Elegant Lifestyle Parks Limited

Certificate of Lawful Development

Westfield Lakes Caravan Park, Far Ings Road,
Barton-Upon-Humber, DN18 5RG

Date: 15/01/2025

Response to Officer Queries

For Application under Section 191 of the Town and Country Planning Act 1990 for *"Confirmation that the site benefits from the 1991 Planning Permission Ref 7/113/1991 dated 3rd December 1991 for 'remove condition 2 of planning permission BA/3/72B and 7/RBT/16/80 to allow all year round residential use of the existing caravan site'"*

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LPL Project No: 1237

Date: 15/01/2025

Version: 1

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Contents

Appendices

1. Introduction

1.1. Laister Planning Limited ('Laister') has prepared this statement in support of application ref: PA/2024/1181 made under Town and Country Planning Act 1990 (TCPA, as amended) Section 191 (S191) for a Lawful Development Certificate (LDC) for *"confirmation that the site benefits from the 1991 Planning Permission Ref 7/113/1991 dated 3rd December 1991 for 'remove condition 2 of planning permission BA/3/72B and 7/RBT/16/80 to allow all year round residential use of the existing caravan site'"* at Westfield Lakes Caravan Park, Far Ings Road, Barton-upon-Humber, DN18 5RG. The type of LDC sought is known as a Certificate of Lawfulness of Existing Use or Development (CLEUD).

1.2. The statement's purpose is to respond to Officer' Queries, set out in various emails, particularly an email dated 2nd December 2024, which are as follows:

- *"Whilst the Licensing Team clearly relied on the 1991 permission in granting the 2000 site licence, I am not at this stage convinced there is robust evidence to show that the 1991 was implemented within 5 years of the grant. There is no evidence that the conditions were satisfied.*
- *The Council tax records show which vans were registered but don't show a pattern of occupation – it could be that they were occupied in accordance with the earlier permissions.*
- *As you know, the Council has earlier referred to the fact that the use of the land changed from caravan park to landscaped grounds of the hotel. My view is that there is some force in this argument, in that the use of the hotel as a conference centre/wedding venue etc is simply not consistent with the access drive being lined by permanent residential static caravans.*
- *Various planning permissions were granted for the site in the 2000s which were subject of HRA assessments (e.g. PA/2003/1628 (which gave existing use as hotel and conference centre). None of the information provided in respect of these assessments referred to a residential caravan park subsisting on the site. Also referred to future plans and these do not refer to caravan park and again, the plans appear inconsistent with the access coming through a residential static site."*

1.3. In addition, as a separate matter, the officer has raised a query regarding whether a material change of use which has not yet gained lawfulness through the passage of time could replace a lawful use gained by way of a planning permission.

1.4. The Local Planning Authority (LPA) is North Lincolnshire Council, and the officer is Mr Paul Skelton.

1.5. This Statement should be read in conjunction with the following documentation submitted with the CLEUD application:

- The Application Forms (prepared via the Planning Portal);
- A Laister Planning Supporting Statement (SS) dated 14/10/2024, and its

appendices; and

- A Site Location Plan (Laister Planning Figure 1).

1.6. This submission should also be read in the context of the applicant letter dated XX, providing a reply to consultee comments on the CLEUD application.

1.7. It is noted that the assessment of this CLEUD is primarily revolving an assessment of documentary evidence pertaining to the historical use of the site. The only person who has made comment on the application which has direct knowledge of the site is Mr Michael Lee, of David Lee Photography, who has provided a statutory declaration in support of the Applicant's version of events. His statement should therefore carry significant weight in favour.

1.8. Interpretation of historical information should be considered within the context of what might happened on site some 20 or 30 years ago. That means that if there is no clear evidence of something taking place, it should be assumed that it has not. We come to this point again throughout this statement.

1.9. Finally, it is helpful to remind the reader that the Planning Practice Guidance (PPG) states with respect to the evidence regarding CLEUD applications:

1.10. The applicant who is *"...responsible for providing sufficient information to support an application, although a local planning authority always needs to co-operate with an applicant who is seeking information that the authority may hold about the planning status of the land. A local planning authority is entitled to canvass evidence if it so wishes before determining an application. If a local planning authority obtains evidence, this needs to be shared with the applicant who needs to have the opportunity to comment on it and possibly produce counter-evidence"* (PPG, 006 Reference ID: 17c-006- 20140306).

1.11. It goes on to state: *"In this case, the Guidance for applications for an existing use further adds "...if a local planning authority has no evidence itself, nor any from others, to contradict or otherwise make the applicant's version of events less than probable, there is no good reason to refuse the application, provided the applicant's evidence alone is sufficiently precise and unambiguous to justify the grant of a certificate on the balance of probability" (PPG, 006 Reference ID: 17c-006-20140306)."*

1.12. We consider that the applicant's evidence

2. Query No 1: Whether the 1991 Permission was Implemented

2.1. A query has been raised about whether sufficient evidence exists to demonstrate that the 1991 Permission (Ref: 7/113/91) was implemented, notwithstanding the issuance of a caravan site licence under the Caravan Sites and Control of Development Act 1960 (the 1960 Act) on 22nd August 2000 (see Appendix 12 of our Supporting Statement). Reference was made to a lack of discharge of condition approvals with the 1991 Permission.

