Neutral Citation Number: [2010] EWHC 1289 (Admin)

Case No: CO/4732/2009

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

Date: 3 June 2010

Before:

HIS HONOUR JUDGE WAKSMAN QC

(sitting as a Judge of the High Court)

BETWEEN:

STEVENAGE BOROUGH COUNCIL

Claimant

- and -

(1) SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT
(2) ABERDEEN PROPERTY INVESTORS (UK) LIMITED (formerly GOODMAN PROPERTY INVESTORS)

Defendants

Richard Humphreys QC (instructed by the Borough Solicitor, Stevenage Borough Council) for the Claimant
John Litton QC (instructed by the Treasury Solicitor) for the First Defendant
Christopher Lockhart-Mummery QC (instructed by Eversheds, Solicitors) for the Second Defendant

Hearing dates: 25 and 28 May 2010

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.

Introduction

1. By a decision letter dated 6 April 2009 ("the DL") Mr Colin Thompson, an Inspector appointed by the First Defendant, granted a certificate of lawful development ("LDC") to the Second Defendant ("GPI"). By that LDC the unrestricted sale of retail goods within Use Class A1 was certified as being lawful within two subdivided units within Unit 7, Roaring Meg Retail Park which is about 1km south of Stevenage town centre. The retail park consists of some 17 units, mainly retail outlets. The relevant LPA is the Claimant, Stevenage Borough Council ("the Council") which applies to the Court pursuant to s288 of the Town and Country Planning Act 1990 ("the Act") to quash that decision.

2. It is common ground that the initial 1987 planning permission in respect of the then undivided Unit 7 restricted the type of retail goods which could be sold at that and the other units. Before the Inspector, GPI contended that a later planning permission in 2006 which on its face related to external works only had the effect of removing that restriction, even though neither the 2006 nor any other planning application since 1987 had expressly sought to remove it. The argument was that in truth, the 2006 permission encompassed not only external works to the units but also internal works to divide Unit 7 into two and as a result, when those works were later done, the altered building constituted a new chapter in the planning history of Unit 7 so that any prior restrictions on retail use were swept away. Alternatively, the application of s75 (3) of the Act had the same effect. The Inspector accepted those arguments. The Council says that he erred in law in so doing.

Factual Background

3. The 1987 planning permission was the first in relation to the new retail park. Conditions 3 and 4 which applied to all units stated as follows:

> "03 . ..the consent which this permission grants, insofar as it relates to retail floor space shall, unless otherwise agreed in writing by the Local Authority be confined to retail warehousing of comparison goods to exclude expressly the sale of all foodstuffs for consumption off the premises, clothes and footwear (other than specifically for the playing of sport) or other fashion goods retailing;
>
> 04 the retail warehouse floor space referred to in Condition 03 of this permission shall not, at any one time, exceed a total of 200,000 square feet (18,580 metres) and in the case of each individual retail warehouse shall, unless otherwise agreed in writing by the Local Authority be not less than a minimum of 15,000 square feet (1,395 square metres).."

4. The reason given for these conditions was "to limit the scale of impact on Town Centre trading and on District and Neighbourhood Centres and to conform with the policies of the County Structure Plan."

5. Subsequent to the 1987 permission, mezzanine floors were added to a number of units. In the case of Unit 7 this occurred some time before 1997. The mezzanine floor is the shaded area shown on the enlarged plan at p71 of the bundle. It had a floor area of a little over half of the 22,000 sq. ft. occupied by the ground floor. The creation of this and other mezzanine floors was in breach of Condition 4 of the 1987 permission ("Condition 4") because of the resultant increase in the total floorspace occupied by the units to well beyond 200,000 sq. ft.

6. Then, on 8 October 2002 planning permission was granted to vary that part of Condition 4 which prescribed a minimum of 15,000 sq. ft. for each unit. The 2002 permission referred to the "Application to vary Condition no. 4..to allow the sub-division of ..No. 7..to provide units of no less than 929 square metres." The grant of permission was subject to a condition that "no retail unit within Unit 7 shall be less than 929 square metres of gross floor space" and the reason given was "to limit the scale and impact on Town Centre and Local Centre trading and to conform with the policies of the County Structure Plan." 929 square metres approximates to 10,000 sq. ft. While an internal sub-division, not part of external works, would not itself require planning permission, a sub-division of Unit 7 would have created two areas of 11,000 sq. ft., a breach of Condition 4 unless varied. The 2002 permission lasted for 5 years.

7. On 3 July 2006 a further planning permission was granted. On its face it permitted recladding and other external works to Units 1A-1D, 2A-2B, 3-5, 6A-B and 7 and the relocation of Unit 14. All of these units are in the southern part of the retail park – see the plan at p60. The northern part had been modernised some years earlier. It is common ground that permission for the creation of mezzanine floors at Unit 7 was on that occasion neither sought nor given. I deal in detail with the 2006 permission below.

