Neutral Citation Number: [2021] EWHC 858 (Admin)

Case No: CO/2314/2020 and CO2315/2020

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

Manchester Civil Justice Centre
1 Bridge Street West
Manchester M60 9DJ

Date: 23/04/2021

Before :

MR JUSTICE JULIAN KNOWLES

- -

Between :

MANCHESTER CITY COUNCIL	**Appellant**
- and -	
SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT	**Respondent**
-and-	
(1) SAIF CHAUDRY	**Interested**
(2) DR PREM PATHAK	**Parties**

- -
- -

Horatio Waller (instructed by **Council Solicitor**) for the **Appellant**
Freddie Humphreys (instructed by **GLD**) for the **Respondent**
The Interested Parties did not appear and were not represented

Hearing date: **2 March 2021**

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Approved Judgment

Mr Justice Julian Knowles:

Introduction

1. These are statutory appeals by the Appellant, Manchester City Council, under ss 288(2) and 289(1) of the Town and Country Planning Act 1990 (the 1990 Act) against a decision made by a Planning Inspector on behalf of the Respondent Secretary of State on 4 June 2020. By an order dated 30 July 2020 Holgate J ordered both appeals to be heard together. The reasons for bringing an appeal under both provisions were explained in *Oxford City Council v Secretary of State for Communities and Local Government* [2007] EWHC 769 (Admin), [15].

2. I held a remote hearing by Microsoft Teams on 2 March 2021. The Appellant was represented by Mr Waller and the Respondent by Mr Humphreys. I am grateful to both of them for their helpful written and oral submissions.

3. The Inspector was appointed to determine appeals brought by the Interested Parties under s 174 of the 1990 Act (Appeal Refs: APP/B4215/C/19/3241275 and 3242151) against an Enforcement Notice (the Notice) dated 23 October 2019 issued by the Council in respect of premises at 3 Grandale Street, Manchester, M14 5WS (the Property). The Notice applied to the land edged in red on the attached plan; the plan showed a red line around the terraced building and rear garden or yard.

4. The Notice was issued by the Council because it appeared to them that there had been a breach of planning control, contrary to s 171A(1)(a) of the 1990 Act, in relation to the Property relating to a change of use. The breach alleged was that:

> "Without planning permission, the material change of use of a dwellinghouse (Class C3) to form 4 commercial units operating as a travel agent (Class A1), 2 x couriers' offices (Class B1) and therapy/medical treatment room (Class D1)"

5. The Notice required the following remedial steps to be taken:

> "1. Cease the use of the property as 4 commercial units operating as a travel agent (Class A1), 2 x couriers' offices (Class B1) and therapy/medical treatment room (Class D1).
>
> 2. Remove from the building all items and paraphernalia associated with the commercial uses.
>
> 3. Dismantle and remove from the land all physical manifestations of the uses in the form of signage and advertisements."

6. The Council's reasons for issuing the Notice were as follows:

> "It appears to the Council that the above breach of planning control has occurred within the last ten years.
>
> The Council considers that it is expedient to issue this notice because the unauthorised change of use results in the loss of a

> family sized dwelling in an area of the city where the Council is seeking to retain and increase the availability of family housing. The uncontrolled and unauthorised uses within the building are considered to have a detrimental impact on the amenity of neighbouring residents due to the increase in comings and goings to and from the premises, and associated noise, disturbance and increase in vehicular and pedestrian traffic.
>
> The development is considered to be contrary to policies SP1, DM1, H5 and C10 of the Core Strategy and contrary to guidance contained in the National Planning Policy Framework."

7. By s 172(2) of the 1990 Act an enforcement notice must be served on the owner and on the occupier of the land to which it relates as well as any other person having an interest in the land. Accordingly, the Notice was served on four businesses occupying separate rooms contained within the Property, as well as the freeholder. The last page of the Notice provided:

> "Below is a list of the names and addresses of the persons on whom a copy of this enforcement notice has been served:
>
> 1. Flywise Travel, Room 1, 3 Grandale Street, Manchester, M14 5WS
> 2. Sha Post, Room 2, 3 Grandale Street, Manchester, M14 5WS
> 3. Xpress Cargo Room, Room 3, 3 Grandale Street, Manchester, M14 5WS
> 4. De-Tox Therapy Practice, Room 4, 3 Grandale Street, Manchester, M14 5WS
> 5. Dr Prem Lathak, 19 The Avenue, Sale, M33 4PB
> 6. Prem Lata Pathak, 1 Grandale Street, Manchester, M14 5WS"

The Inspector's decision

8. The First Interested Party, Mr Saif Chaudry, works for Flywise Travel. The Second Interested Party, Dr Prem Pathak, is the freeholder of 3 Grandale Street. Following receipt of the Notice they appealed to the Secretary of State under s 174 of the 1990 Act.

