



Neutral Citation Number: [2023] EWHC 2553 (Admin)

Case No: CO/2144/2023 AND CO/2152/2023 AND AC-2023-LON-001800

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/10/2023

Before :

KAREN RIDGE SITTING AS A DEPUTY HIGH COURT JUDGE

Between :

WILLOUGHBY (610) LIMITED	<u>Claimant</u>
- and -	
SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES	<u>Defendant</u>
-and-	
HARBOROUGH DISTRICT COUNCIL	
-and-	
WILLOUGHBY (608) LIMITED	
-and-	
BYBROOK FINANCE SOLUTIONS LIMITED	<u>Interested Parties</u>

Mr Gregory Jones KC (instructed by **Gateley Legal**) for the **Claimant**
Ms Constanze Bell (instructed by **Government Legal Department**) for the **First Defendant**

Hearing dates: 12 September 2023

Approved Judgment

Karen Ridge, Deputy High Court Judge :

1. This is an oral hearing into the conjoined applications for permission to bring challenges under s. 288 and s. 289 of the Town and Country Planning Act 1990. Both challenges relate to two conjoined appeal decisions made by an Inspector appointed by the defendant (the Secretary of State), in which she allowed an appeal by the claimant against an enforcement notice and granted planning permission on an appeal against the non-determination of a planning application. The decisions are dated 15 May 2023.
2. Whilst statutory review proceedings under s. 288 have a paper permission stage, an application for permission to appeal under s. 289 is required to be determined at an oral hearing. In the interests of justice, by order dated 3 July 2023, Holgate J. ordered that the permission applications be considered together at a single oral hearing.

Factual Background

3. The claimant is the owner and operator of the eighteenth century Red Lion Pub, located in a conservation area in the village of Great Bowden near Market Harborough. The first interested party is the local planning authority. The second and third interested parties are mortgagees with a legal charge over the property.
4. The public house has a long-standing lawful use, not authorised by the grant of planning permission and therefore not subject to any planning conditions controlling matters such as parking. In response to restrictions imposed as a result of the Covid pandemic and in anticipation of re-opening, the claimant sought to provide further covered, courtyard spacing for outdoor seating by the erection of a series of containers and associated structures.
5. The claimant then sought retrospective planning permission for the structures from the Council. That planning application included a plan (reference L316-BRP-00-00-DR-A-0402-PO6) on which the courtyard is shown, together with a proposed on-site car park containing 6 spaces. The application was supported by a Transport Statement dealing with highway impact. The statement refers to the six off-street car parking spaces and it conducts a swept path analysis of the proposed car park. The MAC transport statement concludes as follows:

“7.1.2 In summary, the TS has identified the following:

- The site benefits from good access on foot and by cycle;
- Bus services are accessible close to the site;
- 12 cycle parking spaces will be provided within the site;
- Vehicular and pedestrian access will continue to be from Main Street;
- 6 on-site car parking spaces will be provided.

7.1.3 In light of the above, there is existing opportunity to park on-street in Great Bowden within 500m of the Red Lion throughout the day. The additional 17 car spaces as suggested by the LHA in accordance with

their previous guidance document HRfD on parking provision, could therefore be accommodated on-street across the wider network of the Appeal Site well within easy walking distance.”

6. The Local Highway Authority had objected to the development following concern about the displacement of existing car parking spaces. Previously there had been 8 car parking spaces on the courtyard but these had been removed and were not present at the date of the application. Their consultation response records:

“The submitted documents show there is an increase in covered floor space of approximately 57.65 square metres. As a guide the Highway Requirement for Development Par 4 defines the level of parking to be one customer car space per 4 square metres of public area plus one staff car space per 10 tables or 40sq. metres. Given this, the Applicant should consider provision for a further 15 customer off street car parking spaces and 2 staff parking spaces.”
7. The claimant says that this objection was misplaced as the Highway Authority had failed to appreciate that the existing lawful use of the site did not include a requirement for on-site parking and that the courtyard area could be used for outside seating for public house patrons.
8. Following a perceived lack of progress, the claimant then submitted an appeal to the defendant for non-determination of the planning application (“the section 78 appeal”). The Council subsequently provided a single putative reason for refusal, namely a failure to demonstrate that significant impacts as a result of the seating area on the transport network could be mitigated.
9. Shortly thereafter, the Council issued an enforcement notice (EN) against the unauthorised structures. This enforcement notice formed the basis of a second appeal to the defendant. One of the three grounds of appeal was that planning permission should be granted.
10. In the Inspector’s decision letter, appeal A comprised the ground (a) statutory appeal against the EN under s.174(2)(a) of the Act. Appeal B comprised the appeal against non-determination of the planning application.
11. The Statement of Common Ground agreed between the claimant and the Council notes that appeal A and B seek permission for the same development. However, arguably there are material differences in the “development” in each of these appeals. The planning application appeal sought permission for the development as proposed, namely the existing structures in the description of development and on the basis of the proposed plan, which had an area depicting on-site parking on the layout.
12. The appeal against the EN contained a deemed application for planning permission for the unauthorised development the subject of the notice, under s.177(5) of the Act, namely the structures. Within the EN there was no existing on-site parking and indeed no existing requirement to provide on-site parking. s.177(1)(a) provides that where such a deemed application is made the Inspector has the power to “grant planning permission in respect of the matters stated in the enforcement notice as

constituting a breach of planning control, whether in relation to the whole or in part of those matters or in relation to the whole or any part of the land to which the notice relates”.

13. The scope of the power under s.177(1)(a) was considered in *Bhandal v Secretary of State for Housing, Communities and Local Government* [2020] EWHC 2724) which confirmed that the act confers wide powers to consider the grant of planning permission but the power is not unfettered and requires a comparison between the matters complained of in the EN against the scheme under consideration. If the proposed scheme can properly be regarded as part of the matters enforced against then there is power to grant permission.
14. Within the statement of common ground the development for both appeals is said to be the same. However, the claimant’s appeal statement made it clear that the proposal was made on the basis that the on-site parking was unnecessary and only if the Inspector considered it necessary, should the parking be required by condition.
15. Both appeals were heard together and the Inspector summarised the main issue in respect of both appeals at DL ¶11:

“The main issue for both Appeal A and Appeal B is whether the development results in significant highways safety issues within the transport network as a result of displaced and additional parking demand within the vicinity of the appeal site.”

16. After setting out the background and analysing the arguments, the Inspector makes a number of findings and set out her final conclusion on the highways issue at ¶26 to¶28 as follows:

“Whilst it is frustrating for local residents to not be able to always park close to their property, there is no evidence before me that there is a direct link between the opening of the quadrant and a lack of availability of parking. The roads are not particularly wide in the vicinity of the site and there may be instances where there are cars parked on both sides of the road. However, the Transport Assessment provided by the appellant indicates that there is ample capacity on nearby roads. Moreover, there is no substantiated evidence to contradict that assessment.

27. The appellant has provided details of bus services which are accessible close to the site. In addition, Appeal B contains proposals for the provision of 6 on site car parking spaces and 12 cycle parking spaces. I am satisfied that suitable conditions can be imposed to require the provision and retention of the car parking and cycle parking facilities.

28. The appellant’s trip generation assessment states that there would be a maximum of 2-3 two way movements between the likely peak period hours of 1300-1400 and 1900-2000.

However, the quadrant courtyard is providing additional seating within an existing public house site. The appeal site which includes the public house itself and the outside areas to the side and rear including the quadrant make up a single planning unit. Whilst providing additional facilities for customers, I am not satisfied on the evidence before me that the development has intensified the public house use in a material way such as to generate a significant increase in parking demand or trip generation”

17. The Inspector allowed both appeals and granted two separate planning permissions, reflecting the different origins of the appeals. When dealing with the imposition of planning conditions, under a separate heading, the Inspector dealt with each appeal individually. She started by acknowledging that conditions should only be imposed where they are necessary, relevant to planning and to the development to be permitted and are otherwise enforceable, precise and reasonable.

18. In the case of appeal A, at ¶36, she concluded that

“The appellant had proposed a condition limiting numbers of customers to the appeal site to overcome the Council’s highway concerns. The Council does not consider that such a condition meets the statutory tests for various reasons including enforceability. However, I have found that the development does not result in an unacceptable impact on highway safety. In view of my findings, a condition restricting numbers is simply not necessary and does not therefore meet the relevant test.”