8. On 6 February 2007 the Council granted an LDC in respect of the existing mezzanine floors at Units 3, 6A and 7 on the ground that the breach of Condition 4 caused by their creation had occurred continuously for the previous 10 years.

9. All the external works to Unit 7 were completed by June 2007. Internal sub-division work was also done. Most of this was completed by June and the remainder by August 2007. The extant mezzanine floor as at 2006 was enlarged slightly but nothing turns on this for present purposes. By the time the works were completed there was strictly no need for the variation to Condition 4 granted by the 2002 permission. That was because the recently legitimised mezzanine floors meant that the total floor space in each sub-divided unit was still above the 15,000 sq. ft. minimum prescribed by Condition 4.

The 2006 Permission

The Application

10. The Brief Description of the Proposed Development in section 4 of the application form dated 9 April 2006 read thus:

> "RECLADDING OF EXISTING RETAIL UNITS, RELOCATION OF MOBEN UNIT AND ERECTION OF NEW CAFÉ BUILDING FOR USE WITHIN CLASS A3. MINOR ALTERATIONS TO CAR PARK."

11. Under section 9b, Floor space, 154 sq. m. was to be demolished and there was 308 sq. m of new floorspace. It is common ground that this was the difference between the old and the new relocated Unit 14 as well as the erection of a cafe. Under section 11 this was said to be a full planning application. The box under (e) for Application for removal/variation of a condition was not ticked. Nor was the box under (b) for Application for change of use.

12. The covering letter dated 18 April is headed: "Planning Application for external alterations to existing retail units, relocation of existing Moben unit, erection of a new café building and minor alterations to car park/landscaping". It refers to the enclosures

submitted as part of it including the location plan and drawing schedule and design and planning statements. It said that the application was submitted to improve and upgrade the retail park through improvements to existing buildings, a new café building and relocation of an existing unit to a more suitable location. The proposed amendments and improvements including new building works were intended to integrate the older terrace of units in the northern [it should have said southern] section of the retail park with the more modern units to the south [north] creating "visual and functional cohesion across the park". Planning issues were dealt with in the planning statement.

13. The design statement at p48A refers to refurbishment of the southern units which would be overclad in metallic silver cladding to match the retail units developed in 2002. Entrance features to be constructed would reflect the new style and provide an identity for individual retailers. It then said:

> "When rebuilt the Moben Unit (unit 14) is to be relocated to enable the sub-division of the former Furntureland unit (unit 7) in the proposed style..."

14. There was then a detailed planning statement accompanied by drawings. Paragraph 1.1 said that:

> "This statement is submitted to assist the Council's consideration of the planning application ..to undertake external alterations to improve and upgrade existing retail units, relocate the existing Moben unit (to enable the subdivision of Unit 7)..."

15. Paragraphs 3.9 and 3.10 refer to the acknowledgement in the adopted development plan of the town's existing areas of retail warehousing to complement the town centre facilities and of the fact that a number of the retail parks were dated and that proposals to regenerate such facilities would be considered favourably.

16. The photographs enclosed with the application include at no. 3 (p63 of the bundle) the then frontage to Unit 7, on its eastern side, when the Furnitureland store was still operating.

17. I now refer to some of the plans submitted with the application. Plan 838-34B shows the existing layout of the units. The enlarged version showing Unit 7 is at p71. The boundary of the existing mezzanine is marked by the words "Extent of existing mezzanine. There is then a caption which reads "SUB-DEVISION OF UNIT 7 PERMITTED BY PERMISSION REF. 01/00120 DATED 08 OCTOBER 2002". The line of the sub-division is not shown on this plan. In the clear area the floorspaces are given and at the top left the words "SHOP INTERNALS NOT SURVEYED" appear. Unit 14 can be seen at the top towards the right.

18. Plan 838-036D is entitled "Proposed Ground Floor and Site Plan." An enlarged version at p74 shows the mezzanine area much expanded with new boundaries marked "EXTENT OF PROPOSED MEZZANINE". The caption referring to sub-division and the 2002 permission appears again in the same form but this time on either side of a physical internal division of the unit. The left side of the unit is now called Unit 7A and the right, Unit 7. Unit 14 has gone. There are New Entrance Features shown along with new signage. They correspond to the sub-divided units.

19. Plan 838-41B shows the existing and proposed elevations to Units 2, 6 and 7A and 7B. The enlarged version at p76 shows the new entrance features and two sets of tenant signage for "Unit 7A" and "Unit 7B".

The Decision Notice

20. This reads as follows:

"Application No: 06/0214/FP

Location:	Roaring Meg Retail Park..
Proposal:	Alterations to external elevations of units, relocation of Moben Unit, erection of a café building and alterations to car park landscaping
Plan Nos:	838-036D; 838-034B....838-041B...

GRANT PLANNING PERMISSION

...the Council have considered your application received with sufficient particulars on 8 May 2006 as shown on the plans accompanying the application.

Planning Permission is granted

Subject to the following conditions...."

