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Case No: CO/5012/2018

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/07/2019

Before:

THE HONOURABLE MRS JUSTICE ANDREWS DBE

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Between :

SWINDON BOROUGH COUNCIL	**Claimant**
- and -	
(1) SECRETARY OF STATE FOR HOUSING COMMUNITIES AND LOCAL GOVERNMENT	
(2) DB SYMMETRY LTD	**Defendants**

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Richard Harwood QC (instructed by **Directorate of Law, Swindon BC**) for the **Claimant**
Charles Streeten (instructed by **Government Legal Department**) for the **First Defendant**
Richard Humphreys QC (instructed by **Jones Day**) for the **Second Defendant**

Hearing date: 18 June 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Mrs Justice Andrews:

Introduction

1. In this judgment, I shall refer to the Claimant as "the Council"; the First Defendant as "the Secretary of State" and the Second Defendant as "DBS".

2. This is an application for planning statutory review under section 288 of the Town and Country Planning Act 1990, challenging the decision of the Secretary of State's Planning Inspector dated 6 November 2018 allowing DBS's appeal against the Council's refusal of a Certificate of Lawfulness of Proposed Use or Development ("Certificate of Lawfulness") in respect of land at Symmetry Park, South Marston, Swindon ("the site").

3. As its name suggests, a Certificate of Lawfulness certifies that a proposed use of buildings or land, or other operations proposed to be carried out, would be lawful: Town and Country Planning Act 1990, section 192(1). The proposed use would be lawful if it would not constitute a breach of planning control.

4. The question whether a Certificate of Lawfulness should or should not have been granted in this particular case turns on the question whether the access roads within the development could only be used by members of the public with the permission of the site owners or management company, or whether, as the Council contends, the outline planning permission for the development requires the public to have rights of way, including in vehicles, over those access roads. That, in turn, depends on the construction of the planning permission.

5. For the reasons set out in this judgment, I have concluded that on its true construction, the planning permission requires the public to have rights of way over the access roads, and the Certificate of Lawfulness was wrongly issued.

Background

6. On 3 June 2015 the Council granted outline planning permission in respect of the site in these terms:

   "*Outline application for employment development including B1b (research and development/light industrial), B1c (light industrial), B2 (general industrial) and B8 (warehouse and distribution), new landscaping and junction to A420 (means of access not reserved).*"

   The permission was subject to 50 conditions.

7. By condition 3, the submission of reserved matters and the implementation of development was required to be in broad accordance with the Illustrative Landscape Masterplan. The internal points of access into development areas A and B (denoted on the plan) were to be subject to detailed assessment at the reserved matters stage. The reasons given were, inter alia:

   "*to ensure that the arrangement of employment uses on site is acceptable and allows for north/south and east/west highway linkages to site boundaries in the interests of*

the proper and comprehensive planning of the wider New Eastern Villages Development Area".

The New Eastern Villages Development Area is referred to in some of the relevant documentation as the NEV, and I will adopt that abbreviation in this judgment. It comprises the site and land around it, all on the east side of the A419 which runs from North to South. It comprises a mix of housing, employment, and retail development including, I was informed, two new villages to the South of the site.

8. Condition 50 of the outline permission made it clear that the approval was in respect of the accompanying plans and documents, which are listed, and included the Illustrative Landscape Masterplan. This shows the application site lying to the immediate south of the A420. Within the western part of the site, a road runs southward from a new junction with the A420 and continues to the southern boundary. It is labelled "North-South access road." Halfway down that road a roundabout is shown, from which another road, described on the plan as the "East-West spine road," runs to the eastern boundary of the site. The portion of the North-South access road which runs from the A420 junction to the roundabout is described as a "dual carriageway" on the Masterplan. The southerly continuation of the North-South access road from the roundabout is labelled "North-South link to wider NEV" and described as a single carriageway. The annotations to each road are that they contain a "carriageway" and "footpaths/cycleways to both sides", giving the respective widths (between 59 and 61 metres).

9. Development area A on the plan is on the eastern side of the North-South access road, and to the north of the East-West spine road, from which vehicular access to it is indicated on the plan. Area B is below area A, to the south of the East-West spine road and on the eastern side of the "North-South link to the wider NEV", with vehicular access to it indicated from the latter (though there was sufficient flexibility to allow for access from the East-West spine road as well, or instead). There is a smaller development area C, which is on the western side of the North-South access road, above the roundabout, and quite close to the A420.

