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Case No: C1/2015/2774

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT
PLANNING COURT
MRS JUSTICE PATTERSON DBE
[2015] EWHC 2292 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28 July 2016

Before:

Lord Justice Elias
Lord Justice Christopher Clarke
and
Lord Justice Lindblom

Between:

Menston Action Group
(Acting by Professor John David Rhodes) **Appellant**

- and -

City of Bradford Metropolitan District Council **Respondent**

- and -

BDW Trading Ltd. (T/A Barratt Homes Yorkshire West) **Interested**
Party

Mr David Wolfe Q.C. (instructed by **Schofield Sweeney LLP**) for the **Appellant**
Mr Vincent Fraser Q.C. (instructed by **the City of Bradford Metropolitan District Council**)
for the **Respondent**

The interested party did not appear and were not represented

Hearing date: 12 July 2016

Judgment Approved by the court
for handing down

Lord Justice Lindblom:

Introduction

1. In this appeal we must interpret a planning condition that requires the preparation of a scheme for surface water drainage in a development of housing. In particular, we must determine what is meant by the concept of “sustainable drainage principles” when used in that condition.
2. The appellant, Menston Action Group (acting by Professor John Rhodes), appeals against the order of Patterson J., dated 3 August 2015, dismissing its claim for judicial review of the decision of the respondent, the City of Bradford Metropolitan District Council, on 15 August 2014, to approve a drainage scheme for a housing development on land at Derry Hill in Menston, a village near Bradford, for which it had granted planning permission in October 2013. The applicant for planning permission was the interested party, BDW Trading Ltd., trading as Barratt Homes Yorkshire West. It has not played any active part in the proceedings. The action group was an objector to the proposal for development and opposed the approval of the drainage scheme. Its claim for judicial review came before Patterson J. at a hearing on 15 and 16 July 2015. She dismissed the claim on all grounds. I granted permission to appeal after an oral hearing on 12 November 2015.

The issues in the appeal

3. The central issue in the appeal concerns the interpretation of a condition on the planning permission – condition 15 – one of whose requirements is that development on the site is not to begin “until a surface water drainage scheme for water passing through the site, based on sustainable drainage principles has been submitted to and approved in writing” by the council as local planning authority. The related – and decisive – issue, which depends on the true interpretation of condition 15, is whether the council could lawfully approve the surface water drainage scheme submitted by BDW under the condition.

The flood risk assessment

4. The site of the proposed development is a sloping field of about 5.4 hectares to the west of the village. It is crossed by a watercourse, which flows roughly from south to north towards the adjacent housing in and around Derry Hill. BDW’s proposal was for a development of 173 dwellings. The action group objected to it on a number of grounds, one of which was that the development would be likely to exacerbate the existing problem of flooding in the residential area. With the application for planning permission BDW submitted its “Flood Risk and Drainage Assessment” (revision D), dated 23 August 2010, which had been prepared by their engineering consultants, Eastwood & Partners. This was the flood risk assessment required under the then extant Planning Policy Statement 25: “Development and Flood Risk” (“PPS25”).
5. In its Executive Summary, the flood risk assessment acknowledged that the site of the proposed development was “shown on the Environment Agency ... flood zone maps as

being in Zone 1, which is “low risk” (less than 0.1% annual probability)” (paragraph 3). It referred to the watercourse, which “runs in open channel before discharging to a culverted system in the existing housing area bordering the site to the north ...”. That system, it said, “runs through gardens before emerging in culverts in the public highway” (paragraph 4). It went on to say (in paragraph 5):

“We are not aware of any recorded flooding incidents on the site, other than water reportedly “sheeting” down the slope during extreme storm events. This situation will be substantially improved as a result of the proposed development due to the interception of existing overland flows and positive drainage of the site.”

There were three “principal sources of potential flooding”: first, the “[overtopping] of the watercourse running through the site”; second, the “[general] run off from the steeply sloping land to the south”; and third, the “[surcharging] of proposed drainage and storm water storage systems” (paragraph 6). The “appropriate standard of protection against flooding [was] 1 in 100 years plus climate change” (paragraph 7). Several flood mitigation measures were proposed (paragraph 8). It was recommended that surface water was “drained to the culverted watercourse downstream of the site ...”. A “restricted discharge” was “appropriate at this location based on “green-field” run off”. The “calculated figure using IOH124 [was] 8.2 l/sec per hectare, for the existing 1 in 1 year run-off” (paragraph 10). Storage was proposed “in a combination of below ground tanks or tank sewers and a [Detention] Basin, designed in accordance with principles set out in the SUDS Manual” (paragraph 11). Land drainage “should be provided in the form of swales, ditches and/or filter drains at the top and bottom of the site, connected to the watercourse running through the site” (paragraph 12). It was “not considered that there [would] be any increased risk of flooding to other properties as a consequence of the development”, if “the general principles and recommendations” in the flood risk assessment were followed (paragraph 13).