2.2. Implementation of the permission was required by 2nd December 1996, some 28 years ago, in accordance with Condition 1 of the permission.

2.3. It is noted that until recently, neither the LPA nor other parts of the Council have questioned the 1991 Permission's implementation. This weighs heavily in favour of the fact that the permission was implemented given the passage of time. However, as we set out below, there is no doubt that it was in fact implemented.

The 1991 Permission

2.4. A copy of the 1991 Permission can be found in Appendix 8 of our Supporting Statement. It was issued on 3rd December 1991, and was granted under Town and Country Planning Act (TCPA, as amended) Section 70, for full planning permission for *"remove condition 2 of planning permission BA/3/72B and 7/RET/16/80 to allow all year round residential use of the existing caravan site; - Westfield Lakes Site, Far Ings Road, Barton-upon-Humber."* It allowed for the establishment of a residential caravan site in place of a holiday caravan site.

2.5. It contained eight conditions, only which three are relevant, as potentially being framed as pre-commencement conditions that might have required details to be approved prior to the implementation of the permission, as follows:

- 1. Timescale – the development must be begun not later than the expiration of five years from the date of the permission.
- 4. *"No additional caravans, chalets or mobile homes shall be brought onto the site before a plan has been submitted to and agreed in writing by the District Planning Authority to show details of the layout of the development and proposals for its landscaping. The landscaping proposals shall include indications of all existing trees and hedgerows on the site, and details of any to be retained, together with measures for their protection during the course of development."*
- 8. *"No additional units shall be constructed on the site until a scheme has been submitted to and agreed in writing by the District Planning Authority indicating the external finishes and colours of the additional units."*

The Case Law

2.6. Before discussing the conditions, I set out below the case law regarding conditions discharge and the implementation of permissions.

2.7. There is a long-established set of case law known as the *Whitley* principles, after the original 1992 Court of Appeal case *F. G. Whitley & Sons v Secretary of State for Wales [1992] 64 P. & C.R. 296*, which sets out the tests for considering whether pre-commencement condition is a "true" condition precedent which means a failure to discharge it before works commences means that the permission was incorrectly or unlawfully implemented. This original case was followed on by a number of other Court of Appeal and High Court cases, including:

- *Carnwath J in R. v Flintshire CC Ex p. Somerfield Stores Ltd [1998] PLCR 336*
- *Leisure Great Britain Plc v Isle of Wight CC [2000] PLCR 88*
- *R (on the application of Hart Aggregates Ltd) v Hartlepool BC [2005] EWHC 840 (Admin)*
- *Greyfort Properties Ltd v Secretary of State for Communities and Local Government and Torbay Council [2011] EWCA Civ 908*
- *Bedford Borough Council v The Secretary of State for Communities and Local Government and Aleksander Stanislaw Murzyn [2008] EWHC 2304 (Admin)*

2.8. The *Whitley* principles establish the single question to be addressed in considering whether a planning permission has been commenced is whether the development was permitted by the planning permission read together with the conditions imposed on it. If the material operations concerned contravened the conditions contained in the permission, then the material operations could not properly be described as commencing the development authorised by the permission.

2.9. *Hart Aggregates* ruled that the principle that a planning permission cannot have been lawfully implemented where all conditions precedent have not been discharged does not apply to all conditions but only to those which *"go to the heart of the permission"*. This case distinguished between conditions that require something to be done (such as *"prior to commencement…"* or *"before development takes place…"*) and those conditions that expressly prevent development from taking place (such as *"no development shall take place until…" or "not to commence development until…"*). The former would be considered a breach of condition that can be enforced against. In the latter, development cannot be taken to have lawfully commenced until the condition has been discharged, subject to the condition going to the heart of the permission.

2.10. The *Bedford Borough Council v The Secretary of State for Communities and Local Government and Aleksander Stanislaw Murzyn* case very succinctly summarises the principles, so I have quoted them here:

> *"…(1) a distinction must be drawn for stage 2 purposes between (a) a condition which in truth merely stipulates that something must be done before the time when the development commences, and (b) a condition which in truth goes further and stipulates that the development cannot commence unless the condition is fulfilled. A breach of condition (a) enables the local authority prima facie to take enforcement action to remedy the non-performance of the stipulated action, but condition (b) if broken renders the development*

unlawful and is therefore subject potentially to enforcement action itself, i.e. cessation of the operation in question, if it is quarrying, or demolition of the house or prevention of further work on it, if it is a permission to build. This distinction mirrors the two different forms of breaches of planning control set out in section 171(A)(1)(a) and (b) of 1990 Act (see also in the context of enforcement the observations of Ouseley J in the Hammerton case at paragraph 141 and the observations which I have already quoted of Sullivan J in paragraph 57 of Hart Aggregates itself).