10. The Illustrative Masterplan was amended to show the East-West route and North-South route extending through the site and into adjoining land. The Design and Access Statement Addendum No. 2 (also expressly incorporated by condition 50) referred to this amendment as being made "*to show highways extending to the site boundaries… to show the connectivity of the site to surrounding land.*" Other details on the Illustrative Masterplan included a proposed strategic footpath and cycle link to connect to adjacent sites within the NEV, running east-west along the southern side of the site; a new public footpath along the northern and eastern sides of the site; and the proposed diversion of an existing public footpath on the western side.

11. Condition 4 required a phasing plan including "*details of buildings, roads and footways*" to be submitted and the development to be carried out in accordance with it. Conditions 9 and 10 required details of "*the surface treatment of any roadways, footpaths, footways or parking areas"* to be submitted within the strategic landscaping and each development phase respectively. Condition 16 required there to be acoustic fencing between the access road and Lock Keepers' Cottage, and precluded any occupation of the development before the completion of the submitted landscape design.

12. Condition 34 required parking and turning areas "*in the interests of amenity and highway safety.*" A number of other conditions were imposed for reasons which were expressed to be in the interests of highway safety, for example, condition 40, which related to a minimum footway width for a proposed bus shelter; condition 42, which stipulated the minimum distance between entrance gates and the back edge of the highway; condition 43, relating to the gradient of private accesses within 10 metres from junctions with the public highway; condition 44, which required visibility splays for all private accesses to be provided before the development was brought into use; and condition 45, which required the submission of detailed junction analysis of any junctions with the North-South spine road "*to inform the design and ensure appropriate capacity".*

13. Condition 37, under the heading "Local Highways Authority", provided as follows:

"*The proposed estate roads, footways, footpaths, verges, junctions, street lighting,… service routes…vehicle overhang margins,…accesses, carriageway gradients, driveway gradients, car parking and street furniture shall be constructed and laid out in accordance with details to be submitted and approved by the Local Planning Authority in writing before their construction begins. For this purpose, plans and sections, indicating as appropriate, the design, layout, levels, gradients, materials and method of construction shall be submitted to the Local Planning Authority.*

***Reason**: to ensure that the roads are laid out and constructed in a satisfactory manner.*"

14. Condition 38, entitled "Foot/Cycleways" states that:

"*The proposed footways/footpaths shall be constructed in such a manner as to ensure that each unit, before it is occupied or brought into use, shall be served by a properly consolidated and surfaced footway/footpath to at least wearing course level between the development and highway.*

Reason: to ensure that the development is served by an adequate means of access.

15. Condition 39, which is at the heart of this dispute, provides as follows:

"Roads

The proposed access roads, including turning spaces and all other areas that serve a necessary highway purpose, shall be constructed in such a manner as to ensure that each unit is served by fully functional highway, the hard surfaces of which are constructed to at least basecourse level prior to occupation and bringing into use.

Reason: to ensure that the development is served by an adequate means of access to the public highway in the interests of highway safety."

[Emphasis added.]

16. The day before the outline permission was granted, the Council entered into an agreement with the developer and the owners of the land under section 106 of the Town and Country Planning Act 1990, ("s.106 agreement") subject in the usual way

to the grant of planning permission. There was no collateral agreement pursuant to section 38 of the Highways Act 1980.

17. The s.106 agreement specifically refers to the North-South link to wider NEV and the East-West spine road described in the Illustrative Landscape Masterplan. Schedule 2 paragraph 2 requires the owners to transfer certain land, referred to as "the A420 improvements land", to the Council for the purposes of carrying out improvements to the A420, and to grant them a licence to enter other land for the same purpose. The A420 improvements land is shown on a separate plan as lying to the West of the North-South access road and just below the A420; the land over which the licence is granted lies immediately beneath it and just above development area C.

18. Paragraph 3 of the same Schedule contains covenants by the owners with the Council that within a year from the date of first occupation of area A they will construct the East-West spine road to base course level to the application site boundary in accordance with condition 39 of the planning permission, and that within a year from the date of first occupation of area B they will do likewise in respect of the North-South link. The final alignment of these roads would be as approved in reserved matters and under condition 37.

19. Reserved matters approval was obtained on 8 April 2016. It required compliance with a plan drawn up by DBS entitled "Proposed Highway Works overall site layout 14668-205 P5". In that plan, the access roads were labelled as carriageways, with footways denoted. Visibility splays were shown for access to the employment areas, with their gates and entrance barriers set back from the access roads. In their planning statement, DBS emphasised that the roads would be constructed "to highway standards".