6. Summarizing discussions that had taken place with the council, the flood risk assessment said it had “been agreed that there is a substantial positive gain from the development in terms of restricting the potential for overland flow (south to north), which will mitigate an existing flood risk to properties along the northern boundary”. In its discussion of “Potential Sources of Flooding”, under the heading “Land Drainage and Overland Flow”, it said:

“It has been reported that during periods of high rainfall, storm water can sheet over the land towards the northern boundary and into existing gardens. It is anticipated that this will be much reduced when the site is developed with a positive drainage system. However, it is recommended that additional land drainage is provided in the form of swales, ditches and/or filter drains at the top and bottom of the site, connected to the watercourse. This will provide additional protection against the risk of overland flows affecting both the proposed and existing development areas.”

As for “Flood Risk Downstream Of The Site”, it said this:

“The site will drain to the existing culverted watercourse downstream of the site and it is therefore necessary to assess the capacity of this system to accept flows,

with the view to maintaining status quo. It should be a fundamental objective of the drainage design not to worsen the existing situation and to bring about a reduction in flood risk if possible.”

Under the heading “Watercourse Capacity” it said that calculations for the capacity of the culvert showed that “[by] connecting the site drainage to the watercourse downstream of the first section, the flood risk in the gardens bordering the site should be reduced”. But it went on to say that “in view of the existing restrictions on capacity in this area, it is anticipated that the gardens will remain at risk of flooding relatively frequently, as at present”. Its “Proposals For Surface Water Drainage” were set out:

“The proposals for surface disposal are indicated on the appended Schematic Drainage Layout numbered 30864/010B, and are as follows:

- Construction of a single surface water outfall from the site connected to the existing culverted watercourse in the road, downstream of the first section in gardens. This connection is to be [requisitioned] from Yorkshire Water.
- Peak flow restricted to “green-field” run off.
- Defects in the existing culverted watercourse downstream of the site to be rectified. Bradford MDC are looking into how this can best be achieved, given the location of the culverts, land ownership and responsibility for the defects.
- Below ground storage to be provided in the on-site sewers for up to and including a 1 in 30 year event, to be adopted by Yorkshire Water.
- Detention Basin to be designed in accordance with the SUDS Manual. This will be dual function, combining an open space recreation area with storm water attenuation storage capacity.
- The Detention Basin may include a permanent water feature. However, the system will be designed to flood relatively infrequently (1 in 30 year storm event), once the available capacity in the sewers has been utilised.
- The Detention Basin will drain automatically to the outfall after the storm has subsided.
- Soakaways and/or swales will be used where possible to provide natural attenuation in the system in accordance with SUDS principles, although it is anticipated that the scope for using these methods will be limited by site topography and poor ground infiltration capacity.”

Condition 15

7. The council’s decision notice granting planning permission states that permission is granted “in accordance with the plans, drawings and documents which form part of the application and subject to the following schedule of conditions”. It includes the council’s statement of compliance with article 31 of the Town and Country Planning (Development Management and Procedure) (England) Order 2010, which says that “[proposals] are assessed against the National Planning Policy Framework [“NPPF”] ...”, and that the council “... has sought solutions to problems arising by liaising with consultees ...”.

8. The council imposed 27 conditions. The contentious one – condition 15 – is in a series of seven, all of which deal with drainage. These seven conditions state:

“13. The development shall be drained using separate foul sewer and surface drainage systems.

Reason: In the interests of pollution prevention and to ensure a satisfactory drainage system is provided and to accord with Policies UR3 and NR16 of the Replacement Unitary Development Plan.

14. A surface water drainage scheme, floor & ground levels shall be designed & constructed to comply with the recommendations & conclusions of the F.R.A. submitted by Eastwood & Partners, ref NJB 30864 Rev D.

Reason: To ensure the site is protected against the risk of flooding.

15. Development shall not begin until a surface water drainage scheme for water passing through the site, based on sustainable drainage principles has been submitted to and approved in writing by the local planning authority. This must include details of how the surface water run off rate of 8.2 litres/second/ha will be maintained for up to and including the 1 in 100 year (plus climate change) rainfall event.