21. The permission is expressed to be for 3 years. There is then an Informative reading as follows:

"Notwithstanding the detail shown on the approved plans, this planning permission does not grant consent for the insertion of any mezzanine floor in any of the retail units within the application site."

22. The grant was said to be for the reason that the proposed development would enhance the appearance of the retail park and surrounding area.

The Present Application

23. Following completion of the works, on 24 January 2008 GPI applied to the Council for an LDC for open A1 retail use of what were by then Units 7A and 7B ie without the restriction imposed by Condition 3 of the 1987 permission. When the Council failed to determine this application GPI appealed and the Inspector held a public inquiry on 17 and 18 February and 5 March 2009 following which he gave the disputed decision in the DL as noted in paragraph 2 above.

24. It should further be noted that the Council accepts that if the Inspector was correct to determine that the 2006 permission did indeed encompass the internal sub-division works, the resultant building was a new chapter in the planning history and/or s75 (3) of the Act applied, thereby having the effect of removing Condition 3 and justifying the LDC granted.

25. If the Inspector was wrong as to the 2006 permission however, he stated that s75 (3) would still apply so as to remove Condition 3 ("Ground 2"). Further, and as an alternative basis to uphold the Inspector, GPI contends that even if confined to external works the 2006 permission led to a state of affairs which was still a new chapter in the planning history so that the LDC granted was justified ("Ground 3"). I deal with each of these matters in turn.

Ground 1: The true nature of the 2006 permission

The Law

26. In *R v Ashford Borough Council* [1998] PLCR 12, when dealing with the question as to whether an outline planning permission could be interpreted by recourse to the underlying planning application, Keene J (as he then was) said this at paragraph 19C-20B of his judgment:

> "(1) 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: .....
>
> (2) This rule excludes reference to the planning application as well as to other extrinsic evidence, unless the planning permission incorporates the application by reference. In that situation the application is treated as having become part of the permission. The reason for normally not having regard to the application is 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:....
>
> (3) For incorporation of the application in the permission to be achieved, more is required than a mere reference to the application on the face of the permission. While there is no magic formula, some words sufficient to inform a reasonable reader that the application forms part of the permission are needed, such as ' ... in accordance with the plans and application ...' or ' ... on the terms of the application ...,' and in either case those words appearing in the operative part of the permission dealing with the development and the terms in which permission is granted. These words need to govern the description of the development permitted:.....
>
> (4) 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: ....

27. These principles were considered further in the context of a full planning permission by Sullivan J (as he then was) in *Barnett v Secretary of State for Communities and Local Government* [2009] 1 P & CR 24. In that case the owner of the dwelling had obtained planning permission to build it in 1995. The site plan showed the curtilage of the intended development which formed part of the planning permission. In 1998 permission was sought to make an extension to the house to include an office and garages. There was no application for a change of use. The application form referred to drawings. Drawing 01 had four features including a location and a site plan. The location plan enclosed by a red line roughly the same area as that covered by the 1995 permission. However the site plan enclosed a larger area within a red line. A later plan showed an area edged in red which was the same as in the 1995 permission. Permission was granted. Later the owner brought the land next to the dwelling into garden use and built a swimming pool and tennis court. About half of the area which contained the pool and tennis court was within the larger red-lined area shown on the 1998 site plan. In opposing an enforcement notice the owner claimed that the 1998 permission had in fact extended the curtilage beyond that granted in 1995. The Inspector held, purportedly applying *Ashford* (supra), that the owner could not refer to the 1998 plans at all and on that basis ruled out any extended curtilage, the 1998 decision notice itself not referring to any curtilage. But if he was wrong about that, then as a matter of construction of the 1998 permission it did not grant any extended curtilage anyway.

28. On an application to quash, Sullivan J held first that the Inspector was wrong to have excluded the plans on the essential ground that where there was a full planning

application the plans and drawings submitted with it could always be referred to, whether they were expressly incorporated into the planning permission or not. In particular he said this:

> 23 In my judgment, both Mr Newberry's submission is correct and proposition (2) in Ashford is correct when it is applied in the proper context. The approach adopted by the Inspector ..... illustrates the dangers inherent in a slavish adherence to judicial dicta without sufficient regard to the fact that such dicta are not to be treated as of universal application and are usually, if not invariably, a response to a particular factual matrix.
>
> In the Ashford case Keene J was considering the proper interpretation of an outline planning permission. The issue was whether, in construing that planning permission, regard could be had to a letter which had been included in an environmental statement that had accompanied the application for planning permission. The reason given for normally not having regard to the application is 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 principle (2)).
>
> 24 If it is plain on the face of a permission that it is a full permission for the construction, erection or alteration of the building, the public will know that, in addition to the plan which identifies the site, there will be plans and drawings which will describe the building works which have been permitted precisely because the permission is not, on its face, an outline planning permission. In such a case those plans and drawings describing the building works were as much a part of the description of what has been permitted as the permission notice itself. It is not a question of resolving an " ambiguity" . On its face, a grant of full planning permission for building operations is incomplete without the approved plans and drawings showing the detail of what has been permitted. In the absence of any indication to the contrary, those plans and drawings will be the plans listed in the application for permission. If the local planning authority does not wish to approve the plans submitted with the application and wishes to approve amended plans, then it can include a statement to that effect in the decision notice. Absent any such statement, the reasonable inference, against the statutory background provided by Section 62 of the Act and the 1988 Regulations, is that a grant of full planning permission approves the application drawings....

