Neutral Citation Number: [2019] EWHC 1399 (Admin)

Case No: CO/5129/2018

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10 June 2019

Before:

NEIL CAMERON QC

(Sitting as a Deputy High Court Judge)

- -

Between:

THE LONDON BOROUGH OF BRENT

Appellant

- and -

THE SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT

First Respondent

-and-

OAKINGTON MANOR PRIMARY SCHOOL

Second Respondent

- -

Dr Ashley Bowes (instructed by Prospect Law Ltd) for the **Appellant**
Mark Westmoreland Smith (instructed by the Government Legal Department) for the **First Respondent**
Matthew Henderson (instructed by Browne Jacobson LLP) for the **Second Respondent**

Hearing date: 22 May 2019

- -

Approved Judgment

The Deputy Judge (Neil Cameron QC):

Introduction

1. This is an appeal made by the Appellant pursuant to section 289 of the Town and Country Planning Act 1990 ("TCPA 1990") against a decision made by letter dated 28th November 2018 of an inspector appointed by the Secretary of State for Housing, Communities and Local Government. By that decision, the inspector allowed the Second Respondent's appeal against an enforcement notice issued by the First Respondent which, as corrected by the inspector, alleged the following breach of planning control "without planning permission the material change of use to a mixed use as a school, nursery, for religious gatherings, celebrations, parties conferences, meetings, sports and leisure activities (i.e. parking that is not ancillary to the uses as a school, nursery, for religious gatherings, celebrations, parties conferences, meetings, sports and leisure activities)"

2. By an order dated 25th January 2019 Robin Purchas QC sitting as a Deputy High Court Judge granted permission to bring these proceedings on Ground 1 as set out in the Appellant's Grounds of Appeal.

3. In Ground 1, which is the only ground before the Court, the Appellant contends that:

   The First Respondent's inspector failed to 'grapple' with the Council's case that a material change of use the land through intensification occurred in 2016

The Background Facts

4. On 12th April 2017 the Appellant Council, in the exercise of the power conferred on them by section 172(1) of the TCPA 1990 issued an enforcement notice. The notice stated (so far as relevant):

SCHEDULE 1

THE LAND OR PREMISES AFFECTED

Oakington Manor Primary School, Oakington Manor Drive, Wembley, HA9 6NF

("the premises" - shown outlined bold in BLACK on the attached plan)

SCHEDULE 2

THE ALLEGED BREACH OF PLANNING CONTROL

Without planning permission, the material change of use from a school to a mixed use as a school and a carpark (i.e. parking that is not ancillary to the use as a school).

("the unauthorised change of use")

SCHEDULE 3

REASONS FOR ISSUING THIS NOTICE

…………

SCHEDULE 4

WHAT YOU ARE REQUIRED TO DO

TO REMEDY THE BREACH OF PLANNING CONTROL - S173 (4)(A)

STEP 1 Permanently cease the use of the land/premises as a public car park.

STEP 2 Do not use the premises for car parking, except for parking that is ancillary to the use as a school.

STEP 3 Remove all vehicles from the premises, except those which are associated with the school.

STEP 4 Remove all advertisements and signs associated with the public parking use.

STEP 5 Remove all other items associated with its use as a public car park.

SCHEDULE 5

TIME FOR COMPLIANCE

1 Day after this notice takes effect.

SCHEDULE 6

WHEN THIS NOTICE TAKES EFFECT

This notice takes effect on 22 May, 2017 unless an appeal is received prior to the effective date.

5. The Second Respondent ("the School") appealed to the First Respondent ("the Secretary of State") against the enforcement notice. The appeal was brought on the grounds set out at paragraphs (a), (d), and (g) of section 174(2) of the TCPA 1990.

6. In the School's Grounds of Appeal to the Secretary of State it stated:

"3.3 It is our client's case that it has been providing parking that is not ancillary to the use of the school for more than 20 years. The mixed use referred to in the Notice has been continuous for that period."

