Neutral Citation Number: [2022] EWHC 1184 (Admin)

Case No: CO/781/2022

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

Tuesday 17th May 2022

Before:
MR JUSTICE FORDHAM

- -

Between:

HADRIAN PROPERTY INVESTMENT LTD	**Claimant**
- and -	
(1) SECRETARY OF STATE FOR LEVELLING UP HOUSING	**Defendants**
(2) NEWCASTLE CITY COUNCIL	
-and-	
WEST END RESIDENTS ASSOCIATION	**Interested Party**

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Paul Tucker QC and **Mark Howells** (instructed by Irwin Mitchell LLP) for the **Claimant**
Horatio Waller (instructed by GLD) for the **First Defendant**
The **Second Defendant** and **Interested Party** did not appear and were not represented

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Hearing date: 17.5.22
Judgment as delivered in open court at the hearing

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Approved Judgment

I direct that 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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THE HON. MR JUSTICE FORDHAM

Note: This judgment was produced and approved by the Judge, after using voice-recognition software during an ex tempore judgment in a remote hearing.

MR JUSTICE FORDHAM:

Introduction

1. For reasons that I will come on to explain, what I am going to do in the present case is this. I am refusing permission in relation to what has been called "Ground 2". I am going to grant permission in relation to what has been called "Ground 1". I will in due course, with Counsel's assistance, consider the question of directions so that Ground 1 can be resolved in this Court. I do not intend to go into any detail in relation to Ground 1 beyond identifying what the issue is. The only conclusion that I have reached in relation to Ground 1 is that it crosses the threshold of being arguable.

2. This is an application for permission for statutory review. The dual decisions challenged, found in a composite decision of the Inspector acting for the Secretary of State, were the dismissal of two linked appeals. Those appeals were against refusals by the local planning authority in September 2020 of two applications for planning permission made in July 2020. The appeal decisions bear a "Decision date: 24 January 2022" after an "Inquiry opened on 16 November 2021". They relate to the "Former Westgate Road Police Station, Westgate Rd, Newcastle upon Tyne, NE4 8RP". The appeal decision is on The Planning Inspectorate website – under the appeal references PP/M4520/W/20/3263625 ("Appeal A") and PP/M4520/W/20/3263441 ("Appeal B") – which is sufficient for the Inspector's appeal decision document to be located by anyone who wishes to find it.

3. Permission for statutory review was refused on the papers on both Grounds on 4 April 2022 (HHJ Belcher), together with an order that the Claimant pay the Secretary of State's costs of the acknowledgement of service in the sum of £5,334 (something I will also need to revisit with Counsel's assistance). The issue is one of arguability. The Claimant has exercised the right of recourse to the Court which arises under the rules and involves the reconsideration of the question of permission for statutory review, in the light of oral argument, which is what I have done today. I am grateful to all Counsel and their teams for the clarity of the written and oral submissions that have been made to assist the Court.

4. The mode of hearing was by Microsoft Teams. Both parties were satisfied, as am I, that that mode of hearing involved no prejudice to the interests of any party. Although there was a delay in this case finding its way into the Court's cause list, happily that was rectified. The case, its mode of hearing, and its start time were all published in that cause list. That means that any interested person could, by using the email address given in the cause list, seek to observe this public hearing. They would also be able to follow up, if they wished to obtain information in an appropriate way about the case. This judgment will moreover be released in the public domain. In all those circumstances there is no difficulty, in my judgment, so far as open justice is concerned.

What the case is about

5. As I have indicated, this case is about the former police station at Westgate Road. The two appeals related to the East and West aspects of proposed development. Existing buildings are a main four storey "central core office block" and a single-storey "East Wing" (formerly the police cells). Those became the subject matter of "Appeal A". The Claimant's proposed development was to demolish the East Wing and build a single-

storey extension which, together with the redevelopment of the main building, would constitute: on the ground floor, shops and a dentist's surgery; and then three floors containing 15 apartments. The West side of the story involved a two-storey "West Wing" used for maintenance. That was to be demolished and replaced with a restaurant and takeaway with drive-thru. That was the subject matter of "Appeal B".