29. In paragraph 29 he observed that the reason why proposition (2) in *Ashford* was not appropriate to apply where there was an application for full planning permission was because on their face such permissions do not purport to be a complete and self-contained description of the development permitted, and the plans and drawings are "a" if not "the" vital part of the permission.

30. He therefore turned to the second ground for the Inspector's decision and here he upheld it. He drew a distinction between the (1995) application to build a new dwelling house, where it is implied that it will be surrounded by a curtilage which in the absence of anything to the contrary will be the red line on the site plan submitted. It will be reasonable to infer that such permission approves that curtilage. But with the (1998) application to extend or alter an existing house there is no such necessary inference. The form did not seek to extend the curtilage as well as extending the house. The extension itself would be within the existing curtilage. And apart from the expanded area shown by the red line in the site plan no other drawing showed an expanded curtilage. And the site plan itself did not have anything to suggest that its red line should be taken to be extending the curtilage already granted. So the 1998 permission had not extended it.

31. The decision of Sullivan J on the first point was not challenged in the Court of Appeal but nonetheless Keene LJ (with whom Clarke LJ and Toulson LJ agreed) approved it saying that what he had said in *Ashford* (supra) was not intended to apply to full

planning permissions for the reasons given by Sullivan J. He also upheld Sullivan J on the second ground. In paragraph 31 of his judgment he referred to the ambiguity between the site and location plans but said that the matter was clearly resolved by the application form and the permission itself neither of which referred to any proposed change of use and the relevant boxes in the application form had been left blank. Nor was there any suggestion that the site area should be changed. The planning permission made reference only to an extension of the house.

32. It is worth adding that given that both Sullivan J and Keene LJ considered the content of the application form it would appear that each considered that this was a case of ambiguity.

The Inspector's Approach here

33. By way of preliminary the Inspector accepted that the 2002 permission had never in fact been implemented. By the time of the inquiry of course, all the work had been done. As he pointed out in paragraph 24 of the DL, had it been implemented the effect would have been that all the 1987 Conditions would have continued to apply. This is because the 2002 permission was sought by way of an application made under s73 of the Act and because of the decision of Sullivan J in *Reid v Secretary of Sate for Transport Local Government and the Regions* [2002] EWHC 2174. This outcome would have been fatal to GPI's application for an LDC granting unrestricted A1 use. As noted above, in the event the 2002 permission was not needed because the minimum floor space in the sub-divided units was kept above 15,000 sq. ft. by reason of the mezzanine floors legitimised by the 2007 LDC.

34. At paragraph 29 the Inspector noted that it was permissible to look at the plans and drawings as a result of *Barnett* (supra). In paragraph 40 he then said this:

> "It is obvious that the original 2006 planning application could and indeed should have been better worded or the LPA could have altered it in the decision notice (but again did not do so) but this does not change the results of the LPA's action. If the decision includes reference to the application plans (in full planning permissions, the case here, *Bennett* [it should be *Barnett*] indicates that they do, then as a matter of logic reference to the plans must form part of the application as well. So the fact that it might be self-evident that the permission cannot grant more than was sought by the application does not alter anything because of the extensive nature of what was actually applied for (and shown on the plans and drawings). It follows that as a matter of fact and degree the implementation of what is a full planning permission for warehouse buildings resulted in a new permission with no restrictions on the sale of retail (Class A1) goods..."

35. In paragraph 31 he recited the work actually done including the physical splitting of the unit in two and went on to say:

> "In this case (and not withstanding the minimum floor space requirements of the 1987 permission) the internal sub-division needs planning permission because it involved associated necessary works to the exterior of the building."

Discussion

On the face of the notice and plans

36. First, this is not a case where the plan (insofar as it deals with sub-division) is revealing the detail of or describes the building works referred to in the decision notice. As already noted the proposal recited in the notice is concerned exclusively

with external works. But I agree with GPI that while a plan showing internal works to Unit 7 as well is different from the notice, it is not inconsistent with it nor does it "cut across" it. The Council disagreed with GPI and also submitted that as a matter of principle if the plans materially add to the development described in the notice, such additional elements must be excluded from the planning permission. Put another way, the words of the notice must have "primacy". Reliance is placed on what Sullivan J said in paragraph 24 of his judgment as set out at paragraph 28 above. But the context there was explaining why in principle one must have resort to the plans in relation to understanding a full planning permission. The particular question of interpretation raised before me was not before him. And see his description of the vital role of plans and drawings in his paragraph 29, referred to in paragraph 29 above. *Barnett* (supra) is simply not authority for the Council's proposition of law here. In my judgment the Council goes too far in this submission and I reject it.