20. A further condition of the reserved matters approval was that:

"*Prior to construction of any footway, cycleway or carriageway, subject of this reserved matters application hereby approved, a strategy for future maintenance and repair of the footway, cycleway or carriageway shall be submitted to and approved by the Local Planning Authority. The strategy, hereafter referred to as the "Maintenance Strategy", shall be fully implemented prior to first use of any footway, cycleway or carriageway, subject of this reserved matters application hereby approved, and shall ensure that any section of footway, cycleway or carriageway within the development which is in use and is not the subject of an agreement with the local highway authority under section 38 of the Highways Act 1980 is maintained to a standard which is safe for use by the general public."*

21. On 11 April 2017, DBS applied for the discharge of this condition, in support of which application they produced a plan which identified the access roads as comprising carriageways, footways and cycleways. They also submitted an estate road maintenance and inspection strategy manual. The application was successful. Thereafter, development of the site commenced.

22. It is clear from the reserved matters approval that it was envisaged that some areas within the development might not have been made the subject of an agreement under s.38 of the Highways Act 1980 (to use the vernacular, "adopted") before they came into use, so that the obligation to maintain them would remain with the landowner.

However, this case is not concerned with the adoption of roads by the Highways Authority or their transfer to a public authority. It is purely concerned with the interpretation of the planning permission.

The Planning Inspector's decision

23. On 19 June 2017, DBS made an application seeking certification of the lawfulness of "*formation and use of private access roads as private access roads*". They accepted that the outline permission required access roads that were "fully functional highways" but argued that although the term "highway" usually means a road over which the general public have the right to pass and re-pass, the context in which it was used in condition 39 was to convey a requirement relating to its construction, not its legal status.

24. The application for a Certificate of Lawfulness was refused by the Claimant on 21 August 2017. DBS appealed, and its argument succeeded before the Planning Inspector. She held that the phrase "*fully functional highway*" in condition 39 could not be divorced from the beginning of the sub-clause which states, "*shall be constructed in such a manner as to ensure…*". Thus, condition 39 imposed a requirement concerning the manner of construction of the access roads and required them to be *capable of functioning as a highway* along which traffic could pass whether private or public. It did not require the access roads, once constructed, to be made available for the use of the general public. She drew support for this construction from the distinct use of the term "public highway" in the reason stated for imposing condition 39. Thus, although she did not say so in terms, the Inspector must have construed "highway" as meaning "road".

25. The Inspector said she did not need to have regard to extrinsic material to aid the interpretation of the permission, as it was not ambiguous, although in her view the extrinsic material supported her conclusions.

26. The Council contends that the Inspector erred in not giving "highway" its normal meaning of a road over which there is a public right of way. Mr Harwood QC submitted that condition 39 required the two north-south roads and the east-west spur road to be highways and so to give the public a right of way, including in vehicles. By requiring the access roads to be "capable" of functioning as a highway, the Inspector was importing words which were not in the permission and ignoring the phrase "is served by".

27. In practical terms the reason why this matters is that if the access roads are private, it will be possible for DBS to seek to defray some of the expense of constructing/maintaining them by asking for a contribution from the developers of sites on the wider NEV in return for granting a licence to use the roads, in particular the North-South link road, to gain access from the A420 to those other developments.

The interpretation of conditions in a planning permission

28. As one might expect, all three experienced planning Counsel instructed in this matter agreed on the principles to be applied by the Court when interpreting a planning permission and any conditions which it contains.

29. A planning permission is a public document which may be relied upon by parties other than those originally involved. Non-compliance with a condition in a planning permission may lead to service of an enforcement notice which, if it is not complied with, can lead to criminal liability. For those reasons, it is particularly important that conditions in a planning permission should be drafted with clarity and precision. However, those good reasons for a relatively cautious approach, which arise from the legal framework within which planning permissions are granted, do not require the adoption of a completely different approach to their interpretation from that used in respect of any other legal document.

30. When concerned with the interpretation of a condition in a planning permission, the Court will ask itself what a reasonable reader would understand the words to mean when reading the condition in the context of the other conditions and the planning permission read as a whole. This is an objective exercise which requires consideration of the natural and ordinary meaning of the words used, the overall purpose of the consent, any other conditions which cast light on the purpose of the relevant words, and common sense: see *Trump International Golf Club Scotland Ltd v Scottish Ministers* [2016] 1 WLR 85 especially per Lord Hodge at [34], (but see also Lord Carnwath at [66]); applied in *Dunnett Investments v Secretary of State For Communities and Local Government* [2017] EWCA Civ 192, (2017) JPL 848 per Hickinbottom LJ at [34]-[37], and *Lambeth London Borough Council v Secretary of State for Communities and Local Government and others* [2018] EWCA Civ 844 (2018) JPL 1160 ("*Lambeth"*) per Lewison LJ at [23] and [26]. The reasonable reader is assumed to be equipped with some knowledge of planning law and practice: *Lambeth* at [52] and [71].