9. The relevant paragraphs of s 174 (Appeal against enforcement notice) provide:

> "(1) 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, whether or not a copy of it has been served on him.
>
> (2) An appeal may be brought on any of the following grounds -
>
> (a) that, in respect of any breach of planning control which may be constituted by the matters stated in the notice, planning

> permission ought to be granted or, as the case may be, the condition or limitation concerned ought to be discharged;
> …
>
> (e) that copies of the enforcement notice were not served as required by section 172;
>
> (f) that the steps required by the notice to be taken, or the activities required by the notice to cease, exceed what is necessary to remedy any breach of planning control which may be constituted by those matters or, as the case may be, to remedy any injury to amenity which has been caused by any such breach;
>
> (g) that any period specified in the notice in accordance with section 173(9) falls short of what should reasonably be allowed."

10. Mr Chaudry appealed to the Secretary of State under s 174(2)(a) using the written representations procedure in the Town and Country Planning (Appeals) (Written Representations Procedure) (England) Regulations 2009 (SI 2009/452)). Dr Pathak appealed using the same procedure under s 174(2)(e), (f) and (g). She also supported Mr Chaudry's appeal.

11. A statement submitted on behalf of Mr Chaudry summarised the reasons why the Inspector should allow the appeal and grant planning permission. It was said that the travel agency would not create an unacceptable impact on neighbouring amenity, and it drew attention in particular to the fact that a travel agency operation like his involved very little parking and waste when compared to an A1 shop, which the Council had permitted on the ground floor of the neighbouring building at 5 Grandale Street.

12. Dr Pathak's Enforcement Notice Appeal Form stated at (f) and (g):

> "The Enforcement Notice requires the cessation of the use of the property as 4 commercial units. These units occupy the ground and first floor of the premises.
>
> …
>
> The premises are currently leased to the operators of the uses alleged in the Enforcement Notice."
>
> …"

13. The Council argued two grounds in response to Mr Chaudry's appeal:

    a. Firstly, the combination of four separate businesses occupying the Property amounted to an intensive use with noise, waste management, parking and pedestrian traffic implications, which produced an unacceptable impact on the amenity of local residents.

b. Second, the change of use resulted in the loss of a family sized dwelling-house, which is a breach of development plan policies which seek to increase the availability of family sized housing in the centre of Manchester, in particular H5 of the Council's Core Strategy. This provides:

> "Central Manchester, over the lifetime of the Core Strategy, will accommodate around 14% of new residential development. Priority will be given to family housing and other high value, high quality development where this can be sustained. High density housing will be permitted within or adjacent to the Regional Centre (Hulme and the Higher Education Precinct) as well as within Hulme, Longsight and Rusholme district centres as part of mixed-use schemes."

14. In its Statement of Case in response to Mr Chaudry's appeal the Council said:

> "7.2 The property is located on a mixed residential and commercial street close to flats and houses and also close to other unauthorised commercial uses. The change of use to a mixed use consisting of Classes A1, B1 and D1 has introduced an intensive use with noise, waste management, parking and pedestrian traffic implications to the detriment of local residents.
>
> …
>
> 7.9 The loss of a family-sized dwellinghouse and its conversion to a mixed commercial activity is contrary to Council policies …"

15. The Council proposed a list of suggested conditions to be attached to the grant of permission should Mr Chaudry's appeal succeed. Conditions (3) and (4) were:

> "(3) The uses hereby permitted are limited to 1 x Class A1, 2 x Class B1 and 1 x Class D1, as set out within the Town and Country Planning (Use Classes) Order 1987 (as amended) or in any provision equivalent to that Class in any statutory instrument revoking and re-enacting that Order with or without modification).
>
> (4) Notwithstanding the provisions of the Town and Country Planning (General Permitted Development) Order 2015 (as amended) (or any order revoking and re-enacting that Order with or without modification) the only uses permitted within Class A1 are "Travel and Ticket Agencies", within B1 "Offices" and within D1 are "Therapy/Medical Treatment Room" and shall not be used for any other purpose within those respective Classes as set out within the Town and Country Planning (Use Classes) Order 1987 (as amended), or in any provision equivalent to that Class in any

> statutory instrument revoking and re-enacting that Order with or without modification)."

16. The Inspector allowed Mr Chaudry's appeal under s 174(2)(a) and quashed the Notice. He dismissed Dr Pathak's appeal under s 174(2)(e) (about which I need say no more). He determined that he need not decide the other grounds of appeal because of his decision to allow the appeal under sub-paragraph (a).

17. The Inspector's substantive decision was as follows:

> "1. The appeal is allowed, the enforcement notice is quashed, and planning permission is granted on the application deemed to have been made under section 177(5) of the 1990 Act as amended for the development already carried out, namely the material change of use of a dwellinghouse (Class C3) to form four commercial units operating as a travel agent (Class A1), 2 x couriers' offices (Class B1) and therapy/medical treatment room (Class D1) at land at 3 Grandale Street, Manchester, subject to the following condition:
>
> 1. The commercial units hereby permitted shall only operate and deliveries shall only be taken at or despatched from the building between 0900 and 2000 hours Mondays to Saturdays and not at all on Sundays and Bank Holidays."