37. In truth, it is unlikely that a Court will be required to interpret a planning permission where the plans show much more extensive works than those recited in the notice. That is because any such discrepancy is likely to have been picked up by the planning officer at the application stage and investigated. The applicant might be told that the LPA is not prepared to deal with that kind of discrepant application at all or that revised plans are required. Mr Lockhart-Mummery's extreme example of the application for a one-room extension whose plans show the erection of an office block falls into that category. But in more modest cases where planning permission has been granted, if the plans show a material addition to the decision notice the common sense approach is not to rule them out *per se* but instead to look at them with some care to see whether they really are part of proposed works. Alternatively, in some cases they may suggest that there is a problem of ambiguity to be resolved under *Ashford* principles.

38. In taking this view I have considered the Council's reliance on the notice requirements for both applicant and LPA under Articles 6 and 8 of the General Development Proceedings Order 1995. The applicant must serve a notice which is a "description of the development" while the LPA is required to serve a notice informing the public how and when they can inspect copies of the application, the plan and other documents submitted with it. But I do not see that the fact that the public are directed first to the description of the works (in the case of the applicant) or may view the application form first as entailing the conclusion that the description in the form (or by analogy in the planning permission decision notice) should "trump" any additional feature shown in the plans. On any development of any significant scale it will obviously be necessary to look at the plans to see what the detail is. Indeed such documents are now usually easily accessible online. And the application itself has of course to be accompanied by these documents – see Article 3 (1) (b) of the Town & Country Planning (Applications) Order 1988.

39. Against that background I turn to the proper construction of the 2006 permission.

40. The first point, as already noted, is the lack of any reference to the internal works in the notice. On the other hand, one needs to take account of the relative significance of the sub-division. In relation to Unit 7 this has become distorted because of the consequences said to flow from the 2006 permission and the works done, namely the effective removal from Unit 7 of all the conditions in the 1987 permission. But in truth the sub-division is the erection of one simple dividing wall in one of 13 units which

are the subject of the application and permission. In overall terms while there was a material addition to the works described in the notice as they affect Unit 7, it can hardly be said to be material across all 13.

41. One then turns to the captions set out in paragraph 17 above as they appear in the proposed plan for Unit 7. Since they refer to a previous planning permission it is objectively legitimate and necessary to see what that permission granted. It did not permit the internal works *per se*. It did not need to, on the assumption they were to be carried out by themselves. What it did was to allow a variation of Condition 4 so as not to render the creation of any subdivided – and therefore lesser – floor space unlawful. As at 2006 that was still an important consideration. In the absence of any lawful mezzanine floors to increase the floor space, the 2002 permission would have been needed even if the 2006 permission allowed for the internal work itself. Or at least arguably so. The message conveyed by the captions is that any decrease in floor space as a result of the proposed sub-division had been covered by the previous submission. That piece of information does not imply that permission for the internal work itself is not sought by the plans on this application.

42. The Inspector himself addressed the captions in paragraph 43 of the DL where he said this:

> "I have also taken account of the wording of some notes on plan No. 838-036D. These are architect's notes recording that the 2002 permission allowed for the sub-division of Unit 7 into two. An Architect is not necessarily a planning specialist and his notation cannot be construed as committing the Appellant to the implementation of a permission which it has steadfastly denied was ever taken up. To my mind the Architect was simply making reference to a then extant planning permission, presumably, in the mistaken belief that it would help his client."

43. I would not myself have expressed the matter in quite this way. After all, a consideration of what the Architect was, or thought he was, doing is not relevant because the Court is not concerned with subjective intent. And a reference to the fact that ultimately the 2002 permission was not used does not really assist as at 2006. Equally I agree that the fact that it was said at the inquiry that the 2002 permission merely "paved the way" for the 2006 permission does not take the matter much further. This may or may not have been in the mind of GPI back in 2006, but it does not assist on objective interpretation. However, it does not follow from the above that the objective analysis in paragraph 41 above is wrong.

44. The question is thus whether the sub-division should be seen as part of the overall package of works. In my judgment, although other possibilities are theoretically open, the inference from the plan must be that the sub-division is intended to be done at the same time as the external works to Unit 7. Of course the former could be delayed and Unit 7 could re-open as a single store but with two major entrances. But as a matter of common sense this seems very unlikely. One also has to remember that although the 2002 permission had another 1½ years to run, the external works across the whole site were substantial and if the intention was not to do anything with the sub-division until after such works had been clearly completed that might be cutting it fine.

45. The fact that the internal works were in the event done along with the external works is of course not directly relevant to the position as at 2006 because that would be to apply hindsight. But it does perhaps suggest that this was the most obvious course to take. It also shows, by way of example, that if the sub-division had not even started

until after the external works had been completed in June 2007, there was not much time until the 2002 permission expired in October. As it turns out, the LDC for the mezzanines removed the need for the 2002 permission in February 2007. But this cannot be assumed to have been known or predicted as at 2006.