31. Where a term is defined in planning legislation then, in the absence of a clear indication to the contrary, that definition shall apply to that term in a planning permission: *Wyre Forest District Council v Secretary of State for the Environment* [1990] 2 AC 357 per Lord Lowry at 365.

32. Thus, the process of interpreting a planning permission does not differ materially from that appropriate to other legal documents. The general rule is that where the planning permission is clear, unambiguous and valid on its face, regard may only be had to the planning permission itself, including the conditions (if any) on it and the express reasons for those conditions, and any plan or other document incorporated in the permission by reference. Extrinsic evidence can only be considered if there is an ambiguity in the wording of the permission.

33. In this case it was not contended that there was any ambiguity, but each party submitted that the permission, and in particular condition 39, admitted of only one interpretation. They just disagreed about what that interpretation was.

34. Mr Streeten, on behalf of the Secretary of State, and Mr Humphreys QC, on behalf of DBS, both relied on the absence of any requirement in the s.106 agreement that the owners of the site should dedicate any part of the land to the public. They referred to the well-known case of *Hall & Co Ltd* v *Shoreham-by-Sea Urban District Council and another* [1964] 1 WLR 240 ("*Hall v Shoreham*") in which the Court of Appeal struck down an express condition in a planning permission that required the landowners to construct an ancillary road at their own expense, and give rights of passage over it to and from such ancillary roads as may be constructed on the

adjoining land. Although the decision was expressed in terms that the condition was *ultra vires* the planning authority, it is more accurately characterised as an example of the application of the principle in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, i.e. the condition was one that no reasonable planning authority could have imposed in those circumstances.

35. Neither Mr Streeten nor Mr Humphreys went so far as to submit that if the permission in the present case were to be construed in the manner contended for by the Council, condition 39 would be unlawful (with the commercially undesirable consequence that the entire permission would be vitiated). However, they relied on *Hall v Shoreham* and the subsequent case law relating to conditions in planning permissions as an important aspect of the factual and legal context against which this permission fell to be construed.

36. Mr Humphreys referred to *Newbury District Council v Secretary of State for the Environment* [1981] AC 578 and *Tesco Stores v Secretary of State for the Environment* [1995] 1 WLR 759, in both of which *Hall v Shoreham* was considered. *Newbury District Council* drew on this and other earlier authorities as establishing that in order to be valid a condition imposed in a planning permission must:

i) Be for a planning purpose;

ii) Fairly and reasonably relate to the development permitted; and

iii) Not be *Wednesbury* unreasonable,

see Viscount Dilhorne's speech at 599H-600B.

37. In *Tesco Stores* the House of Lords approved the formulation of the test in *Newbury District Council*. In his speech, Lord Hoffmann described *Hall v Shoreham* as having exercised a decisive influence upon the development of British planning law and practice. He referred to the circulars issued by the Ministry of Housing and Local Government for the guidance of local planning authorities in the wake of that decision, quoting from what was then the most recent. I note in passing that that circular included the statement that "*conditions may in some cases reasonably be imposed to oblige developers to carry out works, e.g. provision of an access road, which are directly designed to facilitate the development*". Thus, *Hall v Shoreham* was (rightly) not regarded as giving rise to an absolute ban on imposing such obligations. The question whether a condition which is imposed for a planning purpose and relates to the development is *Wednesbury* unreasonable is fact specific.

38. Lord Hoffmann went on to describe how, faced with these restrictions on their powers to impose conditions, local authorities resorted to using agreements under s.106 (and its precursor, s.52 of the Town and Country Planning Act 1971) to achieve the same result. At page 774G-H he described the decision in *Hall v Shoreham* as self-defeating, in that "*by preventing local planning authorities from requiring financial contributions or cessions of land by appealable conditions, it had driven them to doing so by unappealable section 52 agreements*".

39. The decision in *Hall v Shoreham* has not been overruled, and Lord Hoffmann's speech was not the main speech in *Tesco Stores*. That was given by Lord Keith, with

whom the other members of the House, including Lord Hoffmann, agreed. Lord Hoffmann added his observations because of what he termed the "unusual public importance of the questions involved in the appeal." However it is quite clear from the tenor of Lord Hoffmann's speech that he did not subscribe to the view that in principle it would be *Wednesbury* unreasonable in the modern era for a local authority to require the developer to bear some of the external costs of the development, whether by way of condition or by imposing a planning obligation under s.106.