(2) The Whitley principle is only engaged where there is a breach of a class (b) condition. That is because only here can the development as a whole properly be described as unlawful, and it is only if the development as a whole is unlawful that its commencement is deprived of effect for the purpose of running of time.

(3) It is thus necessary to examine and construe the condition carefully, to see whether it is a class (b) condition or, to put it another way, a "true" condition precedent. I interpose to say that in earlier cases this particular issue did not usually arise, since it was accepted that if there was a breach of condition the Whitley principle was engaged. Alternatively, the relevant condition was clearly a true condition precedent in any event.

(4) The paradigm example of a true condition precedent is that referred to by way of example in paragraph 59 of the judgment of Sullivan J, where he refers to a condition which began with words like "No extraction shall take place except in accordance with a restoration scheme ..." Another example would be condition 8 in the Leisure GB case or condition 21 in the Hammerton case. Provided that it is made clear enough in the condition that the development's commencement itself is truly conditional upon the fulfilment of the condition, the subject matter of the condition need not be central; i.e. not concern itself directly with the activity permitted, for example, the extraction or the building.

(5) Other wording might achieve the same result: see the example given in the last sentence of paragraph 59 of the judgment of Sullivan J. At first blush, the words here might not be appropriate to do the job required by Sullivan J, although he says clearly that they do. They seem similar to the words of condition 10, which he rejected as a condition precedent. But I think the explanation lies in the origin of the example as being an outline planning permission. Here, because everything needed to have detailed approval at the outset, the conditions were very likely to be seen as true conditions precedent in any event, and the language here is also important. It refers to before "any" development takes place. This is the language used in the condition for the outline planning permission granted in the Oakimber case. Condition 2 there was that: "This approval is given subject to detailed plans of the layout of buildings, open spaces and drainage and particulars of the type of industries to be provided, being submitted to and approved by the Planning

Authority before any development takes place."

(6) Where, therefore, there is a condition which is manifestly not about the essential subject matter of the permission, the fact that it has to be fulfilled before the relevant operation commences does not mean that the essential operation cannot begin without its fulfilment. Condition 10 fell into this category in the judgment of Sullivan J.

(7) In this regard there was considerable debate before me about Sullivan J's reference to a condition which goes to "the heart of the permission". It has clearly been seized upon to some extent in the planning world because, in the case before me, Mr Murzyn's advisers had contended in their application for a certificate that condition 10 did not go to "the heart of the permission", whereas in his response to this application on behalf of the council, Mr Connell asserted that it most certainly did. Paragraph 61 of the judgment of Sullivan J certainly gives rise at least to the possibility that if a condition was concerned centrally with the activity which is the subject of the permission, it might achieve condition precedent status even without the use of the particular language suggested in paragraph 59. Outside the context of outline permissions that might be rare, but certainly not impossible. In a detailed planning permission for extraction, for example, a condition that some aspect of the actual extraction process had to be submitted and agreed before extraction began could well fall into this category…."

2.11. In summary, there is a sequential test that one must go through to determine whether a planning permission have been implemented where there are pre-commencement conditions attached to the permission:

- Firstly, the condition must be construed; is it a pre-condition to lawful development by expressly forbidding development before it is discharged?
- If so, has there been compliance (a question of fact)?
- If it has not been complied with, can the developer bring himself within one of the recognised exceptions that are summarised in the case law above, such as not going to the heart of the permission (which is rare outside of outline permissions)?
- Finally, even if he cannot bring himself within an exception, would a decision to initiate enforcement be judicially reviewable e.g. because it would be irrational or an abuse of power?

2.12. We discuss this principle within the context of the three conditions of the 1991 Permission below.

The Conditions

2.13. In simple terms, there were no pre-commencement-style conditions attached to the 1991 Permission, as none of these prohibited some development that was authorised by the permission from taking place prior to the discharge of the conditions. As such, the permission could be implemented at any time (indeed it was).