46. The rest of the proposed plans suggest firmly that the sub-division was part of the overall works proposed. The new sub-divided units were given names, Unit 7 and Unit 7A. And it is the case that in relation to Unit 7 unless there was a real intention to make a sub-division, there would be little point in having the two doors and relocating Unit 14 which, at least as shown on the plan, was blocking where the new entrance would be. On the elevation plan 838-041B at p57 the new entrance doors are allocated to Units 7A and 7B thereby emphasising the sub-division.

47. It is also said that the fact that plans show that the "shop internals" had not yet been surveyed militates against the inclusion of the sub-division. But I do not see that the lack of such details means that the application and permission could not have encompassed the main structural item, namely the internal wall, as opposed to matters of fitting out.

48. Logically, if the internal works were part of this package of works, permission for them would be sought at the same time because it was necessary. While it is true that an applicant might have thought, wrongly, that the 2002 permission would cover even this situation or that permission was not required at all, the sensible approach is surely to assume that the applicant would seek what was objectively required.

49. Absent the captions, there would be no reason when looking at the proposed plan not to think that the sub-division was included. For the reasons given above I do not think that the captions impel a different view.

50. It is however necessary to deal with the mezzanine floors. It is accepted by the Defendants that the 2006 application did not include either the extended or proposed increased mezzanine floors. (That the mezzanine floors did not form part of the application is reflected in the fact that the increased retail floor area in the application did not encompass the extra space required by the increase in the mezzanine size – only Unit 14.) It is true that the very inclusion of the mezzanine floors shows that these particular plans included material that was not part of the application. But I do not think that this then supports the notion that another part of the plan – the sub-division – should be regarded as outside the permission as well. First because the sub-division is directly connected with and facilitated by part of the exterior works namely the entrances in a way that the mezzanine floors are not. And second, because the Council made the Informative referred to in paragraph 21 above in relation to the mezzanine floors. So they were outwith this application and permission. The point is then made by the Defendants that if the Council wished to exclude the sub-division at Unit 7 it could have issued an Informative there as well. The response of the Council is to say that it would have to have done something rather more than an Informative which is strictly of no legal effect. It would have required revised or amended plans or would have imposed a Condition. Perhaps, but the point remains that it could have reacted in some appropriate fashion to the inclusion of the sub-division proposal but it did not. I cannot take the absence of any such reaction as entailing the conclusion that, objectively, therefore, the sub-division was simply not part of the application. After

all, taken by itself, and with the benefit of the 2002 permission, the proposed sub-division was innocuous enough.

51. Accordingly the internal sub-division objectively formed part of the proposed works for this permission on the plans. On the facts of this case, that conclusion is not ousted by a lack of reference to them in the planning permission notice.

52. In the grounds for the application before me at p7, the error of law alleged against the Inspector is that in paragraph 40 of the DL he misconstrued *Barnett* (supra) because he included sub-division in the permission even though not in the notice whereas *Barnett* is not authority for this proposition. This was the principal point taken in the Council's submissions also. But that contention rests upon a hard and fast rule of law which *Barnett* did not lay down and which I have rejected.

53. For all the reasons given above, I would therefore uphold the Inspector's decision as to the scope of the 2006 permission. It included the internal works.

54. I should add that the focus above was on the plans because all parties accepted that in this case, it could not be said that the application itself was incorporated by reference into the planning permission.

Ambiguity

55. However, if I am wrong in my conclusion at paragraph 543 above, then in any event this was at best a case of ambiguity. The Inspector did not regard it as such but I should give my findings in case it be thought that it was. Reference to the extrinsic materials does in my judgment show sub-division to have formed part of the application and permission for the reasons set out below.

56. I agree that the letter enclosing the application itself referred only to external alterations and made no reference to the sub-division. The application form's Brief Description also referred simply to recladding of existing units and relocation of the Moben Unit. But the fact remains that the sub-division at Unit 7 was in truth a relatively minor aspect of this whole project affecting 13 units. I do not doubt that it may have been physically possible to insert something about the sub-division into the box at section 4 of the form but the main point is that the sub-division was not a key element of the works as a whole. Its absence from the description in the form is not material here.

57. It is said that if the sub-division was included in the application, section 11 (b) would have been ticked to indicate an application for a change of use ie to unrestricted A1. But that was not relevant at this point. The 2006 permission was all about the works to be done. The Defendants do not suggest that the 2006 permission itself impliedly allowed unrestricted use or that such use was sought in the 2006 application. Rather the unrestricted A1 use is said to have been the consequence of the 2006 permission covering the internal and external works - intended or otherwise.

58. It is also said that section 11 (e) of the form should have contained an application to vary Condition 4 but it did not. I see that but if the 2002 permission was still extant at this stage, it may not have been necessary. For the same reason, the absence of anything in the planning statement justifying the smaller minimum spaces created by

the sub-division by reference to possible impact on town centre trading is not a strong pointer against inclusion of the sub-division.