18. By virtue of s177(5) of the 1990 Act, the scope of the deemed application for planning permission before the Inspector was for the matters stated in the Notice as constituting a breach of planning control.

19. The paragraphs of the Inspector's decision letter that are in issue in this appeal are [11] and [12]. The Inspector said (emphasis added):

> "The second issue – the amenities of neighbouring residents
>
> 11. The only residential use of a neighbouring property is the first floor flat at 1 Grandale Street. Each commercial unit is only likely, given their limited size, to accommodate more than one member of staff and visitors to each unit are likely to be intermittent and limited. The planning permission for the shop at no. 1 is subject to the condition that activities at, and deliveries to, the shop are limited to 0900 to 2000 hours on Mondays to Saturdays, and not at all on Sundays and Bank Holidays. If the commercial uses of the appeal property are limited to similar hours, and given also the nature of the commercial activities at the property, these uses are not likely to generate or cause any significant disturbance for the residents of the first floor flat at no.1. No other matters relating to the commercial uses of the appeal property, such as on-street parking by staff and visitors, would cause any concern for residential amenity. The commercial uses of the appeal property do not conflict with MCS policies SP1 and DM1.

> Conditions
>
> 12. The Council has suggested five conditions. A condition requiring the submission and implementation of a scheme for the storage and disposal of waste is unnecessary as there is ample space at the property, both internally and externally, for the storage of waste, and there are refuse bins in the rear alleyway for the disposal of waste. *Two conditions that specify and limit the commercial uses of the property are also unnecessary because the planning permission that has been granted specifies these uses.*"

20. In [13] and [14] the Inspector said:

> "13. Conditions limiting operating and delivery hours are necessary but the conditions suggested by the Council are too limited. Taking into account the operating and delivery hours of the ground floor shop at no. 1 and that the shop at no. 5 can stay open until 2100 hours on Mondays to Saturdays and until 2000 hours on Sundays, requiring the cessation of operations at the appeal property at 1730 hours would be unreasonable. The two suggested conditions have been amended to reflect the opening hours of the permitted retail use at no. 1, and have been combined in the interests of brevity, clarity and precision. Conclusion
>
> 14. The commercial use of the property does not materially undermine the availability of family housing and does not cause any significant harm to the amenities of neighbouring residents. The ground (a) appeal thus succeeds and planning permission has been granted, subject to a condition, for the material change of use of a dwellinghouse (Class C3) to form four commercial units operating as a travel agent (Class A1), 2 x couriers' offices (Class B1) and therapy/medical treatment room (Class D1) at 3 Grandale Street, Manchester. The ground (f) and (g) appeals by Dr Prem Pathak do not need to be considered."

21. In a separate decision the Inspector made a partial costs award against the Council.

22. The Council sought permission to appeal to this Court against both the substantive decision and the costs decision. It advanced eight grounds of appeal. Following an oral hearing on 25 September 2020, His Honour Judge Eyre only granted permission in relation to the substantive decision on Ground 1, and so I do not need to say any more about the other grounds. In summary, Ground 1 is that the Inspector erred in not imposing conditions on the grant of planning permission.

The issue on the appeal

23. The Council's argument on Ground 1 is put in [5] and [55] of its Skeleton Argument as follows:

> "5. … The sole ground of challenge is that the Inspector erred in refusing to grant planning permission subject to conditions

> requested by the Council that would have limited the use of the building to the commercial activities identified in the Notice which is what the Inspector assessed in his Decision.
>
> …
>
> 55. It is submitted that the Inspector erred in refusing to impose the Council's proposed conditions on the basis that 'two conditions that specify and limit the commercial uses of the property are ... unnecessary because the planning permission that has been granted specifies these uses.'"

24. The nub of the Council's submissions relates to the sentence I have italicised in the Inspector's decision. The Council argues that the Inspector's intention was obviously to limit the uses of the four units to those business uses specified in the Notice, namely, a travel agent; courier companies; and a treatment room. (In fact, by December 2019 one of the courier businesses and the therapy/medical treatment business no longer operated from the property but that is not germane to the appeal). But the Council says that the way in which the Inspector expressed his conclusion meant that that his was not given legal effect, and thus his decision was flawed. It says that the Property now comprises four separate planning units, and that it would therefore be possible for there to be a change of use at the Property in respect of each unit from its current use to a different use within the same class of use, under the Schedule to the Town and Country Planning (Use Classes) Order 1987 (SI 1987/764) (the Use Classes Order) read with s 55(2)(f) of the 1990 Act, and that each unit would benefit from the development rights permitted by the Town and Country Planning (General Permitted Development) (England) Order 2015 (SI 2015/596) (the GPD Order). I will consider the statutory provisions later.