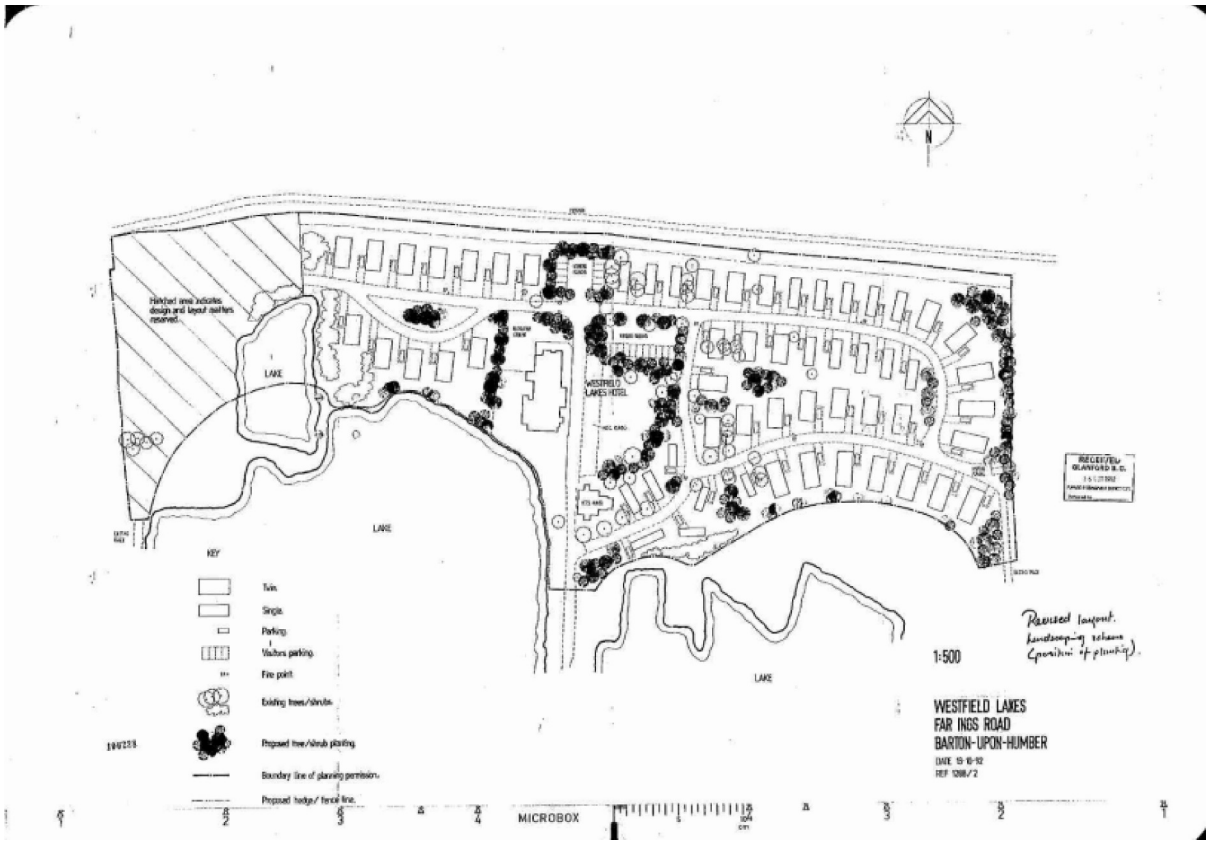
- Condition 1 is a standard timeframe condition and does not forbid development before it could be discharged.
- Condition 4 required the approval of a landscaping plan before any additional caravans are brought onto site. It is silent about the use of any existing caravans that were on site at the time, and so it is not a true condition precedent as it also does not forbid all development authorised by the permission before a discharge of condition is obtained.
- Condition 8 required that prior to any additional caravans being constructed on site, their external appearance must be agreed with the LPA.

2.14. None of the conditions forbade the conversion of existing caravans to residential purposes, and so none are true condition precedents, which mean that the failure to discharge them would have invalidated the permission. They would fail the relevant tests of the *Whitley* principles and so any failure to discharge the conditions in advance of carrying out the works associated with those conditions would have simply amounted to a breach of condition.

2.15. In any event, we can set out below that it is likely that both conditions were discharged prior to the development commencing.

Condition 4

2.16. As regards Condition 4, we have found in the planning history record supplied by the Council that the owner had submitted full landscaping plans post-grant of the permission to reflect the requirements of Condition 4. The following plan was stamped by the Council as being received on 16th October 1992, some nine months after the permission was granted and well before its expiry:



2.17. It clearly sets out the location of existing trees as well as some additional trees and other landscape planting being proposed with the development, in broad accordance with the requirements set out in Condition 4. It has the following hand-written note on it: *"revised layout landscaping scheme (position of planting)"*, although it is not known when this was added and by whom, but the text implies that its purpose was to represent the required landscape plan and was taking on board comments received in relation to a previous plan.

2.18. It is unlikely that the owner would have gone to such great expense and submitted such a plan after the grant of the permission if there was no intention to implement it thereafter. In our view, it is highly likely that Condition 4 was discharged via the submission of this plan, even if the Council's record is incomplete regarding whether it had given its formal approval of the plan after the plan was submitted.

Condition 8

2.19. As regards to the discharge of Condition 8, there are numerous copies of documents showing the external appearances of the caravans within the planning history records for the permission. These also contain references to proposed colour schemes for each caravan. It is not known when these were submitted, but they included copies of the designs for Omar Homes Limited -Constructed units. The details found within them certainly reflect the details that were required by Condition 8. The details found on the planning history file, are as follows:

- 'Ranchhouse – standard, Colour Scheme 3'
- 'Ranchhouse – Executive, Colour Scheme : 2'

- ‘Waveney -Standard, Colour Scheme: 3’
- ‘Waveney – Executive, Colour Scheme 1’
- ‘Domek, Colour Scheme 2’
- ‘Breckland, Colour Scheme 3’
- ‘Suburban, Colour Scheme 1’
- ‘Colorado, Colour Scheme 1’
- ‘Southdown, Colour Scheme 1’
- ‘Brancaster, Colour scheme: 4’
- ‘Ashdale, Colour Scheme 2:’
- ‘Sheringham, Colour Scheme 1’

2.20. For brevity reasons, I have not enclosed these here; you should be able to access these records, or ask the planning administration team to provide them, for verification. However, this kind of detail would suggest that the applicant had made all relevant efforts to discharge Condition 8 on the balance of probabilities, even if the Council did not issue any formal confirmation of discharge.

