series of detailed documents prior to the proposed lake being used for any recreation or other purposes by PGL.

Historic England have commented that whilst they have not been able to review the additional information in detail they confirm it:-

“... certainly seems to be a step in the right direction, presenting a clear list of deliverables and timeframes for their progress and implementation. Item xi looks like the catch-all for elements like the Sunken Garden, Italian Garden, Terraces, etc. not specifically mentioned in any of the other actions. Appendix B proposes to deliver all 11 of the strategies and detailed schemes prior to the proposed activities lake being used for any recreation or other uses by PGL. Using this as the basis for a Condition attached to the activities lake application should help to address our concerns”

62. In relation to the issue of noise, the Update Sheet stated as follows:

“8.35 To try and address the concerns of the Environmental Protection Team the applicant has provided operational noise survey measurements at a raft building session in April this year and from canoeing activities at another site where the characteristic were similar to this proposal, to try and quantify the noise impacts, (having regard to BS 8233:2014; WHO guidelines and Sport England advice). They have based their assessment on predicated [sic]  $L_{Amax}$  sound levels at nearest noise sensitive receptors from the proposed use of the lake and compared it to baseline  $L_{Amax}$  sound levels in 2017 (pre-children) for these receptors and conclude they are broadly the same so no impact.

To address potential noise impacts on residents from raft building, activity stations furthest from residential properties have been identified solely for this purpose.

Head of Environmental Health confirm if working on a purely objective noise level basis the applicants results appears quite true until you add the subjective factors into the consideration of potential impact. Regard has to be given to the nature of the noise, which in the case of the predicated LA max is coaches shouting, groups shouting and singing, kicking of barrels, whistles blown. These noise types did not exist in 2017 when maximum noise levels were likely to have been traffic, boat noise, farming activity, wildlife. It is therefore considered basing noise impacts on purely objective assessment is inappropriate, although it is accepted subjective assessment is difficult to quantify.

Statutory nuisance is determined by subjective assessment of the noise taking into account such factors as the nature of the noise, the nature of the area, the frequency, duration and volume of the noise as well as the actual material impact of that noise on residents. Based on the level of activity proposed on the lake on a daily basis (with no “days off”) for the entirety of the summer, when residents are most likely to use their gardens and have windows open, will have the potential to have a negative material impact on residents use of their property, whether this would be a matter of statutory nuisance is difficult to say.

It is noted no complaints have been received by Environmental Services this year and complaints received last year were not substantiated by officers. The site management has been receptive to suggestions where issues have been identified and currently no evidence to suggest site in its current form is being managed poorly and causing levels of noise beyond which would be expected for its lawful C2 use.

8.42 Whilst acknowledging the potential concerns of Environmental Services, it is considered, on balance, that with appropriate conditions, controlling hours of use (daytime only), no use of the lake out of the operating season, restrictions on numbers using the lake, the implementation of the Noise Management Plan (NMP), (submitted as part of the proposals and which sets out a series of practices staff will use to minimize noise disturbance to residents), the applicants management of noise issues to date, and a condition restricting the use of megaphones, sirens of any kind and any electronic speakers or PA system etc., that the proposal would not be contrary to adopted and emerging policy in terms of residential amenity. The NMP includes identifying Noise Sensitive Zones close to residential properties where further restrictions on certain activities are prohibited (e.g. singing) and includes a complaints procedure. Whilst acknowledging that during the summer residents will be using their garden more it is also noted that the area around Bawdsey Quay and beach attracts many visitors and the use of the River Deben for various sailing activities is also popular during the summer months, and thus be part of the noise environment.”

63. Mr Forsdick placed particular reliance on this part of the Update Sheet, comparing in detail the wording used by the officer to report the EHO’s position, as against the wording of the EHO’s consultation response on 16 July 2019, as further elucidated by the email received on 17 July 2019.
64. By way of update to paragraph 4.13 of the original Officer’s Report (which dealt with third party representations), the Update Sheet noted that:



“4.13 Three further letters have been received from one objector re-iterating concerns previously made regarding the need for a viability assessment and adverse landscape/ecological impacts. The new noise analysis is flawed and misleading focusing on highest sounds. Ridiculous to say screaming and shouting at 70-80 dBs from some 50- 80m away will be reduced to 40-45dBs by the time it reaches residential properties. This is not the case for the abseil tower. Head of Environmental Health will be unable to say with any certainty that the lake will not cause noise nuisance or that any noise disruption can be controlled by the Noise Management Plan.”

65. The Update Report contained a recommendation that officers be granted authority to approve the application subject to the consideration by the Head of Planning of any comments received by Natural England SWT on the additional ecological reports, clarification from Historic England on the wording of the condition to secure the landscape improvements identified in the revised Landscape Strategy and subject to certain additional conditions.

#### The Council's Determination

66. The application was considered by the Council's Planning Committee on the afternoon of 23 July 2019. The Minutes of that meeting provide a summary of what occurred.
67. The Planning Committee received the officer's report and the update sheet. They received a presentation about the application from the Council's Senior Planning and Enforcement Officer which drew attention to the additional information contained in the update sheet. The officer referred to the site visit the Committee had undertaken and then explained the site's location by reference to an aerial photograph, identifying the relevant features on the site, the site history and PGL's subsequent operations. The officer noted that raft building already took place on the restored section of the River Jordan and that the applicant had stated that the ability to offer the activities the Lake would provide was essential as it was expected at PGL sites and would allow the site to remain competitive. The Committee were provided with the detailed plans of the proposal, along with an explanation that the Lake had been reduced in size and moved further away from neighbouring residential properties to mitigate its impact. The Minutes record that "Photographs were displayed, showing the view of the application site that had been demonstrated to Members during the site visit". The activity stations and shelter locations were identified. Cross-sections of the lake were shown and a "comparison photograph" was shown detailed the screening that existing vegetation would provide to the nearby residential dwellings in both summer and winter. The Minutes also state that "The Committee was also in receipt of an image of the site with the proposed lake superimposed on to it, to demonstrate the relationship there would be between the lake, nearby houses and Ferry Road."
68. The officer then dealt with the amendments to the layout of the activity structures proposed to address some of the concerns raised by neighbouring properties in close proximity to those structures, including the application to instal the zip wire in the opposite direction to that consented, which would result in the descent being angled further from a neighbouring property.

69. The Minutes record that the key issues were summarised as being the impact on designated heritage assets, the impact on the landscape, the AONB and the Heritage Coast, the ecological impact and the impact on protected species, the impact on residential amenity, highway safety, flood risk and contamination.
70. The officer referred to the applicant having acknowledged that nearby organisations used the River Deben for waterborne training, but that this was not suitable for the activities proposed as the majority of the guests would be of primary school age.
71. The Committee was then directed to the update sheet regarding paragraph 8.17 of the report on the amended Landscape Strategy and the comments of Historic England on that document.
72. The officer then dealt with ecological concerns before turning to noise. The Minutes record in this respect:

“The objections to the application on the grounds of noise were referenced. The Committee was informed that PGL had taken into account these objections and would implement restrictions on the number of children on the lake at any one time, and the operating times of the lake. The applicant had also produced an assessment that suggested noise levels would be broadly the same as the levels measured at the River Jordan site when raft-buildings takes place. The Senior Planning and Enforcement Officer noted the comments of Environmental Health regarding the subjective factors that should be taken into consideration”

73. The Chairman then invited questions to the officer. In response to one of these, the Minutes record that the officer assured the Committee that restoration works were conditions within the recommendation. The Minutes record:

“A member of the Committee queried the lack of noise level assessment information in the report. The work undertaken by the applicant to measure the sound of raft-building at the River Jordan site was reiterated as were the comments of Environmental Health regarding the subjective factors of any noise made by the activities. The Senior Planning and Enforcement Officer noted that the applicant had agreed to controlling factors to minimise the noise produced.”

74. The Chairman of the Planning Committee invited the Chairman of Bawdsey Parish Council to address the Committee. The Minutes record (amongst other things):

“Mr Block said that the Parish Council had looked at the application in detail and that he would concentrate on three key issues; the impact on residents, the impact on the grassland, and the consideration of an alternative location for the lake.