Reason: To prevent flooding by ensuring the satisfactory storage/disposal of surface water from the site.

16. Surface water management proposals for the construction phases of the development must be submitted to and approved in writing by the LPA.

Reason: To prevent flooding by ensuring the satisfactory storage of/disposal of surface water from the site.

17. Finished floor levels shall be set no lower than 1000mm above stream bed level, at a position measured at right angles from the site.

Reason: To reduce the risk of flooding to the proposed development and future occupants.

18. The ground between the stream and properties shall be set at least 1000mm above the stream bed level to provide a flow corridor for any overland flow due to flood routing.

Reason: To reduce the risk of flooding to the proposed development and future occupants.

19. Prior to the commencement of development no piped discharge of surface water from the application site shall take place until works to provide a satisfactory outfall for surface water have been completed in accordance with details to be submitted and approved in writing by the LPA.

Reason: In the interests of surface water management.”

9. Conditions 14 to 18 embody the advice given to the council by the Environment Agency in a letter dated 11 October 2011, responding to consultation on the application for planning permission. In that letter the Environment Agency confirmed it had no objection to the proposed development, provided that certain measures, corresponding to those ultimately provided for in conditions 15 to 18, were “secured by way of a planning condition ...”. In fact, the Environment Agency were contending for a single condition, which would require that the development “shall only be carried out in accordance with the approved Flood Risk Assessment (FRA) dated 23 August 2010 (revision D) and the following mitigation measures detailed within the FRA ...”, which became condition 14, the “mitigation measures” being specified in the terms adopted by the council in conditions 15 to 18.

The approved drainage scheme

10. Eastwood & Partners submitted the surface water drainage scheme under condition 15 in January 2014. Under the heading “Interpretation”, the document noted that condition 15 refers both to a surface water drainage scheme “for water passing through the site” and a “surface water run off rate” of 8.2 litres per second per hectare, but that the reason for the imposition of the condition refers only to the disposal of surface water “from the site”. It indicated the approach that had been adopted:

“For the avoidance of confusion the flows referred to and terminology used are interpreted as follows.

- a. Water passing through the site means run-off from the wider catchment off site, conveyed both [via] the watercourse running south to north through the site and by overland flow.
- b. The surface water run-off rate of 8.2 litres/second/hectare relates to flows generated on the site to be conveyed by the proposed buried drainage system, to be adopted by Yorkshire Water as public sewers. The figure of 8.2 litres/second/hectare is established in the approved Flood Risk Assessment for the scheme, referred to in [condition] 14, and represents the existing rate of natural run-off from the land for a 1 in 1 year return period.”

The document went on to explain the proposed drainage system, dealing both with the management of flows originating on the site and the management of water passing through the site. In dealing with the latter it said:

“... [It] is to be noted that it is not the responsibility of the developer to resolve any existing flooding issues, but it is required that the situation is made no worse as a consequence of the scheme, and the approved Flood Risk Assessment (FRA) prepared in connection with the proposed development is based on this premise.”

The principles adopted in the arrangements for managing “Overland Flows” were described, including this basic principle:

“The idea in simplistic terms is to mimic as far as possible [the] existing situation identified by [JBA Consulting, acting on behalf of the action group] ...”.

The proposed dimensions and capacities of the swales (shallow ditches) that were to be provided along the southern boundary of the site were set out, and then this conclusion was stated:

“It is appreciated that the residents association [sic] may feel that the flow/volume figures are underestimated, but the consequence of this would be that the swales would perhaps overtop at an earlier stage or during storm events of a shorter return period. The rate of flow passed forward from the outfall pipe to the watercourse however would not increase and, notwithstanding the additional attenuation provided by the swales, there would be no worsening of the existing situation.”

The concluding “Summary” stated:

“1. Flows generated on the site as a consequence of the new development will be managed within the adoptable drainage system. The discharge rate will be limited to a maximum 8.2 l/sec per hectare as required by ... [condition] 15, with below ground storage sufficient for 1 in 100 year storm event plus allowance for climate change.

2. Overland flows from the wider catchment to the south of the site are unaffected by the development, but the addition of swales on the site boundary will assist the attenuation without increasing flood risk.

3. Excess storm water over spilling the eastern bank of the watercourse will be channelled to the open area to the north of the road where the ground will be shaped to ensure provision of a “field” storage volume greater than existing, mimicking the existing situation as far as possible.”

The document included, as appendices, drawings showing the proposed layout of the drainage arrangements on the site, diagrams to demonstrate the management of flows through the site and plans and sections of the proposed swales.