7. In their Statement of Case the Council set out their position on the Ground (d) appeal:

i) At paragraph 3.1.1 and 3.1.3 they stated that the "burden of evidence" was on the School to show that the change of use took place before 12th April 2007 (ten

years before the enforcement notice was issued) and that it was continuous over the period from 12th April 2007 to 12th April 2017 such that enforcement action could be taken against the use at any time during those ten years.

ii) Wembley Stadium was closed from 7th October 2000 until it was officially re-opened on 19th May 2007, and therefore stadium related parking could not have taken place over that period, and that a seven year period must be regarded as a cessation of use (paragraph 3.1.4). The Council further stated: “the New Wembley stadium had not been open for a period of ten years at the time the notice was issued, and as a result unauthorised parking on site could not be considered immune to enforcement action” (paragraph 3.1.4).

iii) The Council advanced an alternative argument that as event day parking at the school is temporary, each incidence of use is temporary and creates a new chapter in the planning history (paragraph 3.1.5).

8. An inquiry was convened to consider the School’s appeal to the Secretary of State, and an inspector was appointed to determine the appeal.

9. At the inquiry, the Council instructed Nigel Wicks to act for them as witness and as advocate. Mr Wicks produced a proof of evidence, in which he stated (inter alia):

> “5.1.1 Car parking in association with events at Wembley stadium has, without doubt, occurred at or around the appeal site, in common with most other viable sites within walking distance, during the past 22 years. The issue is whether at any time throughout a continuous 10 year period the Council could have taken enforcement action against a material change of use of the appeal site. Whilst the appellant has provided evidence of a more commercial and organised use of the appeal premises in more recent times it is clear that:
>
> …………
>
> (g) The use the subject of the enforcement notice, involving public parking of around 300 cars spread across most of the appeal site, is materially different to activities that have occurred at the appeal site over the preceding 20 years.”

10. At the inquiry the parties reached agreement on an amendment to schedule 2 to the enforcement notice, being the Council’s statement of the matters which appear to them to constitute the breach of planning control. The re-formulation is recorded in the inspector’s decision letter.

11. At the inquiry Mr Wicks supplied a written version of his closing submissions. Those closing submissions included the following, at paragraph 29:

> “29. In the unlikely event that you conclude that 60 cars, parked one day in March 2007, followed by a further 500 cars parked over a further 7 days during the rest of that year, was the beginning of a new intermittent mixed use. There is a material difference between that use and the use the subject of the enforcement notice involving around 8,000 cars parked over 42 days in a year. The former activity is parking that is but a contributory part to the general comings goings and activities on the land, during the brief and irregular periods it happened, the latter totally dominates comings goings and

activities on the land for most weekends and many other evenings of the year. What is happening on the land and its impact off the land results in a change the character of the use from anything that happened in 2007 (Mistry). Hertfordshire v. SoSCLG and Metal and Waste Recycling [2012] EWCA Civ 1473 para 25."

12. The reference to 'Mistry' in paragraph 29 of Mr Wicks' closing submissions is a reference to the evidence of Mr Mistry a local resident, who appeared at the inquiry.

13. At the inquiry the School was represented by a partner and another solicitor from the firm of Browne Jacobson LLP. The partner, Mr Barlow, has provided a witness statement in these proceedings. At paragraph 11 of that witness statement he states:

"I can confirm that at no time in the evolution of the description of the breach did the Council ever raise the suggestion that the material change of us which it sought to enforce against was an <u>intensification</u> of a mixed use which included parking. Rather the Council's position was always that the material change of use was caused by the introduction of a <u>new</u> primary parking use."

14. The inspector appointed to determine the School's appeal gave her decision in a letter dated 28th November 2018 ("the DL")

i) At DL5 the inspector recorded the agreement between the parties on the correction to schedule 2 of the enforcement notice:

"Without planning permission, the material change of use to a mixed use as

school, nursery, for religious gatherings, celebrations, parties conferences,

meetings, sports and leisure activities and parking (i.e. parking that is not

ancillary to the uses as a school, nursery, for religious gatherings, celebrations, parties conferences, meetings, sports and leisure activities)."

ii) At DL 6 the inspector stated:

"In my view, the corrected allegation, agreed by the main parties, accurately identifies the mixed use on the appeal site at the time the notice was served."

iii) At DL 7 the inspector stated:

"In appealing on ground (d), the burden of proof is firmly on the appellant to demonstrate, on the balance of probabilities, that the development was lawful through the passage of time at the date when the enforcement notice was issued. That is, had there been a material change of use to a mixed use as school, nursery, for religious gatherings, celebrations, parties conferences, meetings, sports and leisure activities and parking (i.e. parking that is not ancillary to the use as a school, nursery, for religious gatherings, celebrations, parties conferences, meetings, sports and leisure activities) on or before 12 April 2007 and that the mixed use had occurred continuously throughout that period it would be lawful through the passage of time."

iv) At DL 12 the inspector stated (it appears that there is a word or words missing after the words 'material change of use'):

"The Council consider that sometime around 2016 a material change of use at the appeal site that included parking for off-site events at the new Wembley Stadium."

v) The inspector's main conclusions and decision are set out at DL 19 to 23:

"19. The Council consider that the material change of use i.e. the point at which it considers that there was a separate primary parking use at the appeal site, took place in 2016. Between 2007 and 2009 the Council consider that the parking for new Wembley Stadium events was de minimis. In 2013 the Council consider, on the basis of invoices, that parking was available for six off-site events. The Council consider that in 2016/17 there was a marked change in the level of activity for the off-site event parking use at the site. This coincides with Tottenham Hotspur football club holding home games at the new Wembley Stadium.

20. However, in my view a primary parking use to serve those attending events at the new Wembley Stadium started at the time of the under 21's match in March 2007. On the date of this event the school had people outside of the site directing cars to park at the school and collecting money from those driving onto the school grounds to park within the designated area. While numbers of cars parked were between 50 and 60 such numbers could not be regarded as de minimus and it would have been apparent to those in the vicinity of the appeal site that people were parking their cars at the appeal site and walking in the direction of the new Wembley Stadium and returning at the end of the game, all at a similar time. In addition, people from the school collected the £10 parking fee in buckets in 2007, which is not something which took place with any on-site event parking. Furthermore, it would have been different from events at the school where ancillary parking took place as the occupiers of the cars parked would have remained within the appeal site to attend the event. The off-site impacts can therefore be distinguished.

21. The school had restarted a use it clearly found beneficial to the finances of the school at an early opportunity after the new Wembley Stadium was opened. The school then continued to do so for another 7 events in 2007. The use of the parking and the frequency of the parking for events increased and it was managed more extensively and marketed as such, but the primary use for parking began on 24 March 2007. This use was not ancillary to any of the other elements within the mixed use and it was at an intensity, even in March 2007, that constituted a change in the character of activity generated at the site and was material. The parking for off-site events was provided on a regular basis to coincide with many events at the new Wembley Stadium.

22. I find that the case made by the appellant to be sufficiently precise and unambiguous for me to conclude, on the balance of probabilities, that the material change of use to a mixed use as school, nursery, for religious gatherings, celebrations, parties conferences, meetings, sports and leisure activities and parking (i.e. parking that is not ancillary to the uses as a school,

nursery, for religious gatherings, celebrations, parties conferences, meetings, sports and leisure activities) took place on 24 March 2007 and that this mixed use continued for a period of ten years prior to the service of the Notice and the appeal on ground (d) should succeed in respect of those matters which, following the correction of the enforcement notice, are stated in it as constituting the breach of planning control. In view of the success on legal grounds, the appeal under grounds (a) and (g) as set out in section 174(2) of the 1990 Act as amended do not fall to be considered.

Formal Decision

23. It is directed that the enforcement notice be corrected by the deletion of the words " from a school to a mixed use as a school and a car park (i.e. parking that is not ancillary to the use as a school " in Schedule 2 of the enforcement notice and the substitution thereto of "to a mixed use as school, nursery, for religious gatherings, celebrations, parties conferences, meetings, sports and leisure activities and parking (i.e. parking that is not ancillary to the uses as a school, nursery, for religious gatherings, celebrations, parties conferences, meetings, sports and leisure activities). Subject to these corrections the appeal is allowed and the enforcement notice is quashed."

15. At the end of her decision letter the inspector listed documents which had been submitted at the inquiry. Amongst those documents at 9, 10, and 12, are "Legal Transcript submitted by …". I was informed that one of those documents was the judgment in ***Hertfordshire County Council v. Secretary of State for Communities and Local Government*** [2012] EWCA Civ 1473.