Mr Block noted the concerns raised by local residents who had bought homes that had previously been part of the estate. He considered that the concern regarding loss of amenity was

supported by the comments of Environmental Health and that the noise would be continuous, irregular, difficult to control and monitor, and would be every day. Mr Block said that tranquility was an important part of the Deben Estuary; he agreed that Bawdsey Quay was not a tranquil area but considered the area abutting the application site was. He referred to the NPPF supporting this factor for an AONB. ...

75. There were no questions for Mr Block. The Chairman invited the agent for the applicant to address the Committee. The agent referred to the importance of the activities proposed to PGL. In respect of noise, the Minutes record:

“It was appreciated by Mr Cass that noise remained a concern. She highlighted that PGL has made changes to the application in response to comments including changing the position of the lake and the positions of the launch stations around it. Ms Cass said that this demonstrated PGL quickly responding to concerns and that the company had kept the Council up to date at all times. She considered that the noise management plan in place and the site manager’s approach to concerns had addressed concerns raised to date.”

76. The Chairman then invited questions of Ms Cass. She was joined in answering them by Mr Jones, the General Manager of the Site. The Chairman asked for details on how noise levels across the site would be controlled. Mr Jones explained that singing was used when transporting young people between locations on the site and this would be restricted in areas near to residential dwellings. He stated that the sessions on the lake would be designed to be fun but educational and would concentrate on these aspects rather than games or races. He said that young people on the site were supervised for the vast majority of the time on the site, given the profile of the type of young people who commonly visited the site. Mr Jones stated that the only unsupervised activity was orienteering, but this took place well away from the application site.

77. The Chairman then invited the Claimant, as an objector to the application, to address the Committee. The Minutes record as follows:

“Mr Zinns invited the Committee to ask him questions regarding noise concerns, as he considered that there had been significant misrepresentation on the issue. He was representing neighbouring residents who objected to the application and had concerns regarding it. He noted that the CMP had suggested the sell-off of buildings to support the restoration of the estate.

Mr Zinns explained that most residents were retirees or individuals that worked from home. He was of the opinion that a lake would reduce residential amenity and also property value. He highlighted the comments of Environmental Health regarding noise and said that a noise management plan would not resolve the issue.

Mr Zinns said that should the lake be approved he and other residents would pursue private claims against the applicant and considered that this would then cause the lake to be abandoned. He was also concerned regarding the impact of the lake on the drainage of the site and stated that the harm to the parkland would not be realised until it was too late. He outlined the recent profits of PGL and weighed this against its statement that the lake was vital in order to fund restoration works.”

78. It can be seen from the entry in the Minutes that Mr Zins used this opportunity (as he was entitled to do) to highlight for members the comments of the EHO regarding noise.
79. The Chairman invited questions to Mr Zins, but reminding the Committee that determination of the planning application should be based on material considerations and the impact on house prices should not be taken into account. The Minutes record that a member of the Committee asked Mr Zins if he and other objectors, when they had purchased properties, had taken into consideration that they were not buying properties within a conventional residential setting. Mr Zins responded that the properties had been bought from the international school, which had not created a nuisance for residents.
80. The Chairman then invited the Councillor Ward Member for Bawdsey to address the Committee. The Councillor stated he wanted to concentrate on two key issues: noise and impact of the development on the environment. In respect of the former, he stated that he considered the proposed mitigation for noise to be poor and he was concerned about the negative impact it would have on both residents and local wildlife as sound would travel better in such a rural setting. He described the area as calm and tranquil and stated that it attracted humans and wildlife. He stated that the area was a special one that needed to be protected. He welcomed PGL’s efforts and described the company as welcome residents, but stated that the application was too big for what it was trying to achieve and stated that he did not support the application. The Chairman invited questions. The Councillor (seemingly in response) said that the sound travel from the lake would differ from other activities on the site as two sides of the application site bordered residential dwellings and the highways, whilst other activities were situated further into the site.
81. The Chairman then invited the Committee to debate the application. The Minutes reveal that they did. The Minutes record that several members of the Committee noted that they had concerns about the application, particularly in regard to noise (amongst other things) and it was suggested by one Member that the noise issue had not been tackled adequately and that clear statements regarding the impact of noise from the lake were required. Another member noted the assurances of the applicant regarding the mitigation proposed in the application and understood both the applicant's reasons for the application and the objectors' concerns. He was unsure how he would vote on the application. Other members of the Committee spoke positively on the application, noting the significant change that had occurred across the estate during its lifetime and commended the efforts of PGL to mitigate impact on wildlife and its commitment to restore the Estate, highlighting the continued employment opportunities that the site brought. One Member considered that the lake itself would encourage wildlife and noted that similar lakes were encouraged as mitigation on

other developments. These Members indicated that they would vote in favour of the proposal. The site visit was described by one member of the Committee as having been informative. She remained concerned about the impact of noise on residential amenity and was undecided on how to vote on the application.

82. One member then declared a Local Non-Pecuniary Interest in the application, as he had accessed the site under its previous ownership. He noted that children on the site would be engaged in physical activity and take part in positive experiences. He was in support of the application.
83. Another member of the Committee suggested that more detailed facts and figures relating to noise would have been helpful. He spoke about his experience of working on similar sites and considered that the impact of noise on residential amenity would not be significant. However, he was concerned about the impact of the lake's construction on wildlife and disagreed with comments made by other Members on this subject. He acknowledged that some wildlife would return, but not all of what would be disturbed would. He noted the importance of the lake for the development of young people accessing the site and said that, on balance, he supported the proposal.
84. The Chairman acknowledged that the site had been occupied since the late 1890s for various uses. She reminded the Committee that planning applications, where the recommendation was against policy, needed to be determined on the balance of the benefit outweighing the harm. She believed that, on this occasion, the benefit outweighed the harm. She noted the concerns of the objectors but considered the continuation of the restoration of the Estate to be very important. She was also of the opinion that the development of young people was important and that the lake would provide activities that would contribute to such development. The Chairman noted the employment that was brought to the local area by PGL and considered the mitigation for the impact on wildlife to be sufficient. She was in favour of the application.
85. A member of the Committee noted that the report detailed that no noise complaints had been received in 2019 and that complaints in 2018 had not been substantiated. He said that there was clear evidence that PGL was taking onboard suggestions from local residents and attempting to be a good neighbour.
86. The Chairman invited the Committee to determine the application and it was unanimously resolved to give authority to approve the application, subject to the consideration by the Head of Planning and Coastal Management of any comments by Natural England and SWT on the additional ecological reports, clarification from Historic England on the wording of the condition to secure the landscape improvements identified in the revised Landscape Strategy and subject to controlling conditions that are set out in the Minutes.

#### The Grant of Planning Permission

87. Following the Committee meeting and resolution, on 25 July 2019 the Council's Planning Officer wrote to HE. She noted that the Lake application had been recommended for approval by the Planning Committee subject to further clarification from HE about the wording of a condition. By further email on 13 August 2019, the

Council's Planning Officer asked whether HE would be happy with the following condition, and asking a question about it, as follows:

“... ‘Prior to the lake first being used the detailed documents list i)-xi) in Appendix B of the Landscape Strategy received 10/07/19 shall have been submitted to and approved in writing by the local planning authority. The detailed schemes shall be implemented in accordance with the timescales identified in Appendix B. For the avoidance of doubt, with regard to item xi) these include the Sunken Garden, Italian Garden, and Terraces and the works identified in the plan shall be completed by the end of winter 2020/21’

Do you think we should seek clarification what key feature item xi) is referring to, and is the fact that they state works will commence in Winter 2020/21 rather than completed acceptable to you?”