What does condition 15 mean?

11. The general rule governing the interpretation of a planning permission that is clear, unambiguous and valid on its face is that regard may only be had to the planning permission itself, including the conditions imposed upon it and the reasons given for the imposition of those conditions (see, for example, the judgment of Upjohn L.J. in *Miller-Mead v Minister of Housing and Local Government* [1963] 2 Q.B. 196, at p.224). The planning permission and its conditions must be construed as a whole, and as a “reasonable reader” would (see, for example, the judgment of Arden J., as she then was, in *Carter Commercial Developments Ltd. v Secretary of State for Transport, Local Government and the Regions* [2003] J.P.L. 1048, at paragraph 27). If, however, the wording of the permission is ambiguous it is permissible to look at extrinsic material, including the application, to resolve the ambiguity (see the judgment of Keene J., as he

then was, in *R. v Ashford Borough Council, ex parte Shepway District Council* [1999] P.L.C.R. 12, at p.19).

12. In the recent decision of the Supreme Court in *Trump International Golf Club Scotland Ltd. and Another v Scottish Ministers* [2015] UKSC 74 that principle was endorsed by Lord Hodge (in paragraphs 33 and 34 of his judgment, with which the other members of the court agreed). He said there is “only limited scope for the use of extrinsic material in the interpretation of a public document, such as a planning permission ...” (paragraph 33). In support of this proposition he referred to Keene J.’s decision in *Shepway* and the decision of this court in *Carter Commercial Developments Ltd.* (in particular, paragraph 13 of the judgment of Buxton L.J. and paragraph 27 of the judgment of Arden J.). It was, he said, “also relevant to the process of interpretation that a failure to comply with a condition in a public law consent may give rise to criminal liability”. He went on to say this (in paragraph 34):

“When the court is concerned with the interpretation of words in a condition in a public document such as a section 36 [of the Electricity Act 1989] consent, it asks itself what a reasonable reader would understand the words to mean when reading the condition in the context of the other conditions and of the consent as a whole. This is an objective exercise in which the court will have regard to the natural and ordinary meaning of the relevant words, the overall purpose of the consent, any other conditions which cast light on the purpose of the relevant words, and common sense. Whether the court may also look at other documents that are connected with the application for the consent or are referred to in the consent will depend on the circumstances of the case, in particular the wording of the document that it is interpreting. Other documents may be relevant if they are incorporated into the consent by reference ... or there is an ambiguity in the consent, which can be resolved, for example, by considering the application for consent.”

In his judgment Lord Carnwath said this (in paragraph 66):

“... I do not think it is right to regard the process of interpreting a planning permission as differing materially from that appropriate to other legal documents. As has been seen, that was not how it was regarded by Lord Denning in the *Fawcett* case [1961] A.C. 636. Any such document of course must be interpreted in its particular legal and factual context. One aspect of that context is that a planning permission is a public document which may be relied on by parties unrelated to those originally involved. ...”.

13. The focus of the exercise in interpretation for the court in this case is the expression “based on sustainable drainage principles” in the first sentence of condition 15. The court must resolve the meaning of those words, in their context. The general context here is, of course, the context of development control. The specific context is a planning permission for a development of housing and the requirement, in a condition, for the submission to a local planning authority of a scheme for surface water drainage in that development.
14. As the parties agree, whatever the concept of “sustainable drainage principles” might mean in some other context, it does not – and cannot – in this context have the effect of

compelling the council to require, or the developer to submit, a surface water drainage scheme that would alleviate the existing problem of flooding beyond the boundaries of the development site. To construe the condition as requiring “betterment” of that kind would be to ignore at least one of the three fundamental principles recognized in the House of Lords’ decision in *Newbury District Council v Secretary of State for the Environment* [1981] A.C. 578: that conditions attached to a grant of planning permission, to be *intra vires* and valid, must be imposed for a planning purpose, must fairly and reasonably relate to the development permitted, and must not be so unreasonable that no reasonable planning authority could have imposed them (see the speech of Viscount Dilhorne at p.599H to p.600A, the speech of Lord Fraser of Tullybelton at p.607F to p.608C, the speech of Lord Scarman at p.618F to p.619A, and the speech of Lord Lane at p.627A-E). These three principles bear on the local planning authority’s statutory power, now in section 70(1) of the Town and Country Planning Act 1990, to impose “such conditions as they think fit”.