2.21. Both conditions relating for additional caravans were likely discharged before implementation.

Material Operations To Implement the 1991 Permission

2.22. Laister is also confident that the 1991 Permission was implemented before its expiry, and so remained extant thereafter.

2.23. In relation to both conditions, both were silent regarding the conversion of existing units from use for holiday purposes (or nine-month residential purposes) to permanent year-round residential uses. The use of the site for more residential units than was previously authorised would have relied on this later permission.

2.24. We know that Council Tax was paid on seventeen (17) caravans before 2nd December 1996. This is set out in the evidence supplied at paragraph 4.42 of our Supporting Statement - see Caravans Nos 1, 4, 12, 15, 16, 17, 23, 24, 26, 28, 30, 31, 72, ‘Pitch 12’, 18, 41, 43 and another caravan named ‘Summerland’. Prior to the 1991 Permission, only five (5no) caravans were permitted to be permanently residentially occupied, as noted in the *“Report for District Joint Planning Advisory Sub-Committee”* held on 8th July 1991 (see Appendix 1 for a copy). It stated under “Proposal” the following:

> *“This application seeks a variation in the terms of earlier permissions which have been granted. Those permissions permit development of 88 units on a nine month residential basis or for a 365 day holiday use. What is requested is a lifting on the restriction so that all -year round residential use may be undertaken.*
>
> *Initially, the applicant stated he would like to site as many as 88 units on the*

site, the maximum number permitted by present permissions. During consideration of the application this has been reduced to 65 units ***in addition to the existing five already there which enjoy a permanent residential permission.***

At present, there are around 20 caravans/mobile homes on the site in total."

2.25. As such, the permanent residential occupation of any one of the additional 12 caravans that were already on site by that time would only be lawful as part of the 1991 Permission, as previously, the 1981 Permission only allowed for 5no residential caravan on site. This is regardless of whether Conditions 4 or 8 were discharged. In this regard, we know that at least 17 residential caravans were occupied, as they were liable to Council Tax (as set out in the following section of the report, a caravan used for permanent residential purposes on a year-round basis is liable to Council tax in the same way as other dwellings, so this represents a very good proxy for permanent residential occupation).

2.26. A few other points to make about the implementation matter.

Removal of the Toilet Block

2.27. It is also noted that the toilet block has been removed in the eastern end of the Eastern Field. The removal of this block likely required planning permission – the definition of development was amended in the TCPA via the Planning and Compensation Act 1991 on 25th November 1991 to include demolition under Section 55(2)(g) (works that require planning permission), and subsequently further amended on 27th July 1992 to specifically refer to demolition as a "building operation" under Section 55(1A)(a). The removal of the toilet block was a necessary part of complying with the approved layout details of the plan which I referred to above as regards to the discussion around Condition 4. Its removal alone would likely to have resulted in the implementation of the 1991 Permission.

The Provision of the new Access Road

2.28. Another point is that the new access road to the eastern side of the site was installed by 1999, in accordance with Condition 7. It can be seen in the following aerial photograph from Getmapping as being completed by the date of this photograph:

2.29. Although the details should have been approved by the Planning Authority, failure to obtain approval for the roadway construction was only a breach of condition and did not prevent the roadway itself from being installed as part of the permission's requirements.

2.30. There are no records of the Council raising an enforcement notice in relation to the provision of the new access road, although the Council would have been aware of its installation as they were processing numerous applications on site between 1998 and 2003. We would have expected either the Wildlife Trust or English Nature to raise concerns if the access was installed without permission, given the access is located within the SSSI.

The Caravan Site Licence

2.31. Finally, the Caravan Site Licence No 14 was issued on 22nd August 2000, and specifically refers to the 1991 Permission as the relevant permission for Caravan Sites and Control of Development Act 1960 Section 3(3)[1]. That decision was taken by North Lincolnshire Council, as Licensing Authority. However, they would not do that in isolation, and it is likely that they consulted with the Planning Authority within the same Council. Even if they didn't, the

[1] *Section 3(3) states: "A local authority may on an application under this section issue a site licence in respect of* ***the land if, and only if, the applicant is, at the time when the site licence is issued, entitled to the benefit of a permission for the use of the land as a caravan site*** *granted under Part III of the Act of 1947 otherwise than by a development order."*

principles established in *White & Anor v South Derbyshire District Council [2012] EWHC 3495 (Admin)* would apply. In discussing the issue of a site licence which later turned out to be invalid/ultra vires for a lack of confirmed planning permission, and where criminal proceedings were initiated by the Council to force an owner to obtain a fresh caravan site licence, the Court was clear in Paragraphs 41-42 that a caravan site licence which may ultimately be found to be invalid but is not invalid on its face is not without legal consequence that can be relied on by various parties. A copy of that judgment can be found in Appendix 2.