88. The Council's planning officer sent chasing emails for a response on 29 August 2019 and 23 September 2019. Following a discussion that took place, HE responded by email on 23 September 2019 as follows:

“As discussed, Appendix B does not include timeframes for implementation of the works to improve historic views and address detractive elements under items v) and viii) respectively. Furthermore the wording of item x) is unclear about what is being commenced within Winter 2019/20 – just the scheme for the works to the Pulhamite Cliffs or the actual works themselves? Indeed, given the cost and complexity of the cliffs work (which will likely require engagement with the Environment Agency), it may be difficult to set and enforce strict timeframe for implementation of this element. It may be that you feel that agreeing scope and timeframe for programmes of work is inherent in discharge of the individual items captured within this Condition and does not need to be stated explicitly. If not, then you may wish to consider including additional text, such as the following:

*“Prior to the lake first being used the detailed documents list i)-xi) in Appendix B of the Landscape Strategy received 10/07/19 shall have been submitted to and approved in writing by the local planning authority. The detailed schemes shall be implemented in accordance with the timescales identified in Appendix B. For the avoidance of doubt, with regard to item xi) these include the Sunken Garden, Italian Garden, and Terraces and the works identified in the plan shall be completed by the end of winter 2020/2. For items v), viii) and x), the plans/surveys/schemes identified for delivery must*

*included recommended programmes for implementation to be agreed with the Council.”*

89. The Lake Planning Permission was subsequently issued by the Council on 21 November 2019 subject to a number of conditions. Condition 2 requires the development to be completed in all respects strictly in accordance with specified drawings and documents that are listed, including the Noise Management Plan Version 4 dated June 2019. Condition 3 restricts the maximum number of participants using the Lake at any one time to 80 on weekdays, 60 on Saturdays and 50 on Sundays. Condition 4 prevents use of the Lake during the closed season between 14 November and 10 February the following year and at all other times prevents its use before 9am and after 5.30pm and requires equipment and canoes to be removed from the Lake and its edge during the close season. Condition 11 of the Planning Permission was in the form set out in Historic England’s email dated 23 September 2019, with the additional text suggested. Condition 20 required the submitted Noise Management Plan to be implemented in full. Condition 21 prevents the use of loud speakers, megaphones, sirens or amplified sound on or around the Lake. Condition 22 restricts raft-building activities to the activity stations labelled 1-4 on a specified figure 3-4.

### **Legal Framework and Principles**

90. The correct approach to a judicial review challenge of this kind is not in dispute. Relevant principles were authoritatively summarised in *Mansell v. Tonbridge & Malling BC* [2017] EWCA Civ 1314; [2018] JPL 176, in which Lindblom LJ stated at [41]-[42]:

“41. The Planning Court – and this court too – must always be vigilant against excessive legalism infecting the planning system. A planning decision is not akin to an adjudication made by a court (see paragraph 50 of my judgment in *Barwood v East Staffordshire Borough Council*). The courts must keep in mind that the function of planning decision-making has been assigned by Parliament, not to judges, but – at local level – to elected councillors with the benefit of advice given to them by planning officers, most of whom are professional planners, and – on appeal – to the Secretary of State and his inspectors. ...

42. The principles on which the court will act when criticism is made of a planning officer's report to committee are well settled. To summarise the law as it stands:

(1) The essential principles are as stated by the Court of Appeal in *R. v Selby District Council, ex parte Oxtou Farms* [1997] E.G.C.S. 60 (see, in particular, the judgment of Judge L.J., as he then was). They have since been confirmed several times by this court, notably by Sullivan L.J. in *R. (on the application of Siraj) v Kirklees Metropolitan Borough Council* [2010] EWCA Civ 1286, at paragraph 19, and applied in many cases at first instance (see, for example, the judgment of Hickinbottom

J., as he then was, in *R. (on the application of Zurich Assurance Ltd., t/a Threadneedle Property Investments) v North Lincolnshire Council* [2012] EWHC 3708 (Admin), at paragraph 15).

(2) The principles are not complicated. Planning officers' reports to committee are not to be read with undue rigour, but with reasonable benevolence, and bearing in mind that they are written for councillors with local knowledge (see the judgment of Baroness Hale of Richmond in *R. (on the application of Morge) v Hampshire County Council* [2011] UKSC 2, at paragraph 36, and the judgment of Sullivan J., as he then was, in *R. v Mendip District Council, ex parte Fabre* (2000) 80 P. & C.R. 500, at p.509). Unless there is evidence to suggest otherwise, it may reasonably be assumed that, if the members followed the officer's recommendation, they did so on the basis of the advice that he or she gave (see the judgment of Lewison L.J. in *Palmer v Herefordshire Council* [2016] EWCA Civ 1061, at paragraph 7). The question for the court will always be whether, on a fair reading of the report as a whole, the officer has materially misled the members on a matter bearing upon their decision, and the error has gone uncorrected before the decision was made. Minor or inconsequential errors may be excused. It is only if the advice in the officer's report is such as to misdirect the members in a material way – so that, but for the flawed advice it was given, the committee's decision would or might have been different – that the court will be able to conclude that the decision itself was rendered unlawful by that advice.

(3) Where the line is drawn between an officer's advice that is significantly or seriously misleading – misleading in a material way – and advice that is misleading but not significantly so will always depend on the context and circumstances in which the advice was given, and on the possible consequences of it. There will be cases in which a planning officer has inadvertently led a committee astray by making some significant error of fact (see, for example *R. (on the application of Loader) v Rother District Council* [2016] EWCA Civ 795), or has plainly misdirected the members as to the meaning of a relevant policy (see, for example, *Watermead Parish Council v Aylesbury Vale District Council* [2017] EWCA Civ 152). There will be others where the officer has simply failed to deal with a matter on which the committee ought to receive explicit advice if the local planning authority is to be seen to have performed its decision-making duties in accordance with the law (see, for example, *R. (on the*



*application of Williams) v Powys County Council* [2017] EWCA Civ 427). But unless there is some distinct and material defect in the officer's advice, the court will not interfere.”

91. Mr Forsdick refers to *Obar Camden Limited v. Camden LBC* [2016] JPL 241 as a decision of the High Court to quash a grant of permission where an officer's report failed adequately to inform a planning committee of noise concerns expressed by an EHO. In that instance, the EHO had set out a number of concerns to the planning officer about the noise assessment that had been produced in support of residential accommodation being provided adjacent to an existing nightclub and on a busy road. The Court concluded that the EHO's advice had not been accurately communicated to the local planning authority's committee and that the assumption underlying the report (that if mitigation as proposed by the developer was imposed by condition, the noise concern would be overcome) was not what the EHO had been saying. The Claimant submits that a similar analysis applies here.
92. Mr Forsdick recognises that there is no requirement that the author of a report accept, or follow, the advice given by a consultee: see *R (Carnegie) v London Borough of Ealing* [2014] EWHC 3807 (Admin). Mr Forsdick submits that it is no part of the Claimant's case that the Council had to follow the EHO's advice, but the officer's report had properly to understand and communicate the essence of that advice from the EHO, as the Council's in-house expert advisers, rather than materially mislead the Committee as to the nature of that advice, if the Committee were lawfully to take it into account.
93. Mr Forsdick also recognised that the EHO is not a statutory consultee for the purposes of a planning application; but he points out that the EHO is relied on to provide expert technical noise input into planning decision making. He refers in this regard to the decision of the High Court in *R (Nicholson) v. Allerdale BC* [2015] EWHC 2510 at [58] and [61] and [62]; and *Obar* (above). He submits that the report author correctly viewed the EHO's assessment as a fundamental part of fulfilling the duty to “take reasonable steps to acquaint itself with the relevant information to enable him to answer it correctly”: *CPRE v Dover DC* [2018] 1 WLR 108 at [62], but that required the EHO's advice to be properly explained to the Committee.
94. Mr Forsdick draws an analogy to the approach articulated in *R(Akester) v. DEFRA* [2010] EWHC 232 (Admin) at [112]. There it was recognised that a decision maker was not bound to follow the advice of a statutory consultee such as Natural England, but it was required to have regard to it; and given the expert role of a statutory consultee such as Natural England, it was “bound to accord considerable weight to its advice and there had to be cogent and compelling reasons for departing from it.” He submits that whilst the full rigour of that approach may not apply to advice from EHOs, the general approach supports the basic proposition that the Council must properly understand expert advice provided to it. He submits that members will assume that they are properly appraised of the position of their inhouse expert.
95. In my judgment it is unnecessary in this case to explore in detail if the differences between the statutory consultee under consideration *R(Akester)* as compared with the in house EHO consultee in this case affect any wider principle, essentially for the reasons Mr Forsdick gives himself. The basic question is whether on a fair reading

of the report as a whole, which includes the Update Report, the officer materially misled the members on the issue of noise and, in particular the EHO's advice, in a way which was not corrected.