40. In the present case, the landowners were not being required to transfer ownership of the land to anyone without compensation. It is obvious that the developer was being required to construct the access roads and bring them up to a certain standard (and, if they are not then adopted, maintain them) at its own expense, and no complaint is made about that. Despite *Hall v Shoreham* it is not contended that this condition would be unlawful if it means what the Council says it means. The real issue is whether the constructed access roads are required to be made available for public use.

41. Mr Streeten submitted that if the Council had really intended the landowner to be required to dedicate any part of the land on site to the public, it would have required a s.106 obligation to be entered into for that purpose before granting outline permission, and that in turn would have required consideration of the question of financial compensation. The Council did not do so, although it did require rights of access to be granted over part of the site and the cession of some of the land for the purpose of making improvements to the A420. Indeed, Mr Streeten said the Council did not have the evidence to enable it to ascertain whether it could reasonably depart from what he termed the *prima facie* position that it would be *Wednesbury* unreasonable to impose a condition on the developer that required him to build public roads at his own expense.

42. Moreover, Mr Streeten submitted, in order to deprive a landowner of rights over his own property, the language used must be clear. There is nothing in any of the 50 conditions, or in any of the documents incorporated by reference, which refers specifically to the creation of public rights of way over the access roads. If that was what the Council intended, it could and should have said so.

43. Mr Humphreys adopted those submissions, but he added that the reasonable reader would be assumed to know of the practice referred to by Lord Hoffmann of using s.106 to achieve that which cannot (or perhaps more accurately, *may* not) be achieved by imposing conditions. The general understanding that a planning authority will not use conditions to afford rights of way was an important part of the legal and factual context against which the permission fell to be construed. The Court should therefore exercise great caution before accepting the Council's interpretation.

44. On behalf of the Council, Mr Harwood QC did not accept the premise that condition 39 would be vulnerable to being struck down as *Wednesbury* unreasonable, and pointed out that, irrespective of the practice referred to by Lord Hoffmann, there was no legal obligation on a local authority to use s.106 instead of imposing conditions on the permission. If they used a condition, they would run the risk of a *Hall v Shoreham* challenge, which would not necessarily succeed. In the context of the rights and benefits which this permission would confer (allowing the development of a huge industrial complex) giving the public a right to use the access roads (which had to be constructed anyway) to access the wider NEV, was a relatively small price to pay.

45. He further submitted that if, as he contended, condition 39 was clear, and meant what he submitted it meant, there was no need to repeat it in the s.106 agreement, particularly as the latter made express reference to condition 39 in the context of the covenant by the landowners to construct the access roads all the way to the site boundaries. The covenant imported an obligation to fulfil the requirements of condition 39 and the two had to be read together. Therefore, the point made by Mr Streeten and Mr Humphreys about the inherent unlikelihood that the Council would have used a condition instead of the s.106 agreement went nowhere, as in practical terms the Council had used both. It seems to me that there is a great deal of force in that submission, and that neither Mr Streeten nor Mr Humphreys had an answer to it.

46. Mr Harwood also submitted, and I accept, that a permission should be interpreted without any presumptions or burdens favouring either the developer or the local planning authority.

Construction of the permission

47. Against that background, I turn to consider the question of construction at the heart of this case. The starting point is the meaning of the word "highway". In *Transport for London v London Borough of Southwark* [2018] UKSC 63 (a case which was decided after the Planning Inspector's decision in the present case) Lord Briggs said this at paragraph 6:

> "*The word highway has no single meaning in the law but, in non-technical language, it is a way over which the public have rights of passage, whether on foot, on horseback or in (or on) vehicles."*

48. He went on at paragraph 32 to explain that at common law the word "highway" is sometimes used as a reference to its physical elements, sometimes as a label for the public's rights over it, and sometimes as a label for a species of real property, i.e. to describe the ownership rights of highway authorities, landowners and frontagers in respect of the land. When used in a statute (or statutory instrument) as it was in the *Transport for London* case, it necessarily takes its meaning from the context in which it is used. That case was all about ownership rights; the key issue was whether "highway" in the relevant statutory instrument (which transferred to TfL the "highway" of certain roads in the Greater London area previously vested in certain highway authorities) referred only to the surface of the road and enough of the subsoil and airspace to enable use and enjoyment by the public. The Supreme Court held that it was not so limited, and that it operated to vest in TfL all the property rights in the vertical plane of the highway previously enjoyed by the former highway authority in that capacity.