59. The design statement again concentrated on the external works. But, as noted in paragraph 13 above, it did contain these words: "Moben Unit... is to be relocated to enable the sub-division of the former Furntureland unit (unit 7) in the proposed style." Those words explain why the unit was being moved. But on a fair reading I also consider that they show that sub-division "in the proposed style" was part of that application. The same applies to the appearance of the words in brackets in the planning statement referred to in paragraph 14 above.

60. I agree with the Inspector in paragraph 40 of the DL that the original 2006 planning application could and should have been better worded. But in my judgment there was sufficient in the wording of the design and planning statements in the context of the works as a whole, to include the sub-division.

61. Accordingly, I find that if the position was ambiguous with regard to the extent of the 2006 permission by reference to the notice and the plans, then consideration of the further materials show that permission for the sub-division was sought and granted.

Conclusion

62. For all the above reasons, therefore, I uphold the Inspector's decision on Ground 1. It is accepted by the Council that in that event, the application to quash must fail. That being so, it is strictly unnecessary for me to consider Grounds 2 and 3. However, in deference to the arguments addressed to me on these points and in case the matter goes further I set out briefly my findings in relation to them below. These further grounds are considered on the hypothesis that the 2006 permission did not include the sub-division of Unit 7.

Ground 2: Application of s75 (3)

63. Section 75 of the Act provides, so far as is material, as follows:

> "(2) Where planning permission is granted for the erection of a building the grant of permission may specify the purposes for which the building may be used.
>
> (3) If no purpose is so specified, the permission shall be construed as including permission to use the building for the purposes for which it is designed."

64. Section 336 of the Act sets out various definitions. It begins:

> "(1) In this Act, except so far as the context otherwise requires...."

and continues

> " "building" includes any structure or erection, and any part of a building, as so defined...
> "erection" in relation to buildings as defined in this subsection includes extension, alteration and re-erection."

65. At paragraph 38 of the DL the Inspector said that the 2006 permission authorised alteration to a structure falling within this definition of building, that Unit 7 was originally one building and Units 7A and 7B were two buildings created out of that original. But in any event "building" included part of a building and "erection" included alteration "however it is interpreted". So the permission allowed the erection

of a building. He then said in paragraph 39 that as no purpose for the new buildings was specified in the 2006 permission the effect of s75 (3) was that the building could be used for any purpose for which it was designed (here said to be retail warehouse(s)). The Council did not impose a condition like Condition 3 in the 1987 permission so the retail use became unrestricted.

66. It is common ground that the Inspector here was seeking to apply s75 (3) whether he was correct in holding that the 2006 permission covered the internal works or not. So it is invoked by the Defendants as justifying the correctness of the Inspector's decision in any event.

67. Assuming that the 2006 permission was for external works only, the first question is whether s75 (3) is engaged at all. The Council says that it is not. This is because, on the facts of this case, the word "erection" in s75 (2) must be confined to erection only and not to the other meanings ascribed to it by s336 (1) and the same for "building". And on this view of the 2006 permission what was being permitted was at most the alteration to a building (Unit 7) or more appropriately, part of the building, ie its exterior frame. The "context" so requires. See the opening words of s336 (1). If this is right s75 (3) simply does not apply at all because the permission was not for the erection of a building properly so-called.

68. I do not accept this argument. The words "except so far as the context otherwise requires" are a reference to the particular provision within "this Act" in question. The words of that provision may make it inapposite to give a wider meaning to erection or "building". The "context" is thus that of the statutory language not the facts of any given case. The decision of the House of Lords in *Shimizu v Westminster City Council* [1997] 1 All ER 481, relied upon by the Council in this regard, actually supports my view of the relevant "context". See the headnote at p482a-c and the judgment of Lord Griffiths at p493b-494a.

69. But the Council also argues that the factual context for s75 (3) here would have to be a permission to alter the exterior of Unit 7 ie altering a part of a building (the exterior). So one then needs to consider the purpose for which the "building" referred to in s75 (3) is designed. I do not accept that "building" here should simply be read (in this case) as the building (Unit 7) in its altered state. Rather, I agree with the Council that at this point the focus has to be on the subject of the actual works permitted. The works here have nothing to do with the building as a whole, they are only concerned with altering the exterior. The relevant "building" within s75 (3) here is therefore the exterior. It makes no sense to ascribe as a purpose of that part of the building altered – ie the exterior – the purpose of a retail warehouse. The purpose would have to be confined to its role as an exterior surface or the new doors. Since one cannot assign the purpose of retail warehousing to the works in question – or, more accurately, to that part of the building affected by them, there is no de-restriction of the original Condition 3.