19. In the case of the enforcement notice appeal, she said this:

“The conditions for Appeal B are the same as for Appeal A other than the addition of a plans condition which is necessary as not all of the development is retrospective.”

20. At ¶39, the Inspector sets out her overarching conclusions:

“I conclude that, subject to the conditions set out above, the development would not cause significant impact on the transport network in terms of displaced and additional parking demand within the vicinity of the appeal site. There is no conflict with Policy GD8 of the Harborough Local Plan 2011-2031 (the Local Plan) and Policy IN2 of the Local Plan which collectively states that development will be permitted where it meets the relevant criteria including ensuring safe access, adequate parking and ensuring safe efficient and convenient movement of all highway users. I also find no conflict with Policy CAF2 of the Great Bowden’s Neighbourhood Plan (2016-2031) (NP) which supports extensions to existing community facilities provided that the development will not generate a need for parking that cannot be adequately catered for. I therefore find no conflict with Paragraph 110 of the

Framework which refers to development providing safe and suitable access for all users or Paragraph 111 of the Framework which states that development should only be prevented or refused on highway grounds if there would be unacceptable impact on highway safety, or the residual impact on the road network would be severe.”

21. The grant of planning permission in respect of appeal A, contains the following condition:

“1) a. The containers hereby permitted shall be demolished to ground level or be removed and all materials resulting from the demolition shall be removed within five months of the date of failure to meet any one of the requirements set out in (i) to (ii) below:

(i) Within 4 months of the date of this decision the car parking area shown on Plan No L316-BRP-00-00-DR-A0402-P06 has been laid out in accordance with that Plan for 6 cars to be parked and for vehicles to turn so that they may enter and leave the site in forward gear.

ii) Within 4 months of the date of this decision the cycle storage area shown on Plan No L316-BRP-00-00-DR-A0402-P06 has been laid out in accordance with that Plan for 12 bicycles.

b. Upon implementation of the schemes specified in (i) and (ii) of this condition, those schemes shall thereafter be retained and kept available for the parking of vehicles and cycles.

c. In the event of a legal challenge to this decision, or to a decision made pursuant to the procedure set out in this condition, the operation of the time limits specified in this condition will be suspended until that legal challenge has been finally determined.”

22. The permission associated with appeal B, contained two relevant conditions:

“1)The development hereby permitted shall be carried out in accordance with drawing Nos L316 – BRP -00-00 – DR-A-0402 – P06, L316 – BRP-00-00 - DR-A- 0413 – P01 and L316 – BRP -00-00 – DR-A- 0403 – P08.

2) The containers hereby permitted shall be demolished to ground level or be removed and all materials resulting from the demolition shall be removed within five months of the date of failure to meet any one of the requirements set out in (i) to (ii) below:

(i) Within 4 months of the date of this decision the car parking area shown on Plan No L316-BRP00-00-DR-A- 0402-P06 shall have been laid out in accordance with that Plan for 6 cars to be parked and for vehicles to turn so that they may enter and leave the site in forward gear

(ii) Within 4 months of the date of this decision the cycle storage area shown on Plan No L316- BRP-00-00-DR-A- 0402-P06 shall have been laid out in accordance with that Plan for 12 bicycles.

b. Upon implementation of the schemes specified in (i) and (ii) of this condition, those schemes shall thereafter be retained and kept available for the parking of vehicles and cycles.

c. In the event of a legal challenge to this decision, or to a decision made pursuant to the procedure set out in this condition, the operation of the time limits specified in this condition will be suspended until that legal challenge has been finally determined”

23. Following the hearing, the Inspector gave both parties the opportunity to consider and comment on draft planning conditions before the decision was issued. The parties were confined to making comments about the wording of the Inspector’s suggested conditions and were unaware of the outcome at that point. I do not accept the proposition advanced by the defendant that the claimant, in providing comments, had accepted the principle of a condition requiring car parking on-site. That is clearly not the case.