49. There is nothing in that case to suggest that when Lord Briggs was addressing the different meanings of "highway" at common law or in a statute he was countenancing the possibility that a "highway" might be a private road.

50. Section 336 of the Town and Country Planning Act 1990 applies various definitions in the Highways Act 1980 to terms used in the 1990 Act, including "bridleway", "footpath" and "highway", "*except insofar as the context otherwise requires*".

51. Unfortunately, the definition of "highway" in the 1980 Act is not illuminating, as it merely explains what that expression includes. Section 328(1) states that "e*xcept where the context otherwise requires, "highway" means the whole or part of a highway other than a ferry or waterway*". It also includes a bridge which it passes over or a tunnel which it passes through – s.328(2).

52. However, section 329 (1) of the 1980 Act defines various types of highway. Thus a "bridleway" is defined as "*a highway over which the public have the following, but no other, rights of way, that is to say, a right of way on foot and a right of way on horseback or leading a horse, with or without a right to drive animals of any description along the highway*". "Footpath" is defined as "*a highway over which the public have a right of way on foot only, not being a footway*". "Footway" is defined "*as a way comprised in a highway which also comprises a carriageway, being a way over which the public have a right of way on foot only*", (i.e. the pavements at the side of a public road), and "carriageway" is defined as "*a way constituted or comprised in a highway being a way (other than a cycle track) over which the public have a right of way for the passage of vehicles.*"

53. Thus, each definition of a sub-species of a "highway" that appears in the 1980 Act involves the public having a right of way over it – consistently with the common law definition of "highway". Whilst it is correct to say that the expression "footway" only appears twice in the Town and Country Planning Act, and that Act does not expressly adopt the meaning of that word in the Highways Act, it does expressly adopt the meaning of "footpath." In order to understand what a footpath is, it is necessary to understand what a footway is (which in turn requires an understanding of what a carriageway is). The expression "carriageway" is not found in the Town and Country Planning Act.

54. I was referred to the definitions of "highway" in legal dictionaries and other dictionaries. Osborn's concise law dictionary, 12th edition, defines "highway" as "*a road or way open to the public as of right for the purpose of passing and repassing"*. Stroud's judicial dictionary begins with a quotation from Lord Coleridge CJ in *Bailey v Jamieson* 1 CPD 332: "*the common definition of a highway that is given in all the textbooks of authority is that it is a way, leading from one market-town or inhabited place to another inhabited place, which is common to all the Queen's subjects".* It quotes numerous other dicta to the effect that a highway is a public road, including the following by Sedley LJ in *Gullickson v Pembrokeshire CC* [2002] 3 WLR 1072 at 1076:

> "*At common law a highway is a way over which all members of the public have a right to pass and repass without hindrance.*"

55. Jowitt's dictionary of English law, 4th edition, defines a highway as "*a passage which is open to the public*." It then goes on to refer to the definition in the Highway Act 1835, section 5, as "*all roads, bridges (not being country bridges) carriageways, cartways, horseways, bridleways, footways, causeways, churchways and pavements*". The latter definition is the only one referred to in Sturges and Hewitt's dictionary of legal terms. However, it should be noted that the Highway Act 1835 was the statute which first enacted a provision for the statutory vesting of roads in Highways authorities. In that context, a definition of "highway" which included all roads is understandable.

56. There is nothing in any of these definitions to suggest that a "highway" can ever be a way over which members of the public do not have the right to pass and repass.

57. The same theme runs through all the English dictionary definitions. The concise Oxford English Dictionary defines "highway" as "*(chiefly N America), a main road, (chiefly in official use) "a public road"*. The longer version of that work gives as the primary meaning "*a public road open to all passengers"*, with the secondary meaning being "*the ordinary or main route or line of communication followed by land or water*". Chambers defines "highway" as "*a public road on which all have right to go; the main or usual way or course; a road path or navigable river (law).*

58. Neither Mr Streeten nor Mr Humphreys was able to cite a single English authority in which the word "highway" had been interpreted as meaning a private road. Mr Streeten's industry produced a Canadian case, *Regina ex rel Johnson v Johnson* (1962) WWR 381 in which the Supreme Court of Alberta confirmed that a truck driver who was carrying a heavier load than was permitted by the regulations of the highway traffic board was guilty of a criminal offence. The driver contended that the highway traffic board had no jurisdiction to pass regulations that applied to a municipal road, that being the type of road on which he was apprehended. The judge rejected the argument that in the context of the relevant statute a "highway" and road" meant different things. He said that "*the normal use of the word "highway" includes "road", particularly when the reference is to places where there is a public right of travel*".