2.32. The Council issued the 2000 Caravan Site Licence. The legal consequence of that decision is that the Council's licensing team believed that the 1991 Permission had been correctly implemented and was extant. That is a statutory decision; whilst it does not convey a planning permission, it does assist with regard to how the Council viewed the site in 2000. It is important to add here that we must assume the Council was acting competently as a licensing authority and that it did make the necessary enquiries with the planning authority. That caravan site licence remains extant today, having not been revoked by the courts. It continues to imply that the Council has accepted that the 1991 Permission remains extant.

Conclusions on Implementation of the 1991 Permission

2.33. We are discussing a matter that had to take place almost 30 years ago. From the documentation available, there is no evidence to indicate that the 1991 Permission was not correctly implemented. However, there is documentary evidence that it was:

- There are caravans on site after the 1991 Permission was granted.
- Council Tax records confirm more caravans were occupied residentially after the date of the permission (via Council Tax records) than below; and
- a road was installed in accordance with that permission.

2.34. It is also noted that the applicant appears to have sought to discharge any conditions that would restrict the number of caravans that could be stationed on site, through submitting a landscape plan (for Condition 4) and external appearance details for the caravans (for Condition 8). Neither of those conditions had to be discharged prior to implementation, but it still supports the position that the applicant sought to resolve any outstanding details with the Council in good time to enable them to deliver the caravan site as they intended.

2.35. In summary, we can find no records to indicate that the 1991 Permission was not implemented on the balance of probabilities, and indeed, we can also find no evidence that the LPA had ever doubted its implementation in the past when making decisions with regard to the site's planning status. The only conclusion that can be drawn is that it was correctly implemented.

3. Query No 2: Council Tax and Permanent Residential Occupation

3.1. A query was raised as to whether Council Tax was paid on 17no static caravans demonstrates that the units were occupied residentially in accordance with the 1991 Permission, or whether they were simply permitted by some previous permission and/or occupied in some other way. It was suggested that registration for Council Tax on a caravan is not necessarily equates to a pattern of occupation.

3.2. Before discussing this, it is helpful to note that no other permission granted the owner the right to station more than five (5no) permanent residential caravans other than the 1991 Permission, as was noted in the previous section.

3.3. As we set out below, Council Tax is only paid where a caravan is used for permanent residential purposes on a year-round basis; otherwise, the caravan site comprises a commercial holiday caravan site for which Business Rates are paid by the owner of the site itself, even it is occupied residentially for any shorter time period other thorough the year. There is simply no scenario where Council Tax is paid on non-permanent residentially occupied caravans. Council Tax is a very good proxy for evidence of year-round residential occupation of a unit.

3.4. This is referred to clearly in the HMRC's guidance on VAT for caravans.[2] It states at Paragraph 4.4:

> **4.4 The liability of local authority charges**
>
> Where a caravan is used as a person's sole or main residence, it will generally be subject to Council Tax, for which the resident or owner of the caravan or park home will be liable.
>
> Caravans on seasonal or holiday parks will not be subject to Council Tax (unless used as a person's sole or main residence). Instead, the owner of the caravan site will be liable to pay non-domestic rates for the whole site.
>
> If, as a site owner, you pass on the cost of non-domestic rates to individual caravan owners, the recharge will form part of the pitch fee or rental and will be standard rated.

3.5. It is also clear in the regulations. The above HMRC guidance refers to the Non-Domestic Rating (Caravan Sites) Regulations 1990, which states in 2(c):

[2] Caravans and houseboats (VAT Notice 701/20) - GOV.UK

Interpretation

2. In these Regulations —

(a) "caravan" has the same meaning as it has for the purposes of Part I of the Caravan Sites and Control of Development Act 1960 (1)("the 1960 Act");

(b) "caravan site" means any land in respect of which a site licence is required under Part I of that Act, or would be so required but for paragraphs 4, 11 and 11A of Schedule 1 to that Act (2)(exemption of certain land);

(c) a caravan pitch is a "pitch for a leisure caravan" if in accordance with any licence or planning permission regulating the use of the caravan site a caravan stationed on the pitch is not allowed to be used for human habitation throughout the year;

(d) "relevant site" means a caravan site which —

(i) includes some property which is not domestic, and

(ii) has an area of 400 square yards or more; and

(e) "site operator" means the person who is for the purposes of Part I of the 1960 Act the occupier of the caravan site.

3.6. The 'permanent residential' test is clear in part (c) of those Regulations: any caravan must be permitted to be occupied *"throughout the year"* for it to be exempt from the definition of *"leisure caravan"* found in the Regulations, to which Business Rates would apply. Conversely, any caravans which were not capable of year-round occupation were simply *"leisure caravans"* according to the Regulations, even if they could be occupied residentially for a shorter period than the full year. They would not normally be subject to Council Tax.