Grounds of Challenge

24. Both challenges rest on the contention that there is no planning justification for a requirement to provide the on-site car parking because the imposition of such a condition on each of the permissions is unsupported by the Inspector’s prior findings.
25. The first ground of challenge is brought on the basis that (in both appeals) the Inspector has mis-directed herself and/or acted unreasonably in imposing the requirement for on-site parking and, in the absence of such provision, the benefit of the planning permission would be lost. In the alternative, in the case of the enforcement notice appeal permission, the claimant contends that, even if the Inspector were entitled to impose such a condition in the planning application, s78 appeal, she was not entitled to do so in relation to the enforcement notice appeal because that application was against the unauthorised development with no proposal for on-site parking.
26. The second ground relies on the proposition that the Inspector failed to apply the appropriate legal test for the legality of planning conditions, namely that it must, inter alia, be necessary. Alternatively, even if the legal test had been properly applied, the claimant contends that in the case of the enforcement notice appeal, there was no on-site parking proposed or contained within the unauthorised development for which the claimant sought permission.

27. The third grounds is the contention that the Inspector failed to give adequate reasons for the imposition of the conditions in light of earlier findings.

Justiciability

28. The defendant raises a preliminary issue. Ms Bell contends that the claim is not justiciable because, essentially, the claimant is not aggrieved by the decision since the appeals succeeded in full. Ms Bell asserts that the claimant is now seeking to use the Inspector's findings in order to obtain a better outcome than that which was originally sought on appeal. The better outcome is a planning permission without a requirement for on-site parking.
29. The Summary Grounds of Resistance refer to the "unusual request for relief striking down two conditions but retaining the permissions granted". The claimant's grounds contend that the parking conditions on each permission are void and otherwise unenforceable and if successful, invites the court to excise them from the planning permission. Relief is a matter for the substantive hearing of course. At this oral hearing Mr Jones confirmed that the claimant was not seeking to circumscribe the court's options in terms of relief and he accepted that if the challenges were successful quashing of the permission may follow.
30. The claimant's grounds of appeal clearly make reference to the claimant's primary case being a request for the Inspector to grant planning permission without a condition in respect of the "alleged" parking demand. The claimant's second position was that, if the Inspector concluded that there was an unacceptable highway impact which required a condition to mitigate the harmful effects, then the claimant would be willing to discuss the wording of any condition. The grounds read as follows:

"3.5 In the first instance the Appellant would therefore respectfully invite the Secretary of State's Inspector to grant planning permission without any planning condition in respect of the alleged parking demand impact or highway impact of the use of the Development - such PH use of the Appeal Site is already permitted, and there is no current planning requirement to provide any parking spaces within the Appeal Site."

31. It is clear that the claimant was contending for an outcome which did not require the provision of any on-site car parking. Whilst the outcome as far as the claimant was concerned was positive, it was on less favourable terms than had been contended for. As such, if there has been an error, then the matter is justiciable and the claimant is entitled to seek relief in the usual way.

Analysis

32. I shall take grounds (1) and (2) together since they cover the same issues and findings. The defendant submits that the real issue between the claimant and the Council was a dispute as to whether an 'additional' 17 off-street car spaces should be provided, as opposed to the 6 spaces being offered by the claimant.
33. The Inspector's reference at ¶11 in her framing of the main issues as to the effect of "displaced and additional demand" is notable. It must be viewed in the context of the

Inspector acknowledging at ¶15 that there is no parking provision currently at the appeal site following the pub closure. The additional demand logically relates to that demand generated by additional customers using the covered area. The displaced demand logically is a reference to the demand which would have been satisfied by the on-site pub parking prior to its closure.

34. At ¶17 the Inspector notes that the appellant had indicated a willingness to provide the parking in accordance with the plans submitted for appeal B. But this must be viewed in relation to the case advanced by the appellant that it would provide the car parking if it was deemed necessary and the first preference was for no car parking.
35. At ¶19 the Inspector sets out the Local Highway Authority position asserting a shortfall of 17 on-site spaces. She goes on to consider the appellant's transport assessment at ¶21 which sets out survey results of the availability of on-street parking at a time when the public house car park had been closed. At ¶22 and ¶23 she says; .

“22. The survey concludes that even if the Council's figure of 17 spaces was accepted that extra demand could be accommodated on street, because on street parking is not at capacity or under stress on the evidence available. The parking data does indicate that on street parking is not saturated and thus there would be availability of on street parking.