15. Those are principles of law. They are replicated in national planning policy. Thus, Circular 11/95: “Use of conditions in planning permission” – the relevant part of which was current when the council granted planning permission for BDW’s development but cancelled when the Planning Practice Guidance was published in March 2014 – identified “[six] tests for conditions”. It said (in paragraph 14 of the Annex) that “[in] addition to satisfying the court’s criteria for validity, the Secretaries of State take the view that conditions should not be imposed unless they are both necessary and effective, and do not place unjustifiable burdens on applicants”. Therefore, “[as] a matter of policy”, conditions should only be imposed where they satisfy all six policy tests: necessity, relevance to planning, relevance to the development to be permitted, enforceability, precision and reasonableness in all other respects. Amplifying the test of relevance to the development to be permitted, the circular recognized that “[unless] a condition fairly and reasonably relates to the development to be permitted, it will be *ultra vires*” (paragraph 24). So it was “not sufficient that a condition is related to planning objectives: it must also be justified by the nature of the development permitted or its effect on the surroundings”. For example, “if planning permission is being granted for alteration of a factory building, it would be ... wrong to require the improvement of the appearance of layout of an adjoining site simply because it is untidy or congested; despite the desirability of these objectives in planning terms, the need for the action would not be created by the new development. ...” (paragraph 25).
16. That policy is continued in the NPPF and the Planning Practice Guidance. Under the heading “Planning conditions and obligations”, paragraph 206 of the NPPF says “[planning] conditions should only be imposed where they are necessary, relevant to planning and to the development to be permitted, enforceable, precise and reasonable in all other respects”. Paragraph 21a-004 of the Planning Practice Guidance confirms the survival of the “six tests for conditions”. The guidance on the test of relevance to the development to be permitted answers the question “[does] the condition fairly and reasonably relate to the development to be permitted?” with two principles:

“

- It is not sufficient that a condition is related to planning objectives: it must also be justified by the nature or impact of the development permitted.

- A condition cannot be imposed in order to remedy a pre-existing problem or issue not created by the proposed development.”

17. We must, if we can, construe the words “based on sustainable drainage principles” in condition 15 in accordance with those fundamental principles of law and policy. As they apply to the imposition of a planning condition requiring the preparation and approval of a surface water drainage scheme before the approved development is begun, those principles would preclude a condition requiring the submitted scheme to achieve some improvement in the drainage of other land next to the site or nearby. Such a requirement would offend the principle that planning conditions must fairly and reasonably relate to the development permitted. It might also offend the principle that a condition must not be so unreasonable that no reasonable planning authority could have imposed it.

18. Mr David Wolfe Q.C., on behalf of the action group, did not dispute any of this. What he submitted, however, was that condition 15 requires the submission of a surface water drainage scheme in which “sustainable drainage principles” are properly represented. This, he contended, must necessarily involve a demonstration that the potential for reducing existing flooding, both on the development site itself and also in the surrounding area, has been considered. A document submitted under condition 15 that failed to demonstrate that this had been done would not be capable of discharging the requirements of the condition. Construed in the light of legislation and policy bearing on sustainable drainage, as Mr Wolfe argued it must be, the expression “based on sustainable drainage principles” in condition 15 can only, he said, be interpreted in this way.

19. Mr Wolfe relied, principally, on the provisions of the Flood and Water Management Act 2010, which came on to the statute book on 8 April 2010 – in particular, the provisions for “Sustainable drainage” in section 32 and Schedule 3. He acknowledged that section 32 and Schedule 3 were not in force at the time of the council’s grant of planning permission, and indeed that they have not come into force since then. But these provisions are important, he submitted, because they are the only statutory source of a definition of “sustainable drainage”, and demonstrate that this concept embraces the aspiration of improvement rather than merely maintaining the status quo. He pointed to the definition of “Sustainable drainage” in paragraph 2 of Schedule 3, which is this:

““Sustainable drainage” means managing rainwater (including snow and other precipitation) with the aim of –

- (a) reducing damage from flooding,
- (b) improving water quality,
- (c) protecting and improving the environment,
- (d) protecting health and safety, and
- (e) ensuring the stability and durability of drainage systems.”

20. Mr Wolfe also relied on the consultation draft “National Standards for sustainable drainage systems – Designing, constructing, operating and maintaining drainage for surface runoff”, published by the Department for Food and Rural Affairs (“DEFRA”) in December 2011; on the Planning Policy Statement 25: Development and Flood Risk Practice Guide, published by the Department for Communities and Local Government in updated form in December 2009 (“the PPS25 practice guide”); on passages in the

section of the NPPF headed “Meeting the challenge of climate change, flooding and coastal change”; and on the corresponding guidance in the Government’s Planning Practice Guidance, which replaced the PPS25 practice guide.