59. Mr Streeten contended that this supported his submission that all roads are highways. I respectfully disagree. Even if that case had not been concerned with the interpretation of a Canadian statute, it would not have assisted the Secretary of State or DBS, particularly since the road on which the driver was apprehended was undoubtedly a public thoroughfare and his argument (rejected by the judge) was premised on the North American usage of the word "highway" to mean a main thoroughfare. It is certainly not authority for the proposition that a "highway" can refer to any road, including a private road, let alone for the proposition that "highway" and "road" are synonyms.

60. Mr Streeten acknowledged (as did the Planning Inspector) that the interpretation she adopted necessarily meant that the word "highway" was not given its usual meaning. He submitted that in context, the word was being used in condition 39 to mean "road" or, more specifically "the part of the road used by vehicles rather than pedestrians" (to distinguish condition 39 from condition 38, which deals with routes used by pedestrians). The phrase "*other areas that serve a necessary highway purpose*" was a reference to areas over which a car or other vehicle might drive or manoeuvre.

61. Mr Streeten submitted that condition 39 was simply concerned with construction standards. Just as condition 38 was concerned to ensure that the surface of any means of pedestrian access to and from the units within the site was of an appropriate safety standard for those travelling on foot, condition 39 was concerned to ensure that the access roads and any other areas on the site where vehicles might be used were built to an appropriate safety standard. The reference to "the public highway", in the reason given for condition 39 was a reference to the A420 and to any other public road outside the site to which the access roads might link in due course, and an indication

that in context the word "highway" was not being given its primary meaning but simply that of a roadway over which vehicles pass.

62. Whilst I agree that conditions 38 and 39 are concerned with ensuring appropriate construction and safety standards, that does not mean that they are not also concerned with roads or paths over which there are public rights of way. The legal and factual context is vital, and the key issue is what type of road (or, in the case of condition 38, pathway) must be built to those construction standards. The type of road serving each unit is described as a "highway" and that highway must be "fully functional", i.e. it must be operational, at the time when the units are in use. Thus, this issue does not turn on whether the condition is concerned with the manner of construction of the roads. It turns on whether the expression "highway" is being used as a synonym for "road" or, more specifically the physical part of a road over which vehicles travel, or whether it is to be given its normal meaning, thereby making it plain that the access roads denoted on the Masterplan are to be public roads.

63. Looked at in isolation, it is possible to construe condition 39 in the manner for which Mr Streeten contends. It is headed "roads" and it appears in juxtaposition to a condition headed "foot/cycleways", thus it is possible to infer that it is dealing with the matters that are not covered by that previous condition, i.e. vehicular access to and within the site. Conditions in a planning permission are not interpreted like statutes, so, whilst it would be slightly odd, it is not impossible for the words "road" and "highway" to be used to mean the same thing in the same condition. However, condition 39 cannot be read in isolation, and when looked at in context of the overall permission, that is not how the reasonable informed reader would construe it.

64. Unlike condition 37, which refers among other matters to *all estate roads, footways and footpaths* and was imposed to ensure that they were laid out and constructed in a satisfactory manner, condition 39 is specifically aimed only at the proposed *access roads*, which are described as "highways" in the Design and Access Statement. It must be interpreted with that in mind.

65. This site was never intended to be self-contained as a cul-de-sac business estate; it was part of a wider major development, to be connected by the access roads to further development to the South and East. It was expressly intended that the access roads should provide a link to the wider NEV. They were never going to provide access to the development alone. The reasons for Condition 3 make that clear by referring expressly to *highway* linkages to site boundaries both north/south and east/west "*to secure the proper and comprehensive planning of the wider NEV".*

66. In that context it would make no sense for the North/South roads and East/West spur road (and the associated footways and cycleways on either side of the carriageways) to be privately owned roads (or paths) over which members of the public were unable to pass as of right. This understanding is consistent with the illustrative Masterplan which labels the access roads as dual or single carriageways with footpaths and cycleways running along both sides. All those words are consistent with the public having rights of way over the roads, both as regards the carriageways used by cars and other vehicles and the pavements and cycle lanes shown on either side of them. Without such rights, these roads would not serve their intended purpose as thoroughfares or means of access ("links") to the wider development beyond.

67. It seems clear from condition 3 (and from the s.106 Agreement which serves as part of the background) that the Council considered it to be essential in planning terms that the various development parcels within the NEV development area, of which this site was only a part, were connected. The requirement of access roads to provide that linkage was for a planning purpose, fairly and reasonably related to the permitted development, and cannot be described as irrational. Indeed, no complaint was made by DBS about the fact that the developer must bear the cost of constructing the access roads and extending them all the way to the site boundaries in order to obtain the necessary permission to develop this vast industrial complex. It would have to bear that cost irrespective of whether the condition requires those roads to be dedicated to public use. The same is true of the proposed strategic footpath/cycle link to the wider NEV.