3.7. Those which are habitable throughout the year are subject to Council Tax as being used for permanent residential purposes; it is statutorily defined. Indeed, the Local Government Finance Act 1992 confirms in Section 7[3] that caravans occupied "residentially" throughout the year are liable to Council Tax in the same way as any other "chargeable dwelling" set out in Section 6 of the same 1992 Act. Exemptions from Council Tax may include dwellings that are unoccupied (Section 4(4) of the same Act). Council Tax is to be calculated on a daily basis[4]

3.8. From the Act and Regulations, it is clear that no one would actively declare their unit should be subject to Council Tax unless it was their permanent residence; the Regulation allows for any other such caravan to be declared as a leisure caravan to avoid any personal payments to the Council for such Tax (the owner of the caravan site would instead be liable for Business Rates, but may recharge these to caravan owners in the form of annual pitch fees). Such declarations could be made on the date on which the unit became a permanent residence or ceased to be one.

3.9. It is noted that the Council Tax system was introduced on 1st April 1993, which happens to partly coincide with the period of implementation of the 1991 Permission.

3.10. Being liable for Council Tax is therefore a very good proxy for permanent residential occupation of a caravan, particularly with respect of implementation and continuation of the caravan site use.

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[3] Local Government Finance Act 1992, Section 7.

[4] Local Government Finance Act 1992, Section 2

3.11. It is therefore clear that the Council Tax registration of static caravans that were on site in 1993 was solely related to permanently residentially-occupied caravans. The moment that more than five (5no) caravans were registered for Council Tax, this would have implemented the 1991 Permission (five caravans were lawfully permitted on site in accordance with Condition 2 of the 1981 Permission). According to the Council Tax records received from the Council, 17no static caravans were registered as being 'chargeable dwellings' for the purposes of Council Tax on 1st April 1993, because they were permanently residentially occupied at that point in time. This could only have been the case where they were occupied a sole or main residence, because otherwise, they would not have qualified for Council Tax. With so many units being permanently occupied for residential purposes in 1993, it could only be the case where it was lawful under the 1991 Permission, implementing it.

3.12. The Council Tax records demonstrate that residential occupation of the caravans continued until at least 2010. a point that is discussed below.

Conclusions

3.13. The registration for Council Tax demonstrates that there were 17 residential caravans being permanently occupied as a sole or main residence in accordance with the 1992 Act and other Regulations. Their occupation as permanent residential dwellings (a chargeable dwelling according to the 1992 Act), as otherwise, the caravans were deemed to be leisure caravans for the purposes of the Regulations. Caravans used for leisure purposes, would not attract Council Tax records.

3.14. The Council Tax records not only demonstrate the lawful implementation of the 1991 Permission but also that the use continued for some 20 years at least.

4. Query No 3: Perceived Conflict between the Caravan Site and Hotel Conference Complex

4.1. A query has been raised as follows: *"-As you know, the Council has earlier referred to the fact that the use of the land changed from caravan park to landscaped grounds of the hotel. My view is that there is some force in this argument, in that the use of the hotel as a conference centre/wedding venue etc is simply not consistent with the access drive being lined by permanent residential static caravans."*

4.2. This is a surprising position to take. We discussed this matter at length in the Supporting Statement (see Paragraph 2.39), which for brevity reasons, this is not repeated here.

4.3. However, further information is provided herewith which demonstrates that the claim is incorrect and unsubstantiated. Indeed, it was 20 years ago when the hotel extension took place, and there is no documentary evidence to support that claim. Rather, the Council granted the permissions knowing that the caravan site would continue, and issued the 2000 Caravan Site Licence accordingly. It is also noted that some residents moved onto site after the hotel expansion was completed.

4.4. There is substantial evidence in the Supporting Statement that confirms that the hotel and caravan park co-existed since at least the 1970s to 2016 in our Supporting Statement (such as aerial photographs), which will to be repeated here for brevity reasons. In addition, the Committee Report for the 1991 Permission found in Appendix 1 makes references to the caravan park having existed on site alongside the hotel since the 1960s. The uses have, therefore co-existed on site for roughly 60 years. Since 1980, there has been at least some permanent residential occupation the site, which increased with the implementation of the 1991 Permission. There is no indication that either use hindered the operation of the other use (such as frequent noise complaints from those living on site permanents). No conflict can be identified; however, Council officers raised this prospect nonetheless, although they were unable to provide any evidence in support of this claim when asked to justify it.