The Legal Framework

16. Section 289(1) of the Town and Country Planning Act 1990 ("TCPA 1990") provides:

"(1) Where the Secretary of State gives a decision in proceedings on an appeal under Part VII against an enforcement notice the appellant or the local planning authority or any other person having an interest in the land to which the notice relates may, according as rules of court may provide, either appeal to the High Court against the decision on a point of law or require the Secretary of State to state and sign a case for the opinion of the High Court."

17. Planning permission is required for the carrying out of development : s. 57(1) TCPA 1990. The making of a material change in the use of land falls within the definition of development in s.55(1) TCPA 1990.

18. Intensification of use is capable of constituting a material change of use. In the ***Hertfordshire*** case Pill LJ stated (at paragraph 9):

"9. It is not disputed that intensification of a use is capable of constituting an MCU. That was accepted in *Guildford Rural District Council v Fortescue* [1959] QBD 112 , Lord Evershed at page 124, in *Lilo Blum v Secretary of State and Anr* [1987] JPL 278 , by Simon Brown J, and in *R v Thanet District Council* [2001] 81 P & CR 37 by

Sullivan J. What is necessary, however, and accepted by the parties to the present appeal, is that the test for deciding whether there has been an MCU is whether there has been a change in the character of the use. In *East Barnet Urban District Council v British Transport Commission* [1962] 2 QB 484 at 491, Lord Parker CJ stated:

"It seems clear to me that under both Acts [Town and Country Planning Acts, 1932 and 1947] what is really to be considered is the character of the use of the land, not the particular purpose of a particular occupier." "

19. The TCPA 1990 contains an enforcement regime to address breaches of planning control. The term 'breach of planning control' is defined in s.171A(1) TCPA 1990:

"(1) For the purposes of this Act—

(a) carrying out development without the required planning permission; or

(b) failing to comply with any condition or limitation subject to which planning permission has been granted,

constitutes a breach of planning control."

20. The TCPA 1990 confers various powers of enforcement on local planning authorities, including the issuing of an enforcement notice. Where it appears to a local planning authority that there has been a breach of planning control and that it is expedient to issue an enforcement notice they may do so : s.172(1) TCPA 1990. The notice must "state the matters which appear to the local planning authority to constitute the breach of planning control" : s.173(1)(a) TCPA 1990. The notice complies with this requirement if it enables the person on whom it is served to know what those matters are : s.173(2). The notice must specify the activities which the authority require to cease in order to achieve, wholly or partly, the remedying of the breach or remedying any injury to amenity which has been caused by the breach : s.173 (3) and (4). Where an enforcement notice could have required any activity to cease but does not do so and all the requirements of the notice have been complied with then planning permission shall be treated as having been granted in respect of the carrying out of those activities : s.173(11) TCPA 1990.

21. Provision is made for various limitation periods in respect of enforcement notices. In the case of a breach of planning control consisting of the making of a material change in the use of land "no enforcement action may be taken after the end of a period of ten years beginning with the date of the breach" : s.171B(3) TCPA 1990.

22. A person having an interest in the land to which an enforcement notice relates or a relevant occupier may appeal to the Secretary of State against the notice: s.174(1) TCPA 1990. The grounds upon which such an appeal may be made are set out at s.174(2) and include:

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

23. The grounds of appeal set out in s.174(2) (a), (b), (c), (d) and (f) all refer to the 'matters' stated in the enforcement notice, being "the matters which appear to the local planning

authority to constitute the breach of planning control" as referred to at s.173(1)(a).

24. In ***Secretary of State for the Environment v. Thurrock BC*** [2002] EWCA Civ 226 the Court of Appeal considered the approach to be taken when considering an appeal under s.174(2)(d) TCPA 1990. At paragraphs 27 to 29 Schiemann LJ stated:

"27. In the present case, had the activities which took place on the land between 1981-1983 continued unabated until 1992 and had the landowner then ceased to use the land for aircraft activities for 3 years and then sought once more to use it for aircraft activities that type of problem would have arisen. But the inspector did not find that the commercial use continued unabated. If anything, he found the contrary. He approached his task by asking whether the LPA had shown that the commercial use which existed in 1981 and 1982 had been abandoned and applying a presumption that in the absence of clear evidence to the contrary the unlawful commercial activity continued throughout the period 1981-1989. Thus instead of deciding whether the landowner had shown that the unlawful activity had continued throughout the relevant period he asked himself whether the LPA had discharged some burden of proof in relation to that period. He apparently held that the landowner's own declaration in the Requisition for Information that on 8 July 1983 the land was being used for agriculture and a dwelling was not sufficient. He did not ask himself whether enforcement action could have been taken throughout the period 1981-1991 or any other clearly defined 10 year period. That is a question which should in my judgment have been addressed by him and should be addressed by the Secretary of State if this appeal is dismissed and the case is remitted to him.

28. I accept Mr Corner's point that an enforcement notice can lawfully be issued notwithstanding that at the moment of issue the activity objected to is not going on — because it is the week-end or the factory's summer holiday, for instance. The land would still be properly described as being used for the objectionable activity. However, I would reject Mr Hockman's submission that enforcement action can be taken once the new activity which resulted from the material change in the use of land has permanently ceased. I accept that there will be borderline cases when it is not clear whether the land is being used for the objectionable activity. These are matters of judgment for others.

29. Nor did the Inspector clearly address the question whether there had been a material change in the use of the land within the 10 years prior to the issue of the enforcement notice. He did not examine what in 1989 the facts were on the ground. It may be that it was open to him to come to the conclusion that what was going on in 1989 was similar to what was going on 10 years later and that nothing which should be described as a material change of use had occurred between those dates. However, I am not persuaded that this was the way that he approached his task."

25. The principles to be applied when considering a challenge to an inspector's decision are not controversial and are not in dispute between the parties to this appeal. The principles set out by Lindblom J (as he then was) at paragraph 19 in ***Bloor Homes Ltd. v. Secretary of State for Communities and Local Government*** [2014] EWHC 754 (Admin) apply equally to decisions made on enforcement notice appeals.

26. The standards that the courts require of planning decisions was also considered by Cranston J in ***Arsenal Football Club PLC v. Secretary of State for Communities and Local Government*** [2014] EWHC 2620 (Admin). After referring (at paragraph 32)

to ***Seddon v Secretary of State for the Environment*** (1981) 42 P&CR 26 , at 28, ***South Lakeland District Council v Secretary of State for the Environment*** [1992] 2 AC141 , at page 148 G, ***South Somerset District Council and the Secretary of State for the Environment v David Wilson Homes (Southern) Ltd (1993) 66 P & CR 83*** , at page 85, and ***Clarke Homes Limited v Secretary of State for the Environment and East Staffordshire District Council*** (1993) 66 P & CR 263 , at 271–272, he stated (at paragraph 33):

> “33 I would only add that as with a judgment, the appellate body must appreciate how the parties' case was put, since that will bear on how the decision is structured and what parts of the case are given emphasis in it. Moreover, the appellate body should not be expecting that the decision will necessarily flow in a linear manner, part by part, paragraph by paragraph, with the conclusion at the end. That would be a counsel of perfection. The reality is that the decision may have been reached by considering the material as a whole and not by a stage by stage process, each stage considered in isolation. Thus in putting pen to paper a statement at a particular part of the decision may be based not only on what comes before it but it may anticipate what follows. It is artificial to expect the written decision to proceed paragraph by paragraph if the conclusion itself derived from a far from logical process. What is required is that the decision be read in good faith and understood as a whole.”

The Submissions made on behalf of the parties

The Appellant’s Submissions

27. Dr Bowes on behalf of the Appellant identified five legal principles:

   i) In order for a ground (d) appeal to be made out, the breach of planning control must amount to a material change of use (“MCU”) abiding at the time that the enforcement notice was issued, and that use must have subsisted for a continuous period of at least ten years prior to the issue of the enforcement notice.

   ii) In any ground (d) appeal the decision maker must be satisfied that the use which subsisted at the time that the enforcement notice was issued was the same use which subsisted at the beginning of the ten year period.

   iii) As a matter of statutory construction anything short of direct consideration of a continuous use would not be lawful.

   iv) A material change of use may arise as a result of intensification (***Hertfordshire*** paragraph 9)

   v) Reasons must be intelligible and adequate (***South Bucks DC v. Porter*** [2004] 1 WLR 1953 at paragraph 36)

28. Principle (iii) was put on the basis that construction of the statute required consideration of whether the use had been continuous. In developing the argument Dr Bowes also relied upon the ***Re Findlay*** [1985] 1 A.C. 318 (at page 334) line of authorities, that when a statute confers a discretion on a decision maker, and when the statute is silent on the considerations to be taken into account, some considerations will

be so obviously material that anything short of direct consideration of them will amount to an error of law.