### **Ground 1 - Noise**

96. The Claimant's essential complaint under Ground 1 is that the Officer's Report and Update Sheet did seriously mislead Committee members in relation to the issue of noise. The Claimant submits it was materially misleading as to the EHO's advice, the substance of that advice was not addressed, and no sustainable or rational reasons were given for finding compliance with policy in light of that advice.
97. Mr Forsdick made it clear that the Claimant does not claim that the Report and Update Sheet had to set out the entire exchange between the EHO and the planning officers; but he does submit those documents did have to summarise accurately the position of the EHO and they failed to do so.
98. In that context, Mr Forsdick advanced a number of detailed criticisms of the contents of the Report and the Update Sheet. He submitted (amongst other things):
  - i) Paragraph 4.4 of the Report to Committee was not based on the EHO's April 2019 comments.
  - ii) Paragraph 8.34 of the Report portrayed the issue of noise as simply one of further information being required, giving the impression that the EHO had advised the noise issue could be managed out.
  - iii) Paragraph 8.36 of the Report was misleading as there was not just the potential for noise to be heard in the gardens but an inevitability of significant noise peaks being experienced there.
  - iv) No attempt was made to set out the EHO's clear position on the nature of the noise, its intrusiveness, the fact that the Lake would bring higher and much more intrusive noise sources much closer to residents than even the Activity Structures which themselves had led to multiple complaints and the whole gist of the EHO's clear and repeated position was missed out and thus a distorted position presented
  - v) Paragraph 8.38 addressed PGL's attempts to mitigate the noise, but was silent on the EHO's advice as to the innate inability reasonably to control it given the nature of the activities, and the real world experience of lack of actual effective interventions.
  - vi) Paragraph 8.39 was simply wrong and seriously misleading as to the noise "not being as great" as some other activities on offer. Nobody was contending that the residents would not be exposed to a higher noise levels than previously.
  - vii) Paragraph 8.40 expressed a hope that the noise environment could be "further assessed" but that was by reference to mitigation already taken into account by the EHO. Changes to the proposed location of further activity structures to

mitigate the harm caused by the Lake were highlighted, even though there was no claim of such an offsetting effect in the PGL material.

- viii) Paragraph 8.42 reached a pre-conclusion which was inexplicable – on the EHO’s analysis which the Committee was not informed of there would be a clear breach of policy to put into the balance. There was no attempt to explain why the EHO’s views were wrong and the impression given was that the EHO’s concerns were matters of detail to be overcome by further detail.

99. As to the Update Sheet, Mr Forsdick noted that it amended paragraphs 8.35 and 8.42 of the Report, but his criticisms of it included the following:

- i) Paragraph 8.35 of the Update Sheet said that the further information had been to try and address the concerns of the EHO, but the gist of those fundamental concerns was not set out, having previously been omitted from the Report.
- ii) Paragraph 8.35 stated by reference to  $L_{Amax}$  levels that the noise environment was “broadly the same so no impact”, which was intended to give the impression that using what was portrayed as an acceptable methodology there would be no impact.
- iii) When reporting the EHO’s concerns the Update Sheet “cherry-picked” from the final email received from the EHO and missed out the full consultation response and thus the thrust of the EHO’s case. It omitted the EHO advice that:
  - a) “... this type of noise is very intrusive particularly when adding the frequency and duration factors”;
  - b) the EHO’s basic locational point;
  - c) it inexplicably removed the important word “significant” from the sentence “will have a significant potential to have a negative material impact on residents uses of their properties” thus breaching the policy;
  - d) “whilst the LA max levels appear similar the noise climate will be very different” [Appendix F, p3];
  - e) the use of  $L_{Amax}$  was inappropriate at all [Appendix F, p4] (not just inappropriate by itself as the word “purely” used by the officer suggested); and
  - f) the fact that the EHO’s subjectivity assessment was based on the EHO’s expertise (“professional experience”) – as was the standard way of assessing noise nuisance and thus not surprising or objectionable – instead implying that there was something wrong with subjective assessment.
- iv) It did not address the basic locational point that this was an intense use for “probably the noisiest activity” with “very intrusive” noise being brought much closer to residences into an area which did not previously experience

even school noise, with significant potential for nuisance which could not be mitigated;

- v) it did not address the fact that noise issues from existing activities further afield consistent with a C2 use had been addressed by the EHO, but the EHO's point was that this was simply the wrong location into which to extend those uses;
- vi) it did not address or resolve whether the applicant's approach could "accurately portray the potential for noise nuisance";
- vii) it did not mention the EHO had witnessed the inability to control the noise from raft building on site;
- viii) it did not report the EHO's view that the proposed use of the Lake was excessive and unreasonable;
- ix) it used the lack of complaints for other quieter uses further away as somehow showing that the noise at the Lake could or would be appropriately controlled when the EHO's point was the opposite – the noise from other uses may have been controlled but this was a much more difficult location and use;
- x) the lack of substantiated complaints was portrayed as somehow demonstrating that there was no noise problem even with the existing uses when that was not what the EHO was saying and it wrongly gave the impression they were unjustified;
- xi) it failed to identify that the planning team was aware of multiple complaints through the logs and otherwise and that, even from use of the activity structures, PGL had accepted there was a noise issue which needed to be addressed.
- xii) paragraph 8.42 claimed that the EHO's potential concerns had been acknowledged but this was wrong as the summary of the concerns was wrong and the concerns were not "potential" concerns at all, but concerns of the "potential for significant disturbance and noise nuisance".
- xiii) wrongly claimed that, on balance, the measures proposed would avoid the harm to which the EHO referred, even though the EHO had taken those measures into account and wrong suggested that they would overcome the EHO's concerns when the EHO made clear that they would not.
- xiv) failed to tell members that the report was going against the clear and repeated advice of the EHO and that his advice was that there remained a significant potential for a breach of policy.
- xv) inexplicably relied upon noise at Bawdsey Quay as part of the relevant noise environment, with no evidence to justify that conclusion.

100. By contrast, Mr Cannon for the Council submitted that on a fair reading of all the material, no one was or could have been misled. He submits the Report and the Update Sheet provided a legally adequate summary of the issues to the Committee.

He submits the Minutes of the meeting show that members were well aware of the gravamen of the contentious issue noise, but they came to a balanced view of the overall merits of the proposals after a detailed discussion about the issues raised, and with the benefit of a site visit. He submits the detailed and forensic attack on the Officer's Report and the Update Sheet is essentially a complaint about that exercise of planning judgment in this case.

101. In summary, he submits that the Report identified that the EHO had unresolved concerns about noise nuisance and impact on residential amenity and further information was expected and required. He submits that the subsequent Update Sheet provides an adequate and accurate summary of the EHO's concerns, reflecting the crux of the concerns that the EHO himself identified. A reader would have known that the EHO was not satisfied the proposals could be granted without the potential for negative material impact on residential amenity, that the EHO considered the use of  $L_{Amax}$  data to be inappropriate given the nature of the noise to be generated, but that the EHO had not received any noise complaints that year and that complaints in previous years had not been substantiated and PGL had been receptive to suggestions on noise management.
102. Mr Cannon submits that the EHO identified the "crux" of the concern as being the belief that, subjectively exposure to this type of noise in an area where previously this noise did not exist on a daily basis for the entire duration of the summer months where people will be outside or have windows and doors open will have a significant potential to have a negative material impact on residents' use of their properties, but whether this would be a matter of statutory nuisance or not was not possible to say. He submits that this crux was more than adequately conveyed by the Report and the Update Sheet read together. The author of the Update Sheet considered that notwithstanding these concerns of the EHO, planning permission should be granted for the reasons given. The Committee had visited the site and seen the relationships themselves. The Minutes make it clear that members had well in mind the issues about noise and the EHO's concerns and were not materially misled.
103. Given the nature of the Claimant's challenge, I have set out in some detail the various consultation responses that were received from the EHO, and the relevant parts of the Report and Update Sheet that are criticised.
104. Taken at face value, there is some obvious force in the Claimant's points that the Officer's Report and the Update Sheet do not report all of the detail of the EHO's advice on the subject of the noise and, in particular, do not communicate the full extent of, and reasons for, the EHO's concerns as expressed in more detail in the consultation responses.
105. In my judgment, however, the important question remains that of whether, on a fair reading of these reports as a whole, members were materially misled on noise and the EHO's advice and, if so, that has gone uncorrected before the decision was made.
106. The decision in *Mansell* emphasises that where the line is drawn between advice that is "significantly or seriously misleading – misleading in a material way", and advice that is misleading, but not significantly so, will depend on the context and circumstances in which the advice was given and its potential consequences. It is therefore relevant to consider the Report and Update Sheet as a whole, along with

what transpired at the committee meeting as evidenced by the Minutes. Having done so, I am ultimately not persuaded that members were materially misled in the way the Claimant suggests for the following reasons.