21. In the “Executive Summary” of DEFRA’s draft national standards document, paragraph 0.2 described the “key objectives” of “SuDS” – the commonly used acronym for “sustainable drainage systems” – as being to “manage the flow rate and volume of surface runoff to reduce the risk of flooding and water pollution”. Paragraph 1.4 in the “Introduction” said that local planning authorities “could set local requirements for planning permission that have the effect of more stringent requirements than these National Standards”. In Part II, Section D – Function, under the heading “Flood Risk”, paragraph D5 said that “[drainage] systems must be designed so that ... flooding from the drainage system does not occur ... c) [on] neighbouring sites during a 1 in 100 year rainfall event”.
22. The PPS25 practice guide – extant at the time of the council’s grant of planning permission, though not at the time of the approval of the drainage scheme – said that “SUDS, can better manage the risk of surface water flooding, as well as improving water quality by reducing the amount and rate of water flow by infiltration, storage, attenuation and slow conveyance” (paragraph 5.3); that “[conventional] surface water drainage ... may result in flooding problems downstream ...” (paragraph 5.6); that “[for] new developments, the best way of reducing flood risk within the development is to ... control the water at source through sustainable drainage systems (SUDS) ...” (paragraph 5.9); and that “SUDS mimic natural drainage and reduce the amount and rate of water flow ...” (paragraph 5.11). Paragraph 5.13 said this:

“SUDS achieve multiple objectives; they ... ensure that new developments do not increase flood risk downstream ...”.

Developers were enjoined to “consider the type of SUDS which would be appropriate for the site, together with flood routes within and off the site” (paragraph 5.19). Paragraph 5.22 stated:

“To get the most benefit from SUDS they must be considered as early as possible in the planning process and over as wide an area as possible. There may be opportunities to alleviate surface water flooding in adjacent and downstream areas, as well as in the development site. ...”.

It was pointed out that a “poorly maintained SUDS can increase flood risk rather than reduce it ...” (paragraph 5.28). Paragraph 5.33 said:

“SUDS are important for the achievement of sustainable development objectives and can significantly improve environmental quality and reduce surface water run-off. ...”.

Paragraph 5.40 referred to paragraph 6 of PPS25, which, it said, encouraged local planning authorities to prepare surface water management plans “to help reduce impacts of flooding through new development”. Paragraph 5.47 said that “[surface] water management issues should be covered in a site-specific Flood Risk Assessment ... to accompany a planning application”.

23. PPS25 was cancelled by the NPPF upon its publication in March 2012. Paragraph 100 of the NPPF says, among other things, that local plans “should apply a sequential, risk-based approach to the location of development to avoid where possible flood risk to people and property and manage any residual risk, taking account of the impacts of climate change, by ... using opportunities offered by new development to reduce the causes and impacts of flooding ...”. Paragraph 103 says that “[when] determining planning applications, local planning authorities should ensure flood risk is not increased elsewhere ...”.
24. Paragraph 7-050 of the Planning Practice Guidance says that “[local] authorities and developers should seek opportunities to reduce the overall level of flood risk in the area and beyond ...”. And paragraph 7-051 says that “[sustainable] drainage systems are designed to control surface water run off close to where it falls and mimic natural drainage as closely as possible” and “provide opportunities to ... reduce the causes and impacts of flooding ...”.
25. Mr Vincent Fraser Q.C., for the council, submitted that the concept of “sustainable drainage principles” is now – as it was when planning permission was granted – well enough understood by the “reasonable reader” to whom Lord Hodge referred in paragraph 34 of his judgment in *Trump*, and that condition 15, taken in its context, is not ambiguous or unclear. It follows, submitted Mr Fraser, that one does not need to look outside the planning permission for help in interpreting the condition. But if the court does not accept that submission, Mr Fraser said the meaning of the concept of “sustainable drainage principles” in this context is put beyond doubt by the flood risk assessment, read in the light of the relevant planning policy and guidance in the NPPF and the Planning Practice Guidance.
26. I cannot accept Mr Fraser’s contention that the concept of “sustainable drainage principles” is now so widely familiar that the “reasonable reader” of a planning condition in which it appears would, unaided, be confident in his understanding of it, still less that its meaning is obvious. “Sustainability” and “sustainable development” may now be generally understood concepts. The idea of sustainability in the ordinary English sense of the ability of something to be sustained, or in the particular sense of the development of land not making excessive demands on the environment, is not difficult to grasp. But it is, plainly, a broad and versatile concept. The NPPF devotes a large number of paragraphs – paragraphs 18 to 209 – to explaining “the Government’s view of what sustainable development in England means in practice for the planning system” (paragraph 6). Whether development will be “sustainable” in any given respect will depend on the circumstances. And the same may be said of the arrangements proposed for the drainage of a site when developed. A planning condition in which a local planning authority requires a drainage scheme “based on sustainable drainage principles” will require the “reasonable reader” to look at the specific context in which the requirement is imposed. This is not to say that the requirement lacks a practical meaning, merely that its meaning will depend on the context.
27. How then is one to approach the construction of these words in condition 15? I do not see this as particularly difficult. In my view, there is no need to look beyond the terms of the planning permission itself and its relevant conditions, and the documents expressly referred to in the permission, including the flood risk assessment referred to in condition