6. The issues in relation to Appeal A included, in particular: character and appearance; highway safety; living conditions in relation to neighbouring current residents; and living conditions in relation to future occupiers. Important consideration had to be given to harm to significance of identified heritage assets; and the benefits of the proposed development. As can be seen from her Decision, the Inspector concluded: that there were significant shortcomings in terms of design, which conditions could not address and which meant that relevant policies were not met; and that there were significant shortcomings in terms of the effect on privacy of residents in Linwood Avenue, which conditions could not address and which meant that policies were not met.

7. One aspect of the reasons on Appeal A, in considering issues of harm including issues of effect on privacy, and in considering the balancing of the negative aspects against the substantial benefits, was a "fallback position" argument made by the Claimant, of the kind exemplified by R v Secretary of State for the Environment, ex p Ahern [1998] Env LR 189. The nature of the "fallback position" argument is that it was said that the comparison needed to be made with the adverse impacts of conversion of the main building from offices to residential premises, which impacts would be "worse" than the development under consideration. It was that argument which gave rise to an issue about what is permitted by the General Permitted Development Order 2015 (SI 2015 No. 596) ("the GPDO").

8. The issues on Appeal B and the West development included, in particular: character and appearance; highway safety; living conditions for neighbouring current residents; and health and well-being. Again, there were aspects relating to heritage assets, relating to benefits and relating to the balancing of benefits and negative aspects. As can be seen from her Decision, the Inspector came to an adverse conclusion in relation to what she said were significant shortcomings in terms of design which put the proposals in conflict with relevant policies; and she concluded that the substantial benefits of the development did not outweigh the negative aspects and therefore conflicted with the development plan.

Ground 1: "planning unit" and the GPDO

9. Ground 1, on which I am granting permission, is an issue which arose out of the analysis of the "fallback position" argument. The Inspector adopted the approach (at paragraph 121 of her Decision) that the "planning unit" was relevant for the determination of whether permitted development rights were engaged, at least in the present case. She said:

> ***for all of the 'change of use' permitted development rights, it is necessary to establish what the 'from' use is, in order to know whether the relevant permitted development rights engaged. The appropriate way to establish that, is by looking at the planning unit.***

The Inspector went on to explain that, applying the "planning unit" approach, the development of offices in the central building into dwellings would not benefit from

"permitted development rights" under the GPDO. There is no challenge to that analysis if the Inspector was correct – or entitled – to adopt the "planning unit" approach. But that premise is the issue which has been raised as Ground 1.

10. Mr Tucker QC (appearing with Mr Howells) accepts that the "planning unit" approach – found in authorities such as Brazil (Concrete) Ltd v Amersham Rural District Council (1967) 18 P & CR 396 and Burdle v Secretary of State for the Environment [1972] 1 WLR 1207 – is the judicially-adopted legal construct governing the approach to planning questions relating to the question of "change of use" in two areas of the legal map. The first area is when a court (or decision-maker) is considering whether or not there has been a "material change in the use of any buildings or other land" for the purposes of section 55(1) of the Town and Country Planning Act 1990 ("1990 Act"). The second area is when a court (or decision-maker) is considering whether a change of use involves a change from being "used for a purpose of any class specified" to "the use … for any other purpose of the same class" by reference to a "class" in the Use Classes Order (SI 1987 No.764): see section 55(2)(f) of the 1990 Act. In each of those two areas on the legal map, the court (or decision-maker) is concerned with a question as to whether there is a "development", since it is a "development of land" that needs planning permission: see section 57(1) of the 1990 Act. Those change of use questions, in those two areas, give an answer to the question whether what is happening in the "change of use" does – or does not – constitute a "development", so as to require planning permission.