29. Dr Bowes made submissions under the following five headings:

i) At no point in the decision letter does the inspector deal with the submission made on behalf of the Council that a second MCU occurred in 2016.

ii) It appears from DL 14 and 21, that the inspector considered that the sole question was whether a non-ancillary parking use commenced before April 2007, and treated that as the determinative issue.

iii) As a matter of statutory construction the inspector was obliged to consider whether the use subsisting at the time the enforcement notice was issued was materially the same as the use which subsisted 10 years before that date. The inspector failed to do so.

iv) In any event the Council, through Mr Wicks (at paragraph 5.1.1(g) of his proof of evidence, and at paragraph 29 of his closing submissions) made the point that the use which subsisted at the time the enforcement notice was issued was not the same use as that which subsisted ten years before.

v) Had the inspector considered and acceded to the Council's case the School's ground (d) appeal would have failed.

The Respondents' Submissions

30. Mr Westmoreland Smith, who appeared for the First Respondent, submits that:

i) The statutory scheme is based upon consideration of the matters stated in the enforcement notice which appear to the local planning authority to constitute the breach of planning control. Accordingly it those matters which an inspector must consider.

ii) The principle established in ***Thurrock*** that, in order to succeed on a ground (d) appeal, it must be established that enforcement action could have been taken at any time during the relevant ten year period, does not translate into a requirement that the use must be the same at the beginning and at the end of the ten year period.

iii) The reasons in a decision letter must enable the reader to understand what conclusions were reached on the 'principal important controversial issues' (***Bloor*** paragraph 19(2)).

a) The Planning Inspectorate Guidance on Enforcement Notice Appeals – England (23rd March 2016) provide (at D.10.1) that a statement of case "should set out both the planning and legal arguments which a party intends to put forward at the inquiry".

b) The Council's Statement of Case identified the pint at issue on the ground (d) appeal as being whether or not the appellant has shown that a "..mixed use of the property for public car parking has been in continuous use for a period of at least 10 years prior to the notice being issued- such that enforcement action could have been taken against it any time during those 10 years" (paragraph 3.1.3). At paragraph 3.1.4 of their Statement of Case the Council relied upon the fact that the New Wembley Stadium had not been open for a period of ten years at the time the notice had been issued, and therefore the parking use could not be immune from enforcement action. The Council further stated that they had only received complaints regarding the use of the School's site within the last 18 months. The Council also alleged that the use was not sufficient to constitute continuous use (paragraph 3.1.5 of the Statement of Case).

c) Paragraph 5.1.1(g) of Mr Wicks' proof of evidence does not refer to intensification, and is to be read as response to the points taken by the School at paragraphs 3.3, 3.9 and 3.10 of its Grounds of Appeal (on the appeal to the Secretary of State).

d) The issue raised in paragraph 29 of the Council's closing submissions to the inquiry was not before the inspector and was not a principal controversial issue.

iv) In her decision letter the inspector addressed the breach of planning control alleged in the enforcement notice (as corrected).

31. Mr Henderson, who appeared for the Second Respondent, submits:

i) Whether it was incumbent on the inspector to treat the Council's alternative argument as a principal controversial issue does not turn on the legal framework in s.174 TCPA 1990, but on how the Council presented its case to the inspector.

ii) The argument put forward at paragraph 29 of the Council's closing submissions to the inquiry was not a principal controversial issue and the inspector was not required to address it in her decision letter. In support of that submission he submits:

a) The alternative argument put forward at paragraph 29 of the closing submissions was a departure from the case set out at paragraph 3.1.5 of the Council's Statement of Case.

b) At paragraph 4.1 of his proof of evidence, Mr Wicks made no reference to intensification or to a second MCU.

c) Paragraph 29 of the Council's closing submissions to the inquiry does not set out a properly formulated case and does not refer to a second MCU. By raising the point at that stage in the inquiry issues of fairness arise, in particular there was no opportunity to test the point in cross-examination.

iii) The question which the statute required the inspector to consider was whether it had been established that the matters stated in the enforcement notice as constituting the breach of planning control had subsisted for a ten year period prior to the issue of the notice. At DL 7, 8 and 22 the inspector addressed that issue, when she considered whether enforcement action could be taken throughout the ten year period preceding the issue of the enforcement notice.