25. The Council says that it was not legally sufficient for the Inspector to express limitations in the description of the permission he was granting in the way that he did. What he needed to do was to impose planning conditions limiting the use of the rooms to the specified business types. In support of this submission the Council relies on *I'm Your Man Ltd v Secretary of State for the Environment* (1999) 77 P & CR 251, 258-259; *Lambeth London Borough Council v Secretary of State for Communities and Local Government* [2017] PTSR 1494, [49]-[50] (Lang J); and the decision of the Court of Appeal in the same case, [2019] PTSR 143, [28]-[33]. Although the Supreme Court allowed an appeal, Mr Waller said the judgment of Lord Carnwath (with whom the other justices agreed) did not doubt this principle: see [2019] 1 WLR 4317, [7], [26].

26. The Council therefore submitted at [77] of its Skeleton Argument:

> "Accordingly, the decision is subject to a legal error. Its effect is to permit each of the units in the Building to be used for any purpose within the same Use Class, and to change to a different Use Class if permitted by the [GPD Order]. The Building has not been limited to the particular commercial uses specified within the terms of the deemed planning permission, as the Inspector assumed."

27. In response on behalf of the Secretary of State, Mr Humphreys accepted that *if* the four rooms in the Property do indeed comprise four separate planning units, then the Council's submission is sound and the appeal would have to be allowed and the Inspector's decision quashed. But he said that that was not the right interpretation of the Inspector's decision and the evidence. He said that the Property is one planning unit in mixed use. Thus, he said, the Property did not fall within the Use Classes Order and the GPD Order, and that a proposed change of use of any of the units forming the single planning unit would require planning permission and that the Inspector had been entitled to conclude that no conditions were necessary to achieve his intention of limiting the Property's uses. In support of the submission that mixed use properties do not benefit from permitted development rights Mr Humphreys relied in particular on *Belmont Riding Centre Ltd v First Secretary of State* [2004] 2 PLR 8, [22], [31].

28. Mr Humphreys put the matter this way in his Skeleton Argument at [14]-[16]:

> "14. There is a succinct and simple response to the totality of the Claimant's preliminary points. The reason given by the Inspector for not imposing the conditions was: 'Two conditions that specify and limit the commercial uses of the property are also unnecessary because the planning permission that has been granted specifies these uses.' If, as the Defendant contends, the permission granted by the Decision would not allow changes of use to be made by operation of permitted development rights, then the conditions that the Claimant requested [be] imposed were unnecessary. They were unnecessary because the uses specified in the permission are the only ones that can be carried out under the permission because constitute a mixed use of the Property and, as accepted by the Claimant, such a mixed use would not benefit from permitted development rights.
>
> 15. The Inspector did not need to say any more than he did to address this simple point.
>
> 16. …
>
> The Notice was accompanied by a plan identifying the land to which it relates. This identifies the Property surrounded by a single line, there is no delineation of separate units within the Property nor is there, for example, any exclusion of communal areas. Accordingly, in allowing the appeal the Inspector has granted planning permission to use the Property for those uses. In interpreting that permission it is plain from the wording of the permission and the associated plan that the permission does not attach to individual units and is concerned with the Property as a whole. As such it is a permission for a mixed use. As a result of this the Claimant's claim fails as no conditions are necessary to restrict change of use by permitted development on mixed use permissions."

29. For his part, Mr Waller accepted that if the Property forms one planning unit in mixed use, then Mr Humphreys was correct that no planning conditions were necessary, and the appeal would fall to be dismissed.

30. It follows that a key question is whether the Inspector's decision (and any other admissible evidence, a point I discuss later) is to be read so that the Property comprises four separate planning units each with a different use, or as one planning unit in a mixed use. Hence the issue between the parties on Ground 1 was, in the end, quite narrow.

Discussion

Statutory provisions

31. Section 55 of the 1990 Act provides the definition of 'development', for which planning permission is generally required by virtue of s 57(1).

32. Section 55(1) provides:

> "(1) Subject to the following provisions of this section, in this Act, except where the context otherwise requires, 'development,' means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land."

33. Section 57(1) of the 1990 Act provides:

> "(1) Subject to the following provisions of this section, planning permission is required for the carrying out of any development of land."

34. Section 55(2) provides, so far as material:

> "(2) The following operations or uses of land shall not be taken for the purposes of this Act to involve development of the land -
>
> …
>
> (f) in the case of buildings or other land which are used for a purpose of any class specified in an order made by the Secretary of State under this section, the use of the buildings or other land or, subject to the provisions of the order, of any part of the buildings or the other land, for any other purpose of the same class.
> …"

35. Thus, by s 55(2)(f), a change in the use of land within the same Use Class prescribed by the Use Classes Order is deemed *not* to constitute development for which permission is required by virtue of s 57(1).