11. The argument for which I grant permission in this case is that the "planning unit" approach is not the governing criterion for the purposes of consideration of the "distinct" question (a word used in the Secretary of State's summary grounds) of whether there is a "permitted development" for the purposes of planning permission conferred by means of the GDPO, as to which see Article 3(1) of the GDPO and section 59 of the 1990 Act. In particular, when the court (or decision-maker) is dealing with GDPO Schedule 2 Part 3 – which contained a series of "changes of use" classes giving rise to (qualified) entitlements to statutorily-conferred planning permission – the argument is that "planning unit" does not govern the consideration and application of the classes of case described in the GDPO. Mr Tucker QC accepts that he would need to be correct as to Schedule 2 Part 3 in general, in order then to be correct as to the approach to the relevant specific class "MA" which was inserted into the GDPO Schedule 2 Part 3 by means of a 2021 amendment (SI 2021 No. 428). Mr Waller orally – and Mr Westmoreland Smith and Mr Waller in their summary grounds – have set out, at this permission stage, a number of arguments as to why the Secretary of State says that the Claimant's Ground 1 argument is legally flawed when the statutory scheme and the interrelated parts of it are properly understood. Ultimately, the Claimant's argument is that the GDPO – notwithstanding cross-referencing (as in Class "MA") to the Use Classes Order – stands alone and needs to be interpreted and applied within the "four corners" of its express provisions; that it is wrong to "import" into it the concept of "planning unit"; and that the consequentially "liberal" regime is the true purpose and effect. The Secretary of State, in response, submits that treating the legislative scheme as a "single comprehensive code", with a coherence of purpose and design, and in light of the consequences and implications of the arguments, "planning unit" governs this third area on the map, just as it governs the first two.

12. It remains to be seen who is correct. But I am satisfied that the point crosses the threshold of arguability and should be addressed by this Court at a substantive hearing. Neither Counsel was able to identify any authority or commentary which considers "planning unit" – or its absence – in the context of the GDPO.

Ground 2: reasons and design

13. I turn to Ground 2. This is a "reasons" challenge, to the approach taken by the Inspector in the Decision to issues relating to "design". Mr Tucker QC submitted that it was at least arguable that in the circumstances of the present case the Inspector has failed to give legally adequate reasons, which intelligibly and adequately deal with "principal important controversial issues" in the case. Alternatively – as he and Mr Howells submitted in writing – the Inspector acted unfairly in reaching the adverse conclusions that she did, without first affording the Claimant the opportunity to address the points which troubled her and seek to resolve them.

14. Central to these arguments are the significance, throughout the Inspector's adverse conclusions on character and appearance to the cladding colour proposed for the developed main building (on Appeal A) and the restaurant (on Appeal B), and what is called by the Inspector the darker "materials palette". In essence, the Inspector found against the two appeals predominantly – and at least materially – by reference to the dark colour being proposed for the cladding. It is described as "dark charred cedar cladding". Design is an aspect which, as the National Planning Policy Framework emphasises, calls for "collaboration". In the context of Appeal A, the local planning authority and planning officers had not and did not take against the application for planning permission on design issues. In the context of Appeal B, they did not take against the application in relation to the dark colour (to be used for the restaurant building) but had held other aspects against the application (in particular, "scale" and "mass").

15. Proposed conditions, agreed between the Claimant and the local planning authority, had been identified by which "samples" of "the materials" to be used in the construction of the "external surfaces" would need to be submitted to the local planning authority for its approval, before any commencement of "external elevational treatment" of the development. The central question of the dark colour was readily resolvable through that very mechanism. All that the Inspector needed to do was to make clear the impediment, based on the colour that was inappropriate, and it could and would then have been addressed. Alternatively, she ought to have allowed the opportunity for collaboration. Although her Decision refers to other linked matters it is – at least arguably – the position that the Decision might have gone in favour of allowing the appeals, had the question of the dark external colour been addressed through the available route.

16. Centrally to the Inspector's reasoning was her discussion of the condition which – as she recorded – planning officers felt would address the problem. The Inspector needed to give adequate and intelligible reasons as to why that was not an appropriate solution. What she said was "I do not agree", continuing: "This is not a case where a small aspect of the proposed materials palette might reasonably be reserved for future approval. Here, the external remodelling and materials palette are integral to the overall design". The fact that an aspect is "integral" does not mean it is insoluble. No doubt colour was an "integral" part. But the point was that it could nevertheless be addressed, by the

mechanism of the condition. In those circumstances, no adequate reason was given as to why the condition did not provide the solution.

17. That, as I see it, encapsulates the essence of the argument. The same logic follows through to the way in which the Inspector dealt with design in the context of Appeal B.

18. In my judgment, there is no arguable ground along these lines having any realistic prospect of success and a substantive hearing in this Court. In my judgment, beyond reasonable argument, the Inspector gave adequate and intelligible reasons that explained to the parties how she had resolved the principal issues in the case. This was a full planning application involving two applications and detailed design. She identified at the outset of her reasoned Decision that one of the main issues in the case concerned the detailed design of the buildings in both schemes.