70. It would be very odd indeed if the position were otherwise. Suppose that permission was sought to make bright yellow doors for Unit 7 or some other relatively modest alteration which nonetheless required permission. Once permitted this would at a stroke remove Condition 3 because of the effect of s75 (3). Indeed, if this invocation of s75 (3) was correct it would mean that the 1987 restrictions covering all the units in this retail park would now go. That strikes me as absurd. It is no answer to say that

LPAs simply need to be vigilant always to re-impose conditions from the original permission. Consideration of that whenever an application for a modest alteration is made seems to me to be unduly burdensome. There may also be questions as to whether any such conditions "fairly and reasonably relate" to the development permitted (see *Newbury DC v Secretary of State for the Environment* [1981] AC 578, 599). In any event both Counsel for the Defendants here recognised the potential difficulties with this view of s75 (3) and sought to address it in different ways. Mr Litton, for the First Defendant, after originally accepting that an alteration like a new roof would lead to the removal of previous restrictions without more, then said that the purpose ascribed to the particular alteration had to be taken into account and that depended on what it was. Quite so, but I do not see how one ascribes retail purpose to this alteration. Or, he said, in the case of a building like Unit 7 one looks to the purpose of Unit 7. But that would then be true of an alteration to any building and would still yield the absurd results. Mr Lockhart-Mummery for GPI agreed that there were certain "tensions" within s75 (3) but said that this did not matter because here, these were extensive not minor alterations to a building or part thereof. But even so their nature still makes it inapposite to ascribe to it the purpose of the building as a whole (ie retail).

71. In my judgment therefore, s75 (3) does not have the effect of removing Condition 3 from Unit 7 had the 2006 permission been found to be limited to external works, and the Inspector erred in so finding. In the light of my ruling on Ground 1, however, this does not affect the outcome.

Ground 3: The Additional Ground

72. GPI further contends that even if the Inspector was wrong on Grounds 1 and 2, his decision can be justified on the basis that the ultimate result of the 2006 permission was the creation of two new planning units such that previous restrictions no longer apply. It is possible that the Inspector had this further point in mind also, because at paragraph 13 he refers to the question whether the restrictions were extinguished following implementation of the 2006 permission *and* the creation of two units, and in paragraph 37 he said that the implementation of the 2006 permission *and* the physical sub-division of Unit 7 into two created two new planning units and that existing rights attaching to the former planning unit (Unit 7) were lost as in *Newbury* (supra). Either way, the point is now before me.

73. Although the contention is expressed by reference to the creation of two new planning units, the more apt way to put it is surely the creation of a new chapter in the planning history of Unit 7. "Planning unit" should be confined to those cases where the concept is used in the context of deciding whether there has been a material change of use. See for example the judgment of Woolf J in *Winton v Secretary of State for the Environment* [1982] P & CR 205 at 209-210. See also *South Staffordshire District Council v Secretary of State for the Environment* 6 April 1987 in which Glidewell LJ referred to where the expression "new planning unit" was used in the different context of considering if the new permitted development created a new planning unit which had no lawful or established use except the use or uses which the permission itself authorised. A similar concept was sometimes expressed in the phrase "new chapter in the planning history". The former words were used by the House of Lords in *Newbury* (supra) and the latter in *Prossor v Minister of Housing and Local Government* [1968] 67 LGR 109. The latter expression was more appropriate.

74. This is not a case about material change of use and therefore I accept the Council's submission that what this further point really involves is a consideration of whether a new chapter in the planning history of Unit 7 has arrived. In *Newbury* (supra) Viscount Dilhorne said at p599B-C that if the grant of planning permission was of such a character that the implementation of the permission led to the creation of a new planning unit then the existing use rights attaching to the former planning unit are extinguished. In that case the question was concerned with the previous planning rights of the landowner. But it was accepted before me that the same principle applies where what is at issue are the restrictions imposed on the landowner by the LPA under the prior permission.

75. Here it is said that the 2006 permission, even if confined to external works, was such that its implementation led to the construction of two new units which marked a new chapter in the planning history of Unit 7 – such external works were only consistent with the operation of Unit 7 as two units and were necessary to enable such operation. I do not accept that a new chapter was written by the 2006 permission for the following reasons:

(1) On this analysis of the 2006 permission, the internal works relied upon to found the new chapter were not authorised by that permission. This makes it difficult to see that permission as founding a new chapter. Indeed on this view they were unlawful, giving even less reason to see them as a new chapter;

(2) Although I accept that a new chapter can be created by something less than an entirely new building I cannot see that what happened here was sufficient in any event. All that took place was an internal sub-division of an existing building. That there might be some future sub-division was actually contemplated in 1987 in the sense that Condition 4 could be altered by written agreement of the Council and in the event the 2002 permission allowed for sub-division. In the case of Unit 1, Condition 12 expressly allowed for this after 4 years. Moreover, the essential character of the site at Unit 7 – retail warehouse - even though now subdivided, remained unchanged. Its use and operational nature has stayed the same.

Conclusion

76. In the event, however, the Council's application to quash the Inspector's decision made on 6 April 2009 must be dismissed.