36. The various Use Classes are set out in the Schedule to the Use Classes Order. At the relevant time, Classes A1, B1, C3 and D1 were defined as follows (there have since been changes to the classification system):

> **"PART A**
>
> **Class A1. Shops**
>
> Use for all or any of the following purposes -
>
> (a) for the retail sale of goods other than hot food,
>
> (b) as a post office,
>
> (c) for the sale of tickets or as a travel agency,
>
> (d) for the sale of sandwiches or other cold food for consumption off the premises,
>
> (e) for hairdressing,
>
> (f) for the direction of funerals,
>
> (g) for the display of goods for sale,
>
> (h) for the hiring out of domestic or personal goods or articles,
>
> (i) for the reception of goods to be washed, cleaned or repaired,
>
> where the sale, display or service is to visiting members of the public.
>
> **PART B**
>
> **Class B1. Business**
>
> Use for all or any of the following purposes -
>
> (a) as an office other than a use within class A2 (financial and professional services),
>
> (b) for research and development of products or processes, or
>
> (c) for any industrial process,
>
> being a use which can be carried out in any residential area without detriment to the amenity of that area by reason of noise, vibration, smell, fumes, smoke, soot, ash, dust or grit.
>
> …
>
> **PART C**
>
> **Class C3. Dwellinghouses**

> Use as a dwellinghouse (whether or not as a sole or main residence) -
>
> (a) by a single person or by people living together as a family, or
>
> (b) by not more than 6 residents living together as a single household (including a household where care is provided for residents).
>
> **PART D**
>
> **Class D1. Non-residential institutions**
>
> Any use not including a residential use -
>
> (a) for the provision of any medical or health services except the use of premises attached to the residence of the consultant or practitioner,
>
> (b) as a crêche, day nursery or day centre,
>
> (c) for the provision of education,
>
> (d) for the display of works of art (otherwise than for sale or hire),
>
> (e) as a museum,
>
> (f) as a public library or public reading room,
>
> (g) as a public hall or exhibition hall,
>
> (h) for, or in connection with, public worship or religious instruction."

37. Hence, for example, by virtue of s 55(2)(f) and Class A1, planning permission would not be required to convert a travel agent into a shop selling sandwiches for consumption off the premises.

38. Where premises are a composite of different uses (ie, a 'mixed use'), that mixed use does not fall within any Use Class under the Use Classes Order. Thus, a change in any single component within the composite use will, if material, constitute development requiring planning permission: *Belmont Riding Centre Ltd,* supra, [31]. There, Richards J said:

> "31. … If the riding centre activities existed, they existed as part of a mixed use across the whole planning unit including the application area – a mixed use consisting of residential, equestrian and agricultural uses or activities. That there was a mixed use was found by Mr. Baldock and was common ground before the present inspector. I accept Mr. Strachan's submission

> that such a mixed use does not fall within the Use Classes Order and cannot therefore benefit from the exception in s.55(2)(f) …"

39. Under ss 59-60 of the 1990 Act, planning permission may be granted by an order made by the Secretary of State (known as a development order) in respect of development for which permission would otherwise be required. The GPD Order accordingly grants planning permission, subject to conditions, for the change of use of land from a use within prescribed Use Classes to prescribed uses within other Use Classes. Article 3 provides:

> "3(1) Subject to the provisions of this Order … planning permission is hereby granted for the classes of development described as permitted development in Schedule 2."

40. So, for example, Part 3 (Changes of use) (Class A – restaurants, cafes, takeaways or pubs to retail) in Sch 2 provides:

> "Permitted development
>
> A. Development consisting of a change of use of a building from a use falling within Class A3 (restaurants and cafes), A4 (drinking establishments) or A5 (hot food takeaways) of the Schedule to the Use Classes Order, to a use falling within Class A1 (shops) or Class A2 (financial and professional services) of that Schedule."

41. Thus, changing the use of premises from a restaurant to a shop not selling hot food does not need planning permission by virtue of this provision.

42. A change of use within a Use Class which would otherwise be lawful will be removed from the ambit of the Use Classes Order if it would be a breach of a planning condition attached to the grant of permission. Likewise, a change of use from one Use Class to another will be removed from the ambit of the GDP Order if it would be a breach of condition. In other words, the operation of these statutory provisions can be excluded by appropriately worded planning conditions. In *Carpet Décor (Guildford) Ltd v Secretary of State for the Environment* [1981] JPL 806, Sir Douglas Frank QC said at pp807-808:

> "As a general principle, where a local planning authority intend to exclude the operation of the Use Classes Order or the General Development Order, they shall say so by an imposition of a condition in unequivocal terms, for in the absence of such a condition it must be assumed that those orders will have effect by operation of law."