23. The Council has not produced any assessments to contradict the appellant's evidence. The view of the LHA is that the PH should be providing its own off-street parking. The PH is a valued community asset which has operated in previous years with capacity in excess of 200 customers with limited parking on site. The provision of 6 car parking spaces by condition would provide allocated parking spaces which with the addition of cycle storage spaces, will provide some off street facilities. However, if on street parking capacity is available, those spaces can be used by the PH customers in the absence of any Traffic Orders in force to restrict usage and would not cause a highway safety issue on the evidence available.”

36. That appears to be an acceptance of the transport assessment's conclusion that (in the absence of the provision of any on-site public house parking when the survey was undertaken) there was sufficient on-street parking without causing any highway safety issues. That conclusion is reinforced at ¶26 when the Inspector records “Whilst providing additional facilities for customers, I am not satisfied on the evidence before me that the development has intensified the public house use in a material way such as to generate a significant increase in parking demand or trip generation”.
37. At ¶27 the Inspector again notes the offer to provide 6 on-site spaces and says that she is satisfied that conditions could be imposed to secure those matters. Again use of the word “could” is notable, it implies that a condition could be secured if it was considered necessary.
38. Paragraph 28 of the decision letter contains the Inspector's conclusions on the highway issue, she states:

“Whilst providing additional facilities for customers, I am not satisfied on the evidence before me that the development has intensified the public house use in a material way such as to generate a significant increase in parking demand or trip generation”

39. In relation to conditions in appeal A, at ¶33 the Inspector acknowledges that conditions should only be imposed when they are necessary, relevant to planning and to the development to be permitted.
40. At ¶33 it is recorded that conditions relating to the car parking...are imposed to ensure that the facilities are provided and to make the development acceptable in planning terms. The conclusion in the next sentence that the car parking is necessary to make the development acceptable runs counter to the prior findings that there is no substantiated evidence to contradict the appellant’s transport assessment that there is sufficient on-street capacity.
41. The same conclusions on conditions are carried forward in relation to the planning appeal B and the car parking conditions are imposed. The conclusion that the on-site car parking should be required to make the development acceptable is irreconcilable with the earlier findings.
42. Arguably, there are differences between the development considered and the permissions granted in appeal A and appeal B. Condition 1 on the s.78 appeal planning permission requires development to be carried out in accordance with the site layout plan so there is an argument that the on-site parking is part and parcel of the proposed development and the car parking should be provided as part of that proposal. I note that there is no such condition on the enforcement appeal permission.
43. Irrespective of the effects of condition 1 on the appeal B permission, the requirement in condition 2, for on-site parking to be provided failing which the containers must be removed, suffers from the difficulty that the requirement does not appear to be supported by the conclusions. Both limbs of grounds 1 are therefore plainly arguable.
44. The tests for the lawfulness of planning conditions are well-known. They are set out in *Newbury District Council v Secretary of State for the Environment [1981] AC 578*. Any conditions imposed must be for a planning purpose and not for any other purpose; conditions must fairly and reasonably relate to the development permitted; they must not be so unreasonable that no reasonable decision maker would have imposed them. Those tests are repeated in the National Planning Policy Framework at ¶55 and in the National Planning Policy Guidance at paragraph 003.
45. On the face of it, the Inspector’s findings do not disclose a need for the provision of on-site parking to address an otherwise unacceptable planning harm. I further accept Mr Jones’ proposition that the development at issue did not involve a material change of use of the public house space and therefore it is arguable that the condition did not fairly and reasonably relate to what was an enclosure within existing public house floorspace. For these reasons both limbs of ground 2 are arguable.
46. In giving permission on Grounds 1 and 2, the issues raised in Ground 3 are academic and I am not considering those further at this stage.

47. Permission to bring the s.288 statutory review is therefore granted on Grounds 1a and 2a. Permission to challenge the enforcement notice appeal decision is granted on both limbs of grounds 1 and 2.
48. I am happy to receive submissions with respect to the appropriate form of order to enable this matter to proceed to a substantive hearing. If the parties could communicate with each other prior to the formal hand down which I intend to deal with remotely, and without attendance, at 10.30am on Friday 13 October 2023.