107. First, it is relevant to bear in mind that the Report and the Update Sheet ultimately provide advice from the Council's planning officers to the members on the planning merits of what is proposed. In many instances, there will be competing advantages and disadvantages that need to be balanced before making an overall decision. That clearly was the case here. For example, the officers perceived benefits arising from PGL being able to provide rafting and canoeing activities for primary school children at the Estate in an appropriately safe environment as part of PGL continuing its activities in a way which supported the viable use of the Estate as a whole, given the importance attached to the heritage assets. There were consequential limitations on where a lake to enable such activities could be located. On the other hand, it was recognised that the provision of such activities would give rise to inevitable noise affecting local residents in close proximity. Ultimately the Report and Update Sheet were providing advice from the Council's planning officers to members as to how the officers thought the overall balance should be struck, but leaving members to make their own decision.
108. As part of that process, it is important that officers do not materially mislead members on relevant issues, such as advice from the EHO on the issue of noise in this case; but there is no legal requirement to set out verbatim everything that has been said by an EHO in consultation responses or in correspondence with the planning department. It is legitimate, and it may often be desirable (to avoid reports from becoming unwieldy and less able to fulfil their true purpose) to summarise the advice that has been received. A summary must not materially mislead members as to the substance of the advice. But by its very nature, a summary will not set out every word of the advice that it is summarising.
109. Accordingly, the fact that the Report initially, and more importantly in this case the Update Sheet that followed, does not set out verbatim the EHO's consultation response contained in the emails of 16 and 17 July 2019 does not of itself mean that members would have been materially misled. In fairness, Mr Forsdick did not suggest to the contrary. It is important to consider whether the summary communicated to members the substance of the EHO's advice and concerns. I consider it is appropriate in this case to focus on the crux of the concern and whether that was communicated to members.
110. Second, but linked to the first point, it is important to distinguish between EHO advice and planning advice. The EHO was providing advice as a consultee on the question of noise; but the Report and the Update Sheet were ultimately providing planning advice on matters of judgment in question. As pointed out in *R(Carnegie) v London Borough of Ealing and others* [2014] EWHC 3807 (Admin) by Patterson J at [55]

“...there is no reason to impose a legal duty on the responsible officer to identify differences of view within the planning department. It is the role of the planning officer to distil in a clear fashion the issues for members to determine. Of course, if they omit a material consideration, then the report is vulnerable

to challenge. However, in the instant case it was an overall planning judgment that was material.”

111. Just as there may be differences of view on matters of planning judgment, so planning officers may disagree with the views, or the extent of concerns, expressed by a consultee. In providing that planning advice they should not omit material considerations which require consideration by the members. Nevertheless, in some of the Claimant’s criticisms of the Update Sheet it seems to me that the important distinction between the planning advice of the officer, as compared with advice from a consultee with which the planning officer may disagree, may have become blurred to some degree.
112. It was legitimate in principle for the author of the Update Sheet to provide her planning judgments on the merits of what was proposed, even though this may have reflected some disagreement with views of the EHO. This is all the more so in a case where the effect of the noise in issue involved subjective judgment, as the EHO himself characterised it. It still remains important not to mislead members about the views of the EHO; but it was legitimate for the planning officer to have a different view as to the overall acceptability of the noise environment, with the noise management measures proposed, and to communicate that view to members in a report of this kind. It was then ultimately for members to make up their own mind on such matters exercising their own judgment.
113. Third, returning to the question of whether members were materially misled as to the crux of the EHO’s concerns or advice, I ultimately agree with Mr Cannon’s submission that what was communicated was legally adequate. That is not to say that the summary in the Update Sheet was a model in the exercise of precis. In some respects, the approach adopted has inevitably exposed the author to the sort of criticisms the Claimant has advanced. In seeking to remain faithful to much of the wording used by the EHO in the consultation responses, but then omitting what the Claimant perceives to be important words or phrases (such as the adjective “significant” used by the EHO to describe the potential for a negative material impact), the author has perhaps naturally engendered the sort of criticisms now advanced. There is some attempt to summarise. And then there is also use of much of the same wording, but with omission of particular words and phrases. Such omissions can dilute the force of the EHO’s advice. They can also result in an inevitable focus on the words or phrases omitted in a claim of this kind, with a concern that the message becomes misleading.
114. I have considered with care the forensic textual analysis undertaken by the Claimant, comparing the consultation responses against the content of the Report and the Update Sheet. I have also stood back and applied my mind to the question of what the reasonable reader would have actually understood from the Report and the Update Sheet, read as a whole.
115. When tested in both respects in this way, I consider that the Report and Update Sheet do sufficiently inform members both as to the fact of the EHO’s concerns and the reasons for those concerns. I accept that the Report and Update Sheet could have been clearer. For example, many of the Claimant’s criticisms would have foundered altogether if the Update Sheet had stated in express terms that the EHO did not consider his concerns to be overcome by the further information or the mitigation

measures proposed. Nevertheless, I consider that this would have been sufficiently clear to members from both documents read as a whole.

116. The basic position that the EHO thought that the proposal would be a significant source of disturbance to neighbours is reflected in Section 4 of the Report itself. In that section, the Report set out Bawdsey Parish Council's verbatim consultation response. This expressly referred to the EHO's objection to what was proposed and identified it as being present on the Council's website. The Report also referred to the EHO consultation response itself at paragraph 4.4 (as it then stood). The summary of that response begins by stating in terms that the Head of Environmental Health was not convinced from the information submitted that the lake will not be a source of significant disturbance to neighbours given the extent of the activity proposed and the nature of the noise from children and the location of the lake in an area not previously used.
117. These concerns are then picked up again in the analysis section in paragraph 8.34. It is true that in that analysis section the planning officer was clearly reflecting a hope, or even an expectation, that the further noise information anticipated would address the EHO's concerns. But this was then a matter that was revisited in the Update Sheet.
118. I have already noted that the Update Sheet does not say expressly that the further information had failed to address the EHO's concerns. Nevertheless, I consider this is sufficiently clear from the content of the Update Sheet read as a whole as an update to the Report. The Update Sheet begins by identifying that further information had been provided in an attempt to address the EHO's concerns. It explains that the further assessment work used the  $L_{Amax}$  assessment. The Update Sheet correctly reported that the Head of Environmental Health had confirmed that if you worked on a purely objective noise level basis, the results appeared quite true; but it then set out the EHO's point that that was only true until you add the subjective factors into the consideration of impact. The Update Sheet then explained to the members the EHO's position as to the need to have regard to the nature of the noise. It explains what was in fact the EHO's position, that basing noise impacts on a purely objective assessment was inappropriate, whilst also accepting that a subjective assessment is difficult to quantify.
119. I consider it is inherent from what is stated that the further information provided by PGL did not address the EHO's concerns as that further information continued to rely on an objective assessment which the EHO did not consider appropriate for the reasons explained.
120. The Update Sheet also identified what the EHO considered ought to be taken into account in terms of the nature of the noise in order to make a subjective assessment. Members reading this part of the Update Sheet were therefore essentially receiving the advice from the EHO as to the relevant factors to take into account in making a subjective judgment. None of this would have been necessary or relevant to report in the same way if the EHO had been accepting the approach of objective assessment. I do not consider that members were materially misled about the EHO's continuing dissatisfaction with the further information provided. Moreover, the factors to take into account when making a subjective assessment were drawn to members attention by the officer at the Committee meeting itself, as reflected in the Minutes summarised above.