19. In my judgment, beyond reasonable argument, Mr Waller is right when he submits that the Inspector's reasons relating to Appeal A were identifying linked problems, of which the dark colour was one. The Inspector repeatedly referred to the materials palette and the external remodelling. She described the darker materials palette especially in combination with smaller window openings. She said that the modelling and materials palette proposed did not, in her view, amount to good design. And her point about the condition not being the answer was specifically expressed in terms that "the external modelling and materials palette" were "integral to the overall design". She clearly addressed her mind to whether the condition presented a solution and therefore, in that context, to whether colour alone was the problem. She also said at the end of her Decision that she had given careful consideration to whether the shortcomings in terms of design could be overcome by appropriate conditions.

20. As to Appeal B, having already addressed the question of the conditions solution (in the context of Appeal A), the Inspector then went on to discuss the restaurant development. She did so in a passage which, in my judgment beyond reasonable argument, made clear that it was not simply a question of the colour of the cladding, but also the "detailing" (as it was put) in the design of the restaurant building. It was this design which the Inspector said was "not specific to the context". It did not deliver "character, variety and identity". And so it was the design in relation to "architectural detailing", as well as the "proposed materials palette", that the Inspector was concluding were inappropriate.

21. These were all matters of planning judgment for the Inspector. It is, rightly, not suggested that her conclusions were unreasonable in a public law sense or involved any error of law. In my judgment, there is – beyond argument – reasoning from the Inspector which provides the adequacy needed by the applicable public law standard. It is, moreover, in my judgment unarguable that the Inspector was obliged to take some further procedural step, in the light of the planning judgment at which she arrived, in relation to the design shortcomings and the inadequacy of the proposed or other conditions to resolve those shortcomings.

22. Since, unlike Ground 1, I am refusing permission in relation to Ground 2 I have needed to go into it in sufficient depth in order to explain the conclusions at which I have arrived. With Counsel's assistance I will address the question of what further order would be appropriate in the light of what I have decided and explained.

[Later]

Order

23. So far as the appropriate Order is concerned, I will formally refuse permission for statutory review relation to the Decision so far as it relates to Appeal B. That is because Ground 1 relates only to Appeal A, and it is only on Ground 1 that I have granted permission. I will grant permission for statutory review in relation to the Decision regarding Appeal A, restricted to Ground 1.

24. I will direct 35 days for the Defendants and Interested Party to file and serve Detailed Grounds of Resistance (should they wish to avail themselves of that opportunity and participate at the substantive hearing) and any evidence (should they consider that evidence is going to assist the Court). I will make the usual provision for reply evidence (should it be considered appropriate) from the Claimant. I will make further directions for the substantive hearing in this case including relating to bundles and an authorities bundle, as to the timing of those, and as to skeleton arguments. I will provisionally say that the hearing should be fixed in this Court for 1½ days. It may be, that when it is known how many parties are participating, that the solicitors will jointly write to the Court with the news that they and all Counsel are confident that the case can be dealt with within a single day. I have not considered it as necessary in this case for revised grounds for statutory review to be filed by the Claimant. That is because it is a question of deletion of those contents of the existing grounds relating to Ground 2 on which I have refused permission. Those paragraphs can be identified in solicitors' correspondence. So far as concerns points which Mr Tucker QC has accepted, for the purposes of today's hearing, again his instructing solicitors can write a letter to the other parties, in the very near future, simply confirming that the acceptance of those points will be maintained for the substantive hearing. It is not necessary to record those points formally in a pleading, in circumstances where I have given a judgment in which I too have recorded them.

25. So far as costs are concerned, I am satisfied that it is appropriate to adopt a broadbrush approach which divides into two halves the costs that were incurred by the Secretary of State in the production of the Acknowledgement of Service and Summary Grounds. As regards one half (£2,667) I order now that the Claimant pay those costs, they being referable to Ground 2 on which permission has been refused. So far as the other half is concerned, those costs will be costs in the case, so that whether they can be recovered by the Secretary of State will depend on who prevails at the end of the day. No costs order has been sought, rightly, in relation to today's oral hearing.

17.5.22