14. This is a legitimate approach to the interpretation of a planning condition, as the Supreme Court's decision in *Trump* confirms.
28. One must begin with condition 15 itself. The condition leaves it to the council to judge whether the submitted scheme for surface water drainage is, or is not, "based on sustainable drainage principles". It does not stipulate any improvement – or "betterment" – to the drainage of neighbouring land, or the alleviation of existing flooding beyond the boundaries of the development site, and it could not lawfully do so. The same may be said of the other conditions in the series to which condition 15 belongs. The only measurable requirement in condition 15 is that the submitted surface water drainage scheme "must include details of how the surface water run off rate of 8.2 litres/seconds/ha will be maintained for up to and including the 1 in 100 year (plus climate change) rainfall event". This specific requirement must clearly be in keeping with "sustainable drainage principles" in the sense in which that concept is used in the condition. And the reason given for the imposition of the condition – "[to] prevent flooding by ensuring the satisfactory storage/disposal of surface water from the site" – must also accord with those principles. The expression "[to] prevent flooding" here cannot extend to include the amelioration or elimination of existing flooding on neighbouring land. It can only mean "to prevent flooding arising from this development" – because it is, after all, the development itself to which the condition must fairly and reasonably relate. The means of preventing flooding is "by ensuring the satisfactory storage/disposal of surface water from the site" – that is, the site once developed.
29. As Mr Fraser submitted, condition 15 must be read together with condition 14, which also refers to the "surface water drainage scheme". The "surface water drainage scheme" referred to in these two conditions is plainly one and the same scheme. Condition 14 requires that scheme to comply with the recommendations and conclusions of the flood risk assessment submitted to the council with the application for planning permission. It is therefore appropriate, in construing conditions 14 and 15, to consider the proposals for surface water drainage recommended in the flood risk assessment (see paragraphs 5 and 6 above). A surface water drainage scheme consistent with the "Proposals For Surface Water Drainage" in the flood risk assessment will be one that is, for the purposes of condition 15, "based on sustainable drainage principles". Those proposals reflect the purpose of ensuring that the development site itself will be satisfactorily drained and that there will be no increase in flooding to properties adjacent to the site. They are explicitly based on "SUDS principles".
30. The flood risk assessment acknowledges the agreed benefit of the development in "restricting the potential for overland flow . . . , which will mitigate an existing flood risk to properties along the northern boundary". It also acknowledges that "[it] should be a fundamental objective of the drainage design not to worsen the existing situation and to bring about a reduction in flood risk if possible". And it recognizes the benefit of "connecting the site drainage to the watercourse downstream of the first section" in reducing "flood risk in the gardens bordering the site". But it emphasizes that "in view of the existing restrictions on capacity in this area, it is anticipated that the gardens will remain at risk of flooding relatively frequently, as at present". Its specific proposals for surface water drainage include the possibility of rectifying "[defects] in the existing culverted watercourse downstream of the site" with the assistance of the council.