121. The Update Sheet also identified the substance of the EHO's advice that statutory noise would be determined by a subjective assessment of the noise, taking account of the factors that had been identified. Again, I consider it is clear from this that members were being advised as to the EHO's concerns that a statutory nuisance could arise in light of those subjective factors.
122. The Update Sheet then reports the essence of what the EHO had communicated in the consultation response on 16 July, albeit with some unfortunate removal of words and phrases that have fuelled the Claimant's concerns. Even with these omissions, the reader would understand the EHO's basic concern. The Update Sheet identifies that based on the level of activity proposed on the lake on a daily basis (with no "days off" for the entirety of the summer, when residents are most likely to use their gardens and have windows open) the EHO considered the proposal would have the potential to have a negative material impact on residents use of their property, albeit it would be difficult to say whether it would be a statutory nuisance. I accept that removal of some parts of the wording used by the EHO diluted the strength of the EHO's view to some degree, but I am not persuaded that it seriously or significantly misled members as to the basic substance of the EHO's view or concerns.
123. This part of the Update Sheet also needs to be read in conjunction with what is said about paragraph 8.42. There the planning officer "acknowledges the potential concerns of Environmental Services". In so doing, the planning officer was necessarily recognising that such concerns remained. Having acknowledged those concerns, the planning officer then sets out her own view. Her judgment was that, on balance, with the conditions she identified, the proposal would not be contrary to policy in terms of noise impact. That was a planning judgment which I consider she was lawfully entitled to reach having acknowledged the EHO's concerns. She was not bound to reach the same view as the EHO, particularly in respect of a subjective judgment of this kind. She was recognising the EHO's concerns remained, but expressing her own conclusions. She also explained why she reached that judgment, relying as she did to a significant degree on the control measures proposed. The fact that the EHO did not consider that such measures overcame his concerns does not mean it was unlawful or inappropriate for the planning officer to come to a different view and, ultimately, for members to agree with the planning officer.
124. I therefore disagree with the Claimant's basic contention that the gist of the EHO's fundamental concerns was not adequately reported to members. On a fair reading of the Report and Update Sheet as a whole, I consider that the gist was communicated, along with the principal reasons for those concerns.
125. In my judgment members reading the documents as a whole would not have been materially misled on the issue, and in particular, have understood each of the seven main points to which Mr Forsdick referred when making his oral submissions. In particular, members would have understood from the Report and Update Sheet that:
  - i) The EHO considered PGL's use of objective measures in the form of  $L_{Aeq}$  and then  $L_{Amax}$  to be inappropriate, given the nature of the noise concerned. That was adequately communicated to members in the Update Sheet in reporting the EHO's response to "purely objective" assessment, then pointing out the importance of a subjective assessment, and identifying that a purely objective assessment was inappropriate. Moreover, I do not consider it was the EHO's

advice that an objective assessment was entirely irrelevant, and that would have been a surprising contention in any event.

- ii) The EHO considered that it was important to carry out a subjective assessment of noise in this case. This was communicated to members in reporting (amongst other things) that the noise and disturbance from this type of activity cannot be assessed purely on decibel levels, but that the duration, frequency and type of noise should be considered, as it would be when assessing statutory nuisance.
  - iii) The EHO considered that the nature of the noise was likely to be the most significant factor in impact. This is clear from paragraph 8.35 of the Update Sheet.
  - iv) The EHO did not consider that the noise about which he was concerned was going to be adequately controlled by the measures in the Noise Management Plan. This again is clear from the paragraphs read as a whole and is inherent in the planning officer's acknowledgement of the EHO's concerns, but her expression of a different view.
  - v) The EHO's position that this particular location was inappropriate as it did not have a previous noise source when the Manor was being used as a boarding school, it was not a noisy place and the C2 use did not assist PGL. This is clear from the original Report and the Update Sheet.
  - vi) There had been noise complaints, albeit they had not been substantiated by the EHO. This was clear from the entirety of the Report and the Update Sheet. The fact that the complaints had not been substantiated is a faithful reporting of what the EHO had said. I also do not consider that the Report had to provide further detail of complaints that had been made of which the planning department was aware. The fact that such complaints had been made was clear from the Report as a whole and was not in dispute.
  - vii) There was a significant potential for the Lake to impact materially on residential amenity. Again, I consider this to be clear from all of the material before the Committee and the EHO's concerns about what was proposed. Whilst it would have been better not to have omitted the adjective "significant" in this regard, I do not regard the overall effect of doing so as materially misleading the committee (for the reasons already identified).
  - viii) The EHO ultimately did not consider the proposals to be acceptable from a noise perspective. Again, I consider this to be clear from the Update Sheet read as a whole.
126. Mr Forsdick criticised the last sentence of paragraph 8.42 of the Update Sheet. The planning officer referred to the area around Bawdsey Quay and the beach attracting many visitors and to the use of River Deben in the summer forming part of the noise environment. This was not something that the EHO regarded as of significance for assessment of the impact of the Lake on the residential properties. However, I agree with Mr Cannon that it is clear that this paragraph is self-evidently reflecting the planning officer's view, rather than purporting to reflect advice from the EHO. It

may, in part, be affected by the view the officer took as a result of the use of the road to Bawdsey Quay and its relationship to the Estate. But taking Mr Forsdick's criticism at its highest that these areas should not be treated as part of the relevant noise environment for the Lake, ultimately I do not consider members would have been materially misled as a result of this view from the planning officer. As dealt with in more detail below, members visited the site themselves. They would have been well aware of the relative locations of the Lake, the residential properties, Bawdsey Quay and River Deben. They would have been able to make their own judgment about the noise environment in light of all the information they had before them.

127. In my judgment, the way in which these matters were reported sufficiently informed members about the key noise issues which they had to consider and on which they had to make a judgment.
128. Fourth, the analysis above is focused on the Report and Update Sheet. Members would also have had the ability to read in more detail the nature of the EHO's concerns. They had been alerted to the consultation responses being available in the ordinary way on the website. They could be expected to know of the availability of this material anyway. As it happens, I do not think it was necessary for them to read those consultation responses to understand the crux of the EHO's concerns. But members would have been aware of the ability to read the consultation responses themselves if they had wished to do so.
129. Fifth, it also relevant that members carried out a site visit. This forms part of the overall context, along with what transpired at the committee meeting itself, in considering whether members were materially misled in this particular case.
130. So far as the site visit is concerned, it is not in dispute that the committee members visited the site as part of their deliberations on the planning application. The Minutes record that the visit was considered informative. That is hardly surprising. In a case of this kind, where members are advised as to the subjective nature of the noise issue and the factors to take into account, a site visit would have been useful. It would help judge the subjective noise issues having regard the factors the EHO had identified (as reported to them). From that visit, coupled with the detailed locational information they were given, members would have been very well-placed to reach their own judgments about the potential impact of the noise from the proposed location of the Lake on the dwellings in the vicinity. Although they would not have heard the activities occurring in that location, they would have been able to reach an informed judgment about the noise effects. All of this would have been in the context of knowing about the EHO's concerns, the subjective factors the EHO considered relevant, and the concerns of the residents, the Parish Council and the Ward Councillor about noise debated at the committee meeting itself.
131. The Minutes also reinforce my conclusion that members were not seriously and significantly misled by the Report and Update Sheet. The officer presentation focused members' attention on the location of the Lake and its proximity to residents (something they would have already seen on their site visit). The officer identified the impact on residential amenity as being a key issue. The issue of the problems with the lack of alternative locations were considered. The officer expressly noted the comments of Environmental Health on the subjective factors to be taken into

consideration. This repeated what had already been identified in the Update Sheet. Members were told that the EHO considered that it was necessary to carry out a subjective assessment, rather than rely on the objective assessments put forward by PGL's consultants. A member of the committee raised the issue of noise assessment in questioning the officer. The committee listened to the address from the Chairman of the Parish Council which expressly referred to the noise objection in terms of loss of amenity being supported by the comments of the EHO. PGL's agent addressed the members on noise. Members' questions reveal that they were clearly interested in the extent to which the noise management controls might affect the position. The Claimant addressed the committee on noise. He made it clear that he considered there was the potential for statutory nuisance complaints to arise in the future. The Councillor Ward Member also addressed the issue of noise given the Lake's location. The subsequent debate makes it clear that the question of noise was a principal, if not the predominant, focus of the debate. All of this took place in a context where members would have been aware of the crux of the concern being expressed by the EHO from the Report and Update Sheet.