Conclusion

32. As an appeal was made under the ground set out at s.174(2)(d) TCPA 1990 it fell to the inspector to consider whether no enforcement action could be taken in respect of any breach of planning control which may be constituted by the matters stated in the enforcement notice as constituting the breach of planning control.

33. In order to perform that task the inspector was required to ask herself whether enforcement action could have been taken throughout the period April 2007 to April 2017. She also had to consider whether there had been a material change in the use of the land within 10 years prior to the issue of the enforcement notice (***Thurrock*** paragraph 29).

34. If there had been a MCU within the ten year period prior to the issue of the enforcement notice the use subsisting at the time that the enforcement notice was issued would not have continued for a period of ten years, and would not have been immune from enforcement action under the provisions of s.171B(3) TCPA 1990.

35. If a MCU had taken place in 2016 as a result of intensification, the use of the School site at the time of the issue of the enforcement notice in 2017 would not have subsisted for ten years and would not have been immune from enforcement action.

36. For those reasons, if the effect of paragraph 29 of the Council's closing submissions to the inquiry was to submit that a material change of use had occurred in 2016, and if, based on the evidence, that submission had been accepted, the ground (d) appeal would have failed.

37. It is clear that the submission made in paragraph 29 of the Council's closing submissions was made in the alternative to the Council's primary case that there was one MCU which occurred in 2016. The opening words 'In the unlikely event that conclude that 60 cars, parked in one day in March 2007……… was the beginning of a new intermittent mixed use.' make plain that the submission is to be considered in the event that the inspector found against the Council on their primary case. The submission that 'What is happening on the land and its impact off the land result in a change (in) the character of the use from anything that happened in 2007..' together with reference to the ***Hertfordshire*** case (the Court of Appeal judgment in that case was placed before the inspector) was a clear indication that a MCU arising by way of intensification was being relied upon.

38. The submission in paragraph 29 of the Council's closing to the inquiry raised an issue which was capable of defeating the School's ground (d) appeal.

39. At DL 7 the inspector stated that had there been a material change of use to a mixed use as described in the enforcement notice on or before 12th April 2007 and that mixed use had occurred continuously throughout that period it would be lawful through the passage of time.

40. At DL 22 the inspector stated that on a balance of probabilities the case made by the Council caused her to conclude that the use described in the enforcement notice as the matters constituting a breach of planning control ".. took place on 24th March 2007 and that this mixed use continued for a period of ten years prior to the service of the Notice and the appeal on ground (d) should succeed ….". If the inspector had upheld the submission made in paragraph 29 of the Council's closing submissions she would not have so found, as the mixed use which she found to have subsisted on 24th March 2007 would not have continued for a period of ten years prior to the issue of the notice.

41. There is no indication in the decision letter that the inspector gave consideration to the argument that the use which began on 24th March 2007 ceased in 2016 when a further MCU took place as a result of intensification.

42. The issue to be resolved is whether the inspector was obliged to consider that argument.

43. Dr Bowes submits that the inspector was, as a matter of statutory construction, obliged to consider the argument, or alternatively the inspector was obliged to consider the argument as it was put before her.

44. The effect of the statutory provisions was considered in ***Thurrock***. The statutory provisions, so far as relevant to this case, require the inspector to consider:

    i) Whether the appellant had shown that the unlawful activity had continued throughout the relevant period (paragraph 27).

    ii) Whether enforcement action could have been taken throughout the relevant ten year period (paragraph 27).

    iii) Whether there has been a material change in the use of the land within the ten year period prior to the issue of the enforcement notice (paragraph 28).