31. Read as a whole, however, the flood risk assessment cannot legitimately be read as justifying a construction of condition 15 that would render it unlawful as a planning condition and at odds with national policy. It does not justify reading into the condition a requirement to reduce existing flooding outside the development site, which is more than it could properly require. Nor does it justify reading in a requirement for the developer to consider, in the surface water drainage scheme he submits to the council, what scope there might be for doing more than a planning condition could require in this respect – which, as I have said, the council could not compel. The scheme envisaged under condition 15 is one of practical measures for the drainage of the site, consistent with the proposals in the flood risk assessment, not theoretical measures that will – or may – never be put into effect. This does not mean that the developer may not choose to consider the potential for improving the drainage of neighbouring land and for reducing the existing risk of flooding to adjacent properties – only that condition 15 does not oblige him to do so in the surface water drainage scheme he submits to the council.
32. This understanding of the condition, as not requiring a surface water drainage scheme that commits the developer to reducing existing flooding outside the site or to considering how that might be achieved, avoids any conflict with the fundamental principles of law and policy relating to planning conditions to which I have referred. It is not inconsistent with any general policy or guidance relevant to the making of development control decisions. It sits well with national policy in the NPPF – which is referred to, in general terms, in the article 31 statement of compliance in the council’s decision notice (see paragraph 7 above). The salient policy relating to drainage in the NPPF is in paragraph 103. This emphasizes that in determining applications for planning permission, authorities “should ensure flood risk is not increased elsewhere”; it does not warrant the imposition of conditions more onerous than that.
33. Mr Wolfe’s reliance on the provisions of the Flood and Water Management Act 2010, and the various statements of policy and guidance to which he referred, is, I think, misplaced. Neither the provisions of the 2010 Act nor any of the passages of policy and guidance to which he drew our attention displaces the proper construction of the concept of “sustainable drainage principles” in the particular context of this planning condition and the planning permission on which it was imposed. The definition of “sustainable drainage” in paragraph 2 of Schedule 3 to the 2010 Act is framed in very general terms – though, as paragraph 1(1) provides, in that schedule a “drainage system” does not include “(a) a public sewer” or “(b) a natural watercourse”. Paragraph 2 encompasses five aims of wide application, which are not intended as a checklist for judging the acceptability of a surface water drainage scheme submitted under a planning condition. And whilst the policies and guidance cited by Mr Wolfe contain general references to the desirability of development alleviating existing flooding on adjacent land, they do not make this an obligatory ingredient of a sustainable drainage system provided for a particular proposal. I accept that in other contexts the concept of “sustainable drainage principles” might have a broader meaning than it can properly bear in condition 15. In a different context, a different understanding of it might be appropriate. In this context, however, it must have the specific meaning intended for it in condition 15. So too the expression “based on sustainable drainage principles”: in this particular context that expression cannot mean “based on every principle that might qualify as a principle of sustainable drainage”.
34. I therefore reject Mr Wolfe’s argument on the interpretation of condition 15.

Did the council fail to apply the requirements of condition 15 lawfully?

35. If my interpretation of condition 15 is correct, I cannot see it could be argued, and Mr Wolfe did not argue, that the council's approval of the surface water drainage scheme prepared by Eastwood & Partners was unlawful. The action group's appeal depends on Mr Wolfe's suggested interpretation of the condition being right, which in my view it is not. In my view there is no doubt that the council was entitled to find the submitted scheme acceptable and in compliance with condition 15. Its decision to approve the scheme was not unlawful.

Conclusion

36. For the reasons I have given I would dismiss this appeal.

Lord Justice Christopher Clarke

37. I agree.

Lord Justice Elias

38. I confess that I have found Mr Wolfe's submission very puzzling. He accepts, as he must, that a legitimate condition cannot require the scheme to reduce the risk of flooding in sites adjacent to the development site. He submits that there must, however, be a proper consideration of the possibility for such reduction, even though the developer could for any reason, good or bad, refuse to implement such a scheme. There are obvious and immediate difficulties with this argument. First, what is the limit of the consideration which the developer must give to alternative schemes? No doubt there are numerous ways in which the risk of flooding outside the development site could be reduced, depending on the resources which might be made available. What assumptions, if any, should be made about resources? And how far from the development site should consideration of potential flood reduction be given?

39. Second, how can it be justified to require the cost of considering alternative schemes when the developer is under no duty to implement them, however desirable they may be?

40. Third, it is the scheme which must be based on sustainable drainage principles and I do not see how it can sensibly be said that a failure by the developers to consider the possibility of an alternative scheme or schemes, which could result in risk reduction away from the development site, is a principle of the scheme which the developer has actually adopted for the site itself. It says nothing about how the scheme works or what are its effects.

41. Mr Wolfe has provided no satisfactory answers to these questions. I would add that the evidence is, in any event, that the impact on adjacent properties has been considered in the flood risk assessment, and the scheme adopted does have some benefits for these properties, albeit not eliminating the risk of flooding entirely: see paragraph 30 above.

Assuming there is a duty to consider such risk reducing schemes, why does this scheme not satisfy the requirement? If it does not, what more is required of the developer to constitute compliance?

42. For these reasons and the much fuller reasons given by my Lord, Lindblom L.J., I would dismiss this appeal.