132. In light of these conclusions, I consider that the circumstances are very different to those that led to the finding of unlawfulness in the *Obar* case on which Mr Forsdick relied. There the report to committee failed to inform members about the local planning authority's EHO advice that: (1) the noise assessment had only taken into account structure borne noise from an adjoining nightclub use, but the noise from patrons needed to be taken into account as a subjective measure affecting the proposed residential amenity; and (2) there had been a failure to assess the effects of traffic noise (on a very busy corner) on the proposed residential units and whether it was acceptable (see paragraphs 22-26 in particular of Stewart J's judgment). In light of those failures, the overall effect of the report suggesting that the applicant's mitigation measures were sufficient, was found to be materially misleading. By contrast here, the crux of the EHO's advice in this case was communicated to members. This then required the members to exercise their judgment as to the impact of that noise and to weigh this in the overall planning balance when deciding whether or not to grant planning permission.
133. In short, I consider the Report and the Update Sheet did not materially mislead members as to the noise issue. The committee members were informed adequately about the EHO's advice. The substance of the points he made were identified and enabled members to make their own assessment. The planning officer was entitled to express her view that, notwithstanding the EHO concerns, she considered the noise mitigation measures would enable the proposal to be compliant with policy. No further reasoning was required for her reaching that view. It was then a matter for the committee members, in the exercise of their judgment, to decide whether they agreed.
134. Accordingly, despite the very thorough and comprehensive nature of Mr Forsdick's submissions, I reject Ground 1.

## **Ground 2 - Heritage**

135. Under Ground 2, Mr Forsdick submits that the Report and Update Sheet materially misled members in relation to heritage matters. He submits that PGL were effectively proposing "enabling development", albeit that he says it is not necessary for the purposes of his argument for it to have been development that meets that description.

His essential point is that the development proposed was, in part, justified to members by reference to heritage benefits that would be delivered, but that no such benefits were to be delivered or were in fact secured.

136. Mr Forsdick divided his complaint under this heading into three core areas.
137. First, he argued that the Report proceeded on the basis that PGL would fund the costs of urgent, essential and major coastal protection and Pulhamite Cliff works, when in fact that was expressly not the case as the works were dependent on grant funding. He makes the point that benefits which were not secured by the development could not be relied upon to justify it and members were materially misled that the Lake would pay for, or secure, such works when they would not. He refers in particular to paragraph 8.7 of the Report which included the sentence “all these works are at a substantial cost to the applicant”, when read with paragraph 8.6 and paragraph 8.13.
138. Second, he submits the harm caused by the Lake was said to be offset by the benefits secured, but most of the same benefits had already been secured to offset the harm caused the Outdoor Activities Structures Planning Permission and they could not be relied upon again to justify the Lake.
139. He argues that whilst paragraph 8.13 of the Report referred to both, the necessarily essential link was not made that most of the works in question had already been secured by Outdoor Activities Structure Planning Permission. He submits that 2018 Landscape Plan for that latter permission included items (ii), (iii) and (iv) of what came to be set out in Appendix B of the later Landscape Strategy for this permission. He also submits that this point also applies to: part of the area covered by item (i) in Appendix B; “the north of the mansion” area under (vi); the terraces, Italian Garden, Sunken Garden and cliff garden areas under item (xi) and (x) of Appendix B, having regard to Condition 11 that came to be imposed on the Lake Permission; most of item (v) of Appendix B; and the Lemonary and Walled Garden in item (ix) of Appendix B in light of the requirements of Conditions 7 and 11 of the Outdoor Activities Structure Planning Permission. He submits that even if it is correct that the Landscape Strategy approved Condition 11 went wider than strictly required by the Outdoor Activities Structure Planning Permission in some limited respects, the significant majority of the benefits were already secured and members were not told this and were materially misled into thinking that offsetting heritage benefits were being secured, when they were already secured under the Activities Structures Planning Permission. He also submits that the timescales for items (ii)-(iv) were in fact a significant relaxation of what had already been secured and members were not informed about this
140. Third, he submits the conditions did not secure that which was assumed. Condition 11 and Appendix B, item (x) relating to works to the Pulhamite Cliffs, only requires a detailed scheme to be commenced, but not implemented or completed. He makes similar points about items (v), (viii) and (ix). Moreover, he submits that for the most significant works the only obligation was to commence them and not to complete them, but securing those works was fundamental to the logic for the Lake.
141. Mr Forsdick notes that the extent to which benefits offered by proposed development can be said to be ‘secured’, and the consequent question of what (if any) weight to be attributed to them as material considerations weighing in favour of a scheme, are matters matter of planning judgment: see, by analogy, *R (Lady Hart of Chilton) v*

*Babergh DC* [2014] EWHC 3261 (Admin) at 58. However, his challenge is directed to the members being materially misled by what was reported to them by officers (as summarised above). He submits members were wrongly assured by officers as to what the planning permission would deliver.

142. In response, Mr Cannon made what Mr Forsdick described as “headline criticisms” of the Claimant’s challenge which Mr Forsdick accepted would “destroy” his heritage ground of challenge if they were right, but he submitted were wrong.
143. It is convenient to deal with these first. The first point made by Mr Cannon is that on a fair reading of the Report, members were not told or directed that works to the heritage assets in question (in particular the coastal works and Pulhamite cliffs) were being secured at PGL’s cost. He submits that is not a fair reading of the sentence in paragraph 8.7: “All these works are at a substantial cost to the applicant, particularly the works required to prevent the estate...”.
144. I agree with Mr Cannon’s submission. In my judgment, a fair reading of what is being identified in paragraph 8.7, read in context with paragraph 8.6 and paragraph 8.13, is that there is a range of significant work required to maintain and protect the Estate given the diversity of its historic assets. The first sentence of paragraph 8.7 is merely identifying that such maintenance works do involve substantial cost to the applicant, as one might expect. It is not seeking to suggest that the applicant will necessarily be able to fund all those works itself, or that the applicant will not need external funding for some of those works. Nor is it suggesting that the Lake proposal is necessary to fund all of those works, or that the Lake is being justified as providing funding for all of those works. That is not what paragraph 8.7 says, nor do I consider it to be a natural reading of those paragraphs.
145. That, of itself, disposes of this point. I do not consider the Committee were materially misled as to what is stated in the report. Even if there were in fact some ambiguity in what is being stated in this part of the report (which I do not think is the case), I would not have considered this to be a basis for concluding that the Committee were materially misled in any event. As Mr Forsdick himself necessarily accepts, the applicant itself was not suggesting that the Lake would fund those works – to the contrary, the supporting information with the application identified that the works in question would require external funding. In such circumstances, it seems to me that read in a context where such supporting material formed part of the applicant and it was available to the Committee members (see paragraph 3.7 of the Report), it would have been wrong to conclude that any such ambiguity in these paragraphs did materially mislead members.
146. The second point made by Mr Cannon is that members were not told that such works would be secured by the grant of planning permission. Mr Forsdick disputes this and says that members were repeatedly told this was the case, having regard to the Report and also the Minutes of the committee meeting which record, amongst other things, that: “The Senior Planning and Enforcement Officer assured the Committee that restoration works were conditioned within the recommendation.”
147. Again, I agree with Mr Cannon’s submission. Read fairly and as a whole, I do not agree with Mr Forsdick that members of the committee were repeatedly told that the restoration works in question, namely the coastal works and works to the Pulhamite

Cliffs were secured by the Lake proposal. This involves a misreading of the Report, including paragraph 8.7 for the reasons I have already identified. This means that Mr Forsdick's reliance on what is stated in the Minutes is misplaced. As a matter of fact, restoration works were conditioned as part of the Lake planning permission being proposed by officers, and therefore the statement made by the officer was correct. Mr Forsdick's case depends upon interpreting the term "restoration works" here as encompassing all works referred to in paragraph 8.7 of the Report, or all restoration works being contemplated for the Estate generally (for example, as in overall strategy timetable in Appendix B). I do not consider that is what was intended nor what would have been understood by members from the officer's comments. Again, if there had been ambiguity about this, I would still not have concluded that members were materially misled given their access to the application and supporting material which makes clear that the coastal and Pulhamite Cliff works would require external funding.