43. This principle was upheld by the Court of Appeal in *Dunnett Investments Ltd v Secretary of State for Communities and Local Government* [2017] EWCA Civ 192, [37]:

> "37. In relation to the interpretation of, specifically, a planning condition which is said to exclude the operation of the GPDO, other authorities are of some assistance. From them, the following themes can be discerned.
>
> (i) It is rightly common ground that a planning condition on a planning consent can exclude the application of the GPDO (see *Dunoon Developments v Secretary of State for the Environment and Poole Borough Council* (1993) 65 P&CR 101 ('*Dunoon Developments*')).
>
> (ii) Exclusion may be express or implied. However, because a grant of planning permission for a stated use is a grant of permission for only that use, a grant for a particular use cannot in itself exclude the application of the GPDO. To do that, something more is required (see, eg, *Dunoon Developments* at [107] per Sir Donald Nicholls VC).
>
> (iii) In *Carpet Décor (Guilford) Limited v Secretary of State for the Environment* (1981) 261 EG 56, Sir Douglas Frank QC sitting as a Deputy High Court Judge said that, because in the absence of such a condition the GPDO has effect by operation of law, the condition should be in 'unequivocal terms'. Although 'unequivocal' was used by Mr Katkowski in his written argument, during the course of debate he accepted that that term was now less appropriate, given the modern trend away from myopic focus upon the words without proper reference to their full context. However, he submitted (and I accept) that, to exclude the application of the GPDO, the words used in the relevant condition, taken in their full context, must clearly evince an intention on the part of the local planning authority to make such an exclusion."

The interpretive approach to the Inspector's decision

44. Authoritative guidance on the correct interpretive approach to an Inspector's decision was given by Lindblom J (as he then was) in *Roger Wood v Secretary of State for Communities and Local Government* [2015] EWHC 2368 (Admin), [40]-[41]:

> "40. The guiding principles on the interpretation of planning permissions are clearly established in the relevant case law. The proper interpretation of a planning permission is a matter of law for the court (see the judgment of Keene LJ, with whom Sir Anthony Clarke MR and Toulson LJ agreed, in *Barnett v Secretary of State for Communities and Local Government* [2009] EWCA Civ 476, at paragraph 28). 41. In *Ashford Borough Council*, the case to which the inspector referred in paragraph 25 of the decision letter, the court had to construe an outline planning permission. Keene J, as he then was, identified

> (at pp19 and 20) five 'legal principles applicable to the use of other documents to construe a planning permission'. In summary: first, '[the] general rule is that in construing a planning permission which 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 …' (see *Slough Borough Council v Secretary of State for the Environment* (1985) JPL 1128, and *Miller-Mead v Minister of Housing and Local Government* [1963] 2 QB 196); secondly, it is not appropriate to refer to the planning application itself and 'other extrinsic evidence' unless the application is incorporated into the permission by reference, the reason for this being 'that the public should be able to rely on a document which is plain on its face without having to consider whether there is any discrepancy between the permission and the application' (see *Slough Borough Council v Secretary of State, Wilson v West Sussex County Council* [1963] 2 QB 764, and *Slough Estates Ltd v Slough Borough Council* [1978] AC 958); thirdly, if the application is to be incorporated into the permission by reference, the words governing the description of the development permitted must make it clear that the application forms part of the permission (see *Wilson and Slough Borough Council v Secretary of State*); fourthly, '[if] there is an ambiguity in the wording of the permission, it is permissible to look at extrinsic material, including the application, to resolve that ambiguity …' (see S*taffordshire Moorlands District Council v Cartwright* (1992) JPL 138); and fifthly, '[if] a planning permission is challenged on the ground of absence of authority or mistake, it is permissible to look at extrinsic evidence to resolve that issue …' (see *Slough Borough Council v Secretary of State, and Co-operative Retail Services v Taff-Ely Borough Council* (1979) 39 P & CR 223 and (1981) 42 P. & C.R. 1)."

The requirement for conditions in the grant of planning permission

45. In *I'm Your Man Ltd*, supra, pp257-258 it was established that any intended restriction or limitation on the grant of planning permission in respect of a planning unit must be expressed by way of condition rather than by being 'built in' to the description of the permission being granted.

46. The principle was applied by Lang J in *Lambeth London Borough Council*, supra. Planning permission had been granted for a DIY store which purported to restrict the goods which could be sold to non-food goods. The restriction was not expressed as a condition, and was held by Lang J therefore not to be effective in law. She accordingly dismissed the local authority's appeal against the Inspector's decision which had held, in effect, the restriction on the sale of food not to be of legal effect. She said:

> "49. In *I'm Your Man Ltd v Secretary of State for the Environment* (1998) 77 P & CR 251 Robin Purchas QC, sitting as a deputy judge of the Queen's Bench Division, held that a grant of planning permission for use of a warehouse/factory for a temporary period of seven years had granted permanent, not temporary, permission because the limit on the period of the permission should have been expressed by way of condition, not merely in the description of the permission. He concluded, at p257, that the TCPA 1990 did not expressly provide a power for the imposition of limitations on the grant of planning permission. Under the statutory scheme, such limitations could only be imposed by conditions, which could then be enforced.
>
> 50. The reasoning in the *I'm Your Man* case was upheld by the Divisional Court in *R (Altunkaynak) v Northamptonshire Magistrates' Court* [2012] PTSR D27; [2012] LLR 458 and by the Planning Court in *Cotswold Grange Country Park LLP v Secretary of State for Communities and Local Government* [2014] JPL 981. Both these cases concerned substantive limitations on the permission granted, not merely temporal ones. In the *Altunkaynak* case Richards LJ said, at para 39: 'The relevant principle, drawn from the wording of the statute, is a general one: if a limitation is to be imposed on a permission granted pursuant to an application, it has to be done by condition.' In the *Cotswold Grange* case Hickinbottom LJ cited this passage and said, at para 21, that it 'succinctly and perfectly encapsulates the principle derived from the *I'm Your Man* case.'"