68. In condition 38, there are references to specific types of highway – both footpaths and footways, as well as to "the highway" itself. The Illustrative Masterplan showed new public footpaths and cycleways. Condition 38 makes it plain that the footpaths, as well as the pavements on each side of a carriageway, must be properly consolidated and surfaced. It cannot sensibly be argued that the footpaths and footways on the plan are not routes over which the public have rights of way. This permission cannot be construed as requiring the developer to allow the public the right to pass along any pavements constructed by the side of the access roads, but not to drive vehicles on them.

69. Condition 39 refers, specifically, to the access roads which have already been shown on the Indicative Masterplan and referred to as "highways" in the reasons for Condition 3. It expressly envisages that these access roads serve a necessary highway purpose – i.e. they enable the public to pass over them in vehicles – because of the reference to "other areas" that serve such a purpose. The construction of the access roads is required to be in such a manner as to ensure that each unit of the development is *served by a highway* that is fully functional.

70. In my judgment the meaning of condition 39 is clear; the word "highway" is being used in its ordinary sense, and it is not being used as a synonym for road (or the part of a road that is used by vehicles rather than by pedestrians). That is how the reasonable reader, with an appropriate degree of knowledge of planning matters, including the practice alluded to by Lord Hoffmann in *Tesco Stores*, would understand it. As Mr Harwood put it, land is not served by a highway by accessing a fully functioning road which could become a highway at some time in the future. The Council has made itself clear because it has used a word which anyone would naturally understand to mean a public road, and which is never used to mean a private one. Condition 39 is not the only place in the permission in which that word is used to specifically denote the access roads. Elsewhere in the permission, where roads are referred to, the expression "road" or "roadway" is used.

71. The Planning Inspector fell into error because she did not appreciate that this planning permission, read as a whole, plainly envisages that the access roads are to be highways, in the normal sense in which that word is used, and that the public are also to have rights of way over the site via the footways and cycleways shown on the Illustrative Masterplan on each side of those access roads, in order that there should be a functional link between the A420, the site itself, and the wider NEV development beyond the site.

72. As for the reason given for imposing condition 39, the expression "public highway" is not a term of art, but in this context it probably does mean an adopted highway running outside the development site, specifically the A420, and any similar road to which the access roads will link. As I have pointed out, the access roads would not necessarily be adopted, at least during the timescale covered by this condition. That also appears to be the sense in which it is used in condition 43, which refers to the gradient of private accesses constructed within a certain distance (10 metres) from the junction of the highway and the public highway. Whilst that condition may just have been a "boilerplate" term, as Mr Streeten suggested, Mr Humphreys very fairly pointed out that in Area C it was possible that private accesses would run off the North-South access road close to the junction with the A420.

73. Finally, I must briefly deal with DBS's fall-back position that if condition 39 is to be interpreted in the manner contended for by the Council, it excludes those parts of the access roads beyond the entrances to the units and extending to the site boundaries. That cannot be right; the condition relates to the access roads, as a whole, and the access roads had to be built all the way to the site boundaries in order to provide the link to the wider NEV that the Council obviously regarded as essential. It is not how the reasonable reader would understand the condition.

Conclusion

74. Condition 39 is designed to ensure that the envisaged means of access to, from and over the site linking the A420, in particular, and other exterior roads to the wider NEV is of an adequate standard, and what the Council has required the developer to provide in this context are highways, i.e. public roads, that are fully functional for public use because they have been constructed to the specified standard prior to occupation and first use of the units which they will serve within the site. The word "highway" in the condition would be understood by the informed reader to bear its usual meaning. That is what the access roads were intended to be. It is not being used in this context either as a synonym for "road" or to describe the part of a road used by vehicles rather than pedestrians.

75. This condition does not introduce the requirement to grant a public right of way over the access roads by surreptitious means; the fact that the access roads are intended to be public roads is plain on the face of the permission read as a whole. Even if there was no express discussion of that topic with the Council, that much should have been obvious to the landowners and the developer from the outset. The s.106 agreement, which includes an obligation on the owners to construct the access roads to the site boundaries in accordance with condition 39, is entirely consistent with this interpretation.

76. For those reasons, the Council's claim succeeds, the decision of the Planning Inspector is quashed, and the Certificate of Lawfulness that she granted must be set aside.