148. Mr Cannon's third point is that the benefits that were secured by the Lake planning permission were not secured under Condition 7 of the Outdoor Activities Structures Planning Permission as suggested by Mr Forsdick, so there was no "double counting" in that respect. Mr Forsdick disputes that, but I agree with Mr Cannon.
149. The first part of Condition 7 of the Outdoor Activities Structures Planning Permission required a landscape scheme to strengthen the existing woodland structure and provide additional planting to ensure the appropriate screening of activity structures to be submitted and approved in writing within 3 months of the commencement of development. That condition was discharged. By its own terms, it is clear that the Landscape Scheme was in respect of what was being approved by that permission. Requirements for a Landscape Scheme or Strategy in respect of the Lake do not involve any necessary duplication.
150. The second part of Condition 7 was, whether intentionally or accidentally, far less onerous. It simply required submission of a landscape strategy within 6 months of commencement for the remaining parkland, including the north of the mansion, the Terraces, Italian Garden, Sunken Garden and the Cliff Garden area. It did not include a requirement to implement, let alone complete, that strategy.
151. As I have said, the absence of any requirement to implement and complete any such strategy may have been intentional or it may have been an oversight. It may have been considered too onerous, or not in fact necessary, to require implementation of that strategy to make the proposals in the Outdoor Activity Structures Planning Permission acceptable in their own right. The submission of a strategy may have been considered enough of a step in the right direction. There is an obvious contrast in this respect between Condition 7 and Condition 11 of the Outdoor Activity Structure Planning Permission relating to works in the walled garden which do include a completion clause. This strongly suggests to me that the decision to limit the obligation under Condition 7 was deliberate. Alternatively, it may have been an oversight. But in either event, there is no requirement under Condition 7 to implement and complete any such strategy.
152. By contrast, Condition 11 of the Lake Planning Permission imposed a requirement that the detailed documents listed in i)-xi) of Appendix B of the Landscape Strategy had to be submitted and approved prior to the Lake first being used. It also identified

that the detailed schemes had to be implemented in accordance with the timescales identified in Appendix B. It was further made clear that for the works under item xi) – including to the Sunken Garden, Italian Garden, Terraces and works identified the plan, these had to be completed by the end of winter 2020/2021. For items v), viii) and x) – the latter relating to the Pulhamite Cliffs, the plans/surveys/schemes identified for delivery had to include “recommended programmes for implementation to be agreed with the Council”. This reflects what is clear from the Landscape Strategy document itself - such works were not being secured by the Planning Permission and were not intended to be secured, but rather a step forward in approving recommended programmes for implementation. This understanding is ultimately reflected in HE’s comments on the draft condition and the amendments they suggested for clarification which were adopted. This interpretation as to the limits of the requirements in respect of item x) is a now a matter of common ground between the parties and I agree with that interpretation.

153. It is evident from comparison between the obligations that although there is something of an inevitable overlap in the subject matter of the Landscape Strategy in respect of the two permissions, Condition 11 of the Lake Permission overall imposes more significant requirements than were previously required of the Outdoor Activity Structures Planning Permission. This, of itself, answers Mr Forsdick’s complaint based on alleged double-counting.
154. It may be that the extent of any overlap (for example in respect of what had already been secured for the walled garden and Lemonary under the earlier permission) could have been more clearly articulated. But reading the report as a whole, it would have been clear that there was such an overlap. Paragraph 8.5 of the Report informed members that PGL had also delivered, and were in the process of delivering some Estate enhancements and, as part of that, specifically identified that work was in progress on the Lemonary as well as repairs to the walls and gates to the walled garden. The fact of commencement of those restoration works is repeated again in paragraph 8.13. Therefore it seems to me that it is wrong in principle to suggest that the committee could have been materially misled about this.
155. Therefore I do not consider the failure to make such overlap more explicit materially misled members. The reality is that the Landscape Strategy secured by the Lake Planning Permission went significantly beyond the much less onerous obligation attached to the Outdoor Activity Structures Planning Permission in securing important landscape benefits for the Estate. It does not secure all restoration works for the Estate’s many heritage assets, including the coast and Pulhamite Cliffs, but it was not intended to do so and members were not advised that it would. I am satisfied that members were not materially misled about what it did secure and, ultimately, were entitled to exercise their planning judgment (one shared by HE) that what was secured amounted to benefits which clearly weighed in their decision to grant planning permission for the Lake
156. In addition, it is also important to bear in mind the chronological context of what was occurring. This means that the existence of some overlap (or double-counting as Mr Forsdick might describe it) was unsurprising, but did not vitiate the Council’s decision.



157. The Landscape Strategy that was being submitted in support of the Lake Planning Permission was also in fact submitted at a time when the far weaker Part 2 of Condition 7 of the Outdoor Activity Structures Planning Permission (along with Condition 5 of another planning permission) had yet to be discharged. This was an incidence of chronology. In such circumstances, it was open to the officers of the Council, HE and ultimately the Council itself to deal with the matter in the way they did, with Condition 11 of the Lake Planning Permission securing further aspects of an overall Landscape Strategy for the Site. This is a point which has also been the subject of evidence and common ground now reached between the parties. The subsequent discharge of the second part of Condition 7 of the Outdoor Activity Structures Planning Permission did not in fact occur until after the grant of planning permission under challenge in this case and was then discharged by reference to a different plan.
158. Mr Cannon's fourth point in response was that there was no promise to secure the Pulhamite Cliff works, as can be seen from the Landscape Strategy document itself read as a whole. Mr Forsdick disagreed, again relying upon paragraphs 8.6, 8.7 and 8.13 of the Report in particular.
159. I have already rejected Mr Forsdick's analysis of those paragraphs. In addition, I agree that it is important to read the Landscape Strategy document as a whole, with Appendix B, which does make it clear that the Pulhamite Cliff works required external funding from a charitable trust. I consider it is clear that the officers of the Council, the members of the Committee and, importantly, HE would have been aware of this when making their overall decision. Mr Forsdick's submission also appears to depend upon an assumption that the Landscape Strategy that was submitted was not understood by members. I do not consider there is a basis for making that assumption in this case.
160. Mr Forsdick also referred to extracts of the Planning Statement and Design and Access Statement submitted in support of the application. On a fair reading of those documents, I do not consider that any of the references he took me to, read as a whole, suggest that works to coast or the Pulhamite Cliffs were being secured by the Lake, or that the Lake was being justified on the basis that such works would occur. They do seek to make the overall point that continuation of a viable use of the site by PGL was part of the strategy of maintaining the Estate and its many heritage assets. To that extent, the provision of the Lake was an important part of PGL's overall strategy of providing a competitive offer and maintaining the viability of its operations. This would support a continuing viable use of the site with the consequential benefits for the heritage assets. To that extent, the prospect of the coast works and Pulhamite Cliff works being delivered with external funding would no doubt be enhanced by the continued presence of a single owner operating the site for a viable use. But none of the references, nor the general point being made, necessarily suggests that the Lake secured those coast and cliff works; nor do they mean that the Lake was being justified on the basis that those works would be delivered.
161. Again, those documents need to be read as a whole and, ultimately, with the Landscape Strategy document that came to be submitted, as considered in the Update Sheet.

162. In light of these conclusions, I do not regard it necessary to resolve any dispute that there may be between the parties as to whether what was proposed should formally be categorised as “enabling development” within the meaning of that concept under the HE guidance or not and Mr Forsdick himself accepted that this was not a necessary part of this case.
163. For these reasons, I reject Ground 2 and each of the three elements advanced by the Claimant. I am not persuaded the committee were materially misled about the heritage benefits associated with the proposal, or indeed misled at all on that topic.

### **Conclusion**

164. In light of my conclusions on both grounds, notwithstanding Mr Forsdick’s comprehensive and forcefully made submissions on behalf of the Claimant, I dismiss this claim for judicial review.