47. The local authority appealed, but the Court of Appeal dismissed its appeal. This line of cases was approved: [29]-[33]. Lewison LJ specifically approved what Richards LJ had said in *Altunkaynak,* supra, [39], which Lang J quoted.

48. The local authority appealed to the Supreme Court, which allowed its appeal, but, as I have said, did not doubt the correctness of the *I'm Your Man* principle. Lord Carnwath said at [26] of his judgment:

> "26. In this court Mr Reed for the council repeated and developed his arguments in the Court of Appeal. In line with the decision of the High Court in *I'm Your Man Ltd v Secretary of State for the Environment* [1998] 4 PLR 107, he did not seek to argue that the proposed wording could be treated as an enforceable 'limitation'. He accepted the need to establish that the permission was subject to a legally effective condition in that form."

Analysis

49. I have come to the conclusion that Mr Waller's submissions are, in substance, correct, and that the way in which the Inspector expressed his decision did not give legal

effect to his intention to restrict the uses of the four units to those businesses specified in his grant of planning permission because of the rule in the *I'm Your Man* case. Thus, I conclude that his decision is flawed and must be quashed. That this *was* the Inspector's intention was common ground between the parties.

50. Where there is a material change of use of buildings or other land, then by s 55(1) of the 1990 Act, that change of us constitutes development for which, by s 57(1), planning permission is required unless an exception applies. This issue raises the question of what comprises the 'land' in question for the purposes of determining whether there has been a material change of use. Such land, correctly identified, is known as the 'planning unit'.

51. *Telling & Duxbury's* Planning Law and Procedure (16th Edn, Oxford) says at [6.44]:

> "We may now consider the second 'leg' in the definition of development – namely, 'the making of any material change in the use of any buildings or other land'. The buildings or land under consideration in any given case are often referred to as 'the planning unit'; this is usually the unit of occupation …"

52. The issue can be illustrated by the facts of *Church Commissioners for England v Secretary of State for the Environment* (1995) 71 P & CR 73. The applicants were the landlords of the Metro Centre near Gateshead. This is a large shopping centre with a number of retail units, restaurants, public walkways, and other facilities. There were over 300 units in total. The applicants sought a certificate of lawful use in respect of a vacant retail unit, which had been a furniture shop (Class A1), but which they wished to convert into a restaurant (Class A3). They argued that the Metro Centre itself was the correct planning unit against which to judge whether or not there would be a material change of use if the conversion went ahead, and that only a substantial change in the retail purpose of the Centre would constitute such a change of use. Rejecting the applicants' contention, the judge held that the correct planning unit was the retail unit itself, and not the Metro Centre as a whole, and thus that permission was required for a change of use for that unit from Class A1 to Class A3.

53. The author of *Bowes*, Planning Law (14th Edn, Oxford), puts the matter this way at [6.129]:

> "Similarly, where a motorway services area includes a variety of shops providing a range of facilities for travellers such as eating areas, general shops, and an amusement arcade, each individual shop may constitute a separate planning unit, so that a change of use from any unit to a betting office would involve a change of use and, if material, require planning permission."

54. The question arising in this case can be illustrated by the following example. Suppose Flywise Travel closed down and Dr Pathak wished to change the use of Room 1 from a travel agent to a sandwich shop (both Class A1 uses). Would the planning unit be Room 1, or the whole property at 3 Grandale Street ? If the former, then because of the *I'm Your Man* principle, the purported restriction imposed by the Inspector would be of no effect and the change of use would be lawful even in the absence of planning permission because of s 55(2)(f) of the 1990 Act. If the latter, however, then because

3 Grandale Street is in mixed use, it would fall outside the Use Classes Order and so, for the reasons already given, would not benefit from permitted development rights, and planning permission would be required.