45. The 'unlawful activity' as referred to in paragraph 27 in ***Thurrock*** is the activity or use which is described in the enforcement notice as constituting the matters which appear to the local planning authority to constitute the breach of planning control (s.173(1)(a) TCPA 1990).

46. In my judgement there is no obligation on an inspector to cast around to ascertain whether some further or different breach of planning control to that alleged in the enforcement notice, whether by MCU or otherwise, has occurred.

47. If an enforcement notice alleges that a use has intensified to such an extent as to amount to a material change of use, and that such a change of use occurred at a time which was less than ten years before the enforcement notice was issued, that matter would have to be considered by an inspector. However, I do not accept that, as a matter of statutory construction, an inspector determining an enforcement notice appeal is, in every case, required to consider whether the use subsisting ten years before the enforcement notice

was issued has, within the ten year period ending on the date the enforcement notice was issued, changed to such an extent as to be intensification constituting a material change of use.

48. For those reasons, in this case, in my judgment the inspector was not obliged, as a matter of statutory construction, and absent any submission to that effect from any party, to consider whether the use subsisting in April 2007 had at some time within the ten year period ending on 12th April 2017 intensified to such an extent as to amount to a material change of use.

49. Dr Bowes also puts the Appellant's case on the basis that an express submission was made to the effect that a material change of use by way of intensification did occur in 2016. He relies upon paragraph 5.1.1(g) of Mr Wicks' proof of evidence, and paragraph 29 of the Council's closing submissions at the inquiry.

50. I agree with the submissions made on behalf of the Respondents that paragraph 5.1.1(g) of Mr Wicks' proof of evidence does not refer to a material change of use by way of intensification. Paragraph 5.1.1(g) does not proceed on the basis of an assumption that a material change of use occurred in March 2007 and that the use was intensified in 2016, it refers to the preceding 20 years.

51. For the reasons given at paragraph [37] above in my judgment the submissions made at paragraph 29 of the Council's closing submissions at the inquiry was a clear indication that a MCU arising by way of intensification was being relied upon.

52. The issue to be determined is whether the inspector erred by not addressing that submission in her decision letter.

53. In my judgment the principles set out in ***Re Findlay*** apply when considering the matters to be taken into account on the exercise of a discretion vested in a decision maker and are not directly applicable to the matter at issue in this case, namely whether the inspector erred by failing to grapple with the Council's argument relating to intensification.

54. The principle stated at paragraph 19(2) in ***Bloor*** applies to the giving of reasons. The reasons must be intelligible and adequate enabling the reader to understand why the appeal was decided in the way that it was and what conclusions were reached on the principal important controversial issues.

55. The submission that there had been material change of use by way of intensification went to one of the issues that the inspector, on a ground (d) appeal, was required to consider, namely whether the appellant had shown that the unlawful activity had continued throughout the relevant period. In my judgement the submission made was plainly relevant to that issue, and if the principles in ***Re Findlay*** do apply would fall into the category of being obviously material. As the submission went to an issue which the inspector was required to consider, her failure to have regard to it and to address it in the decision letter was an error of law.

56. I have also considered the fairness issues raised by the Respondents. It is right to say that the submission at paragraph 29 of the Council's closing submissions at the inquiry was raised at a late stage of the inquiry and after evidence had been heard. It may be

said that it was an appropriate response to the evidence which had been heard, and that closing submissions should reflect the evidence, and that it can be appropriate for a party to adjust its case in the light of the evidence. It would have been desirable if the Council had put forward an alternative wording for Schedule 2 in the enforcement notice to reflect its alternative case; however it was not essential for the Council to do so in order to raise the point.

57. One of the advantages of determining a planning appeal (including an enforcement notice appeal) by holding an inquiry is that an inspector can ask for clarification of issues when submissions are delivered orally. Further the School, as appellant, had the last word and could have responded to the Council's submission. Given the procedure adopted any unfairness arising as a result of the Council putting its case in a different way in its closing submissions was capable of being overcome.

Conclusion

58. For the reasons I have given, I find that the inspector erred by failing to have regard to and to address the submission made on behalf of the Council that a material change of use by way of intensification occurred in 2016.

59. I remit the matter to the Secretary of State for re-hearing and determination in accordance with the opinion of the court.