55. Important guidelines for resolving the issue of what the planning unit is were given by Bridge J (as he then was) in *Burdle v Secretary of State for the Environment* [1972] 1 WLR 1207. He said at p1212:

> "What, then, are the appropriate criteria to determine the planning unit which should be considered in deciding whether there has been a material change of use ? Without presuming to propound exhaustive tests apt to cover every situation, it may be helpful to sketch out some broad categories of distinction.
>
> First, whenever it is possible to recognise a single main purpose of the occupier's use of his land to which secondary activities are incidental or ancillary, the whole unit of occupation should be considered. That proposition emerges clearly from *G. Percy Trentham Ltd. v. Gloucestershire County Council* [1966] 1 WLR 506, where Diplock LJ said, at p513:
>
> > "What is the unit which the local authority are entitled to look at and deal with in an enforcement notice for the purpose of determining whether or not there has been a 'material change in the use of any buildings or other land'? As I suggested in the course of the argument, I think for that purpose what the local authority are entitled to look at is the whole of the area which was used for a particular purpose, including any part of that area whose use was incidental to or ancillary to the achievement of that purpose."
>
> But, secondly, it may equally be apt to consider the entire unit of occupation even though the occupier carries on a variety of activities and it is not possible to say that one is incidental or ancillary to another. This is well settled in the case of a composite use where the component activities fluctuate in their intensity from time to time, but the different activities are not confined within separate and physically distinct areas of land.
>
> Thirdly, however, it may frequently occur that within a single unit of occupation two or more physically separate and distinct areas are occupied for substantially different and unrelated purposes. In such a case each area used for a different main purpose (together with its incidental and ancillary activities) ought to be considered as a separate planning unit.
>
> To decide which of these three categories apply to the circumstances of any particular case at any given time may be

> difficult. Like the question of material change of use, it must be a question of fact and degree. There may indeed be an almost imperceptible change from one category to another Thus, for example, activities initially incidental to the main use of an area of land may grow in scale to a point where they convert the single use to a composite use and produce a material change of use of the whole. Again, activities once properly regarded as incidental to another 1213use or as part of a composite use may be so intensified in scale and physically concentrated in a recognisably separate area that they produce a new planning unit the use of which is materially changed. It may be a useful working rule to assume that the unit of occupation is the appropriate planning unit, unless and until some smaller unit can be recognised as the site of activities which amount in substance to a separate use both physically and functionally."

56. In the present case the Inspector did not refer to planning units and did not directly indicate whether each of the four business rooms at 3 Grandale Street was a planning unit. To that extent, his decision is ambiguous. There are points which can be made both ways. For example, Mr Waller pointed to the fact that the Inspector referred in [1] to the 'development already carried out, namely the material change of use of a dwellinghouse (Class C3) to form four commercial units …' which he said was a strong indication that the Inspector was regarding each room as a planning unit. He also pointed to the fact that the Notice had been posted to each occupier of the four rooms separately. For his part, Mr Humphreys relied on the plan attached to the Notice, which showed the whole of the Property as being the land to which the Notice related. He also pointed to the Council's response to the appeal to the Inspector, in which it had referred to a 'mixed use'.

57. In my judgment it is clear, reading the Inspector's decision with the extraneous material (which I judge I am allowed to do because the decision is ambiguous, per the guidance in *Roger Wood*, supra), then the only rational conclusion is that each of the four rooms within 3 Grandale Street comprises a planning unit, so that if there was a material change of use in respect of one of the rooms this would be lawful, notwithstanding the form of the grant of permission, because the purported restrictions were not expressed as conditions. I have concluded that if the Inspector had expressly turned his mind to this issue, and directed himself correctly on the law, this is the conclusion he would have been bound to reach.

58. As *Burdle*, supra, makes clear, the question of what the planning unit is in any given case is one of fact and degree. In my judgment, the following facts lead to the conclusion that each room is a planning unit, so that if there were to be a change of use in one of the rooms, the land involved against which that change would properly fall to be measured would be the room and not the whole Property. First, it is clear from the Notice that there are four rooms within 3 Grandale Street which at the relevant time were occupied by four different commercial businesses operating independently. Second, Dr Pathak's Enforcement Notice Appeal Form referred in terms to each room being let under a separate lease. From this I infer that each business was in exclusive occupation of its room (subject to the usual landlord's rights of entry and the terms of the lease). Third, the Notice was served on each

business separately under statutory provisions requiring 'the occupier of the land to which it relates' to be served with it (s 172(2), 1990 Act). Fourth, I infer that each room formed a self-contained lockable unit to which only the occupier and the landlord had lawful entry. Mr Humphreys did not dispute – and in fact expressly accepted – that I could properly infer each room would be lockable and accessible only by the tenant and the landlord. It seems to me self-evident that that must be so. This conclusion is not, in my judgment, affected by the fact that there was a shared common entrance to 3 Grandale Street, and shared bathroom and kitchen facilities.

59. I take the points made by Mr Humphreys in support of his case, including how the Council described the property in its appeal documents, but it seems to me that these cannot be conclusive on the question I have to decide. The Council were not conceding that the Property would be the planning unit in the case of a change of use of one of the rooms.

Conclusion

60. The Inspector's decision can only properly be construed as rejecting the conditions as unnecessary because he considered that the deemed planning permission lawfully specified and limited the commercial uses of the Property. For the reasons I have explained, the limitation is of no legal effect, and therefore the decision betrays an error of law and must be quashed.