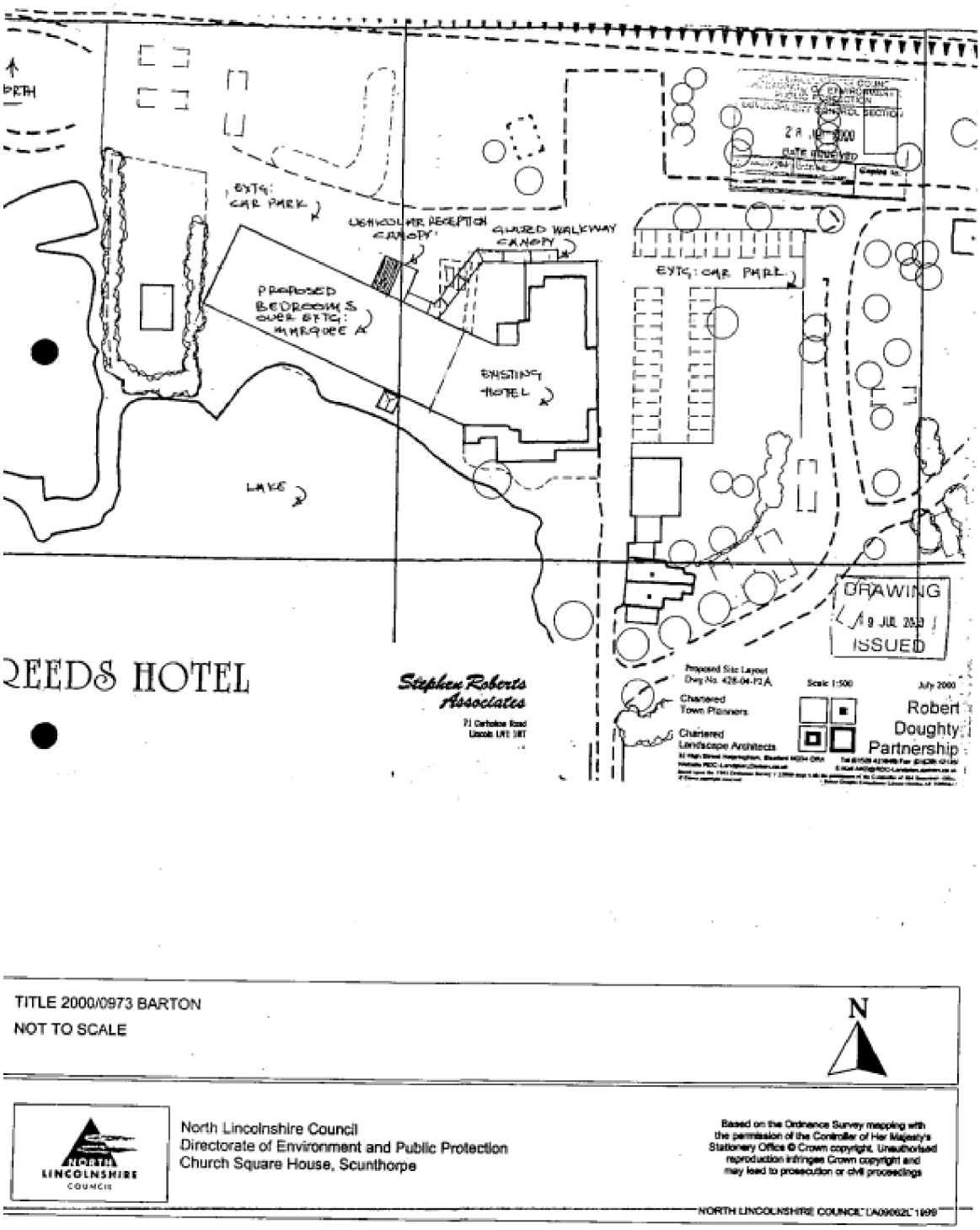
4.5. In 1991, the key planning permission was granted, which permitted a large residential caravan park to co-exist alongside the hotel. It is clear that both uses could co-exist at that point and they did so after 1993 at the latest, according to Council Tax records.

4.6. In 2000, the Council granted a Caravan Site Licence, when both the hotel and the caravan park clearly co-existed. The purpose of the licence was to ensure the proper management of the caravan site, and the issuance of the licence indicates that the Council did not perceive that the presence of the hotel would adversely affect the operation of the caravan site. Again, no conflict was raised at that point, but we'll come to this again below.

The 2000 Permission

4.7. Most relevant, however, is the key 'Proposed Site Layout' drawing submitted with the application that results in Permission Ref PA/2000/0973 for *"to erect a hotel extension"*. This drawing can be found in Appendix 3, and extract can be found below. It clearly shows

the retention of at least eight caravan bases following the expansion of the hotel to incorporate the conference venue.



4.8. This drawing is stamped by the Council, incorporated into the Planning decision by way

of reference.[5] There are at least eight caravan bases shown on the drawing, five to the east of the expanded hotel and three to the northwest. The presence of the caravans would have been known to the Council at the time of making the decision (.e.g., through a site visit carried out by any officer).

4.9. It is factually incorrect to state that the hotel expansion prejudiced the caravan bases when the primary drawing showing submitted with the application and which was incorporated into the Permission by way of reference shows both the continuation of the caravan site use along with the hotel's expansion. The LPA, in granting this permission, simply did not perceive that there would be any conflict of uses in 2000 when they were determining this application; otherwise the drawing would have been updated to remove the depiction of the existing caravan bases.

4.10. Furthermore, none of the conditions of the 2000 Permission required the cessation of the use of the caravan site, or the removal of any caravans on site. This option was open to the Council if they considered that there would be a conflict following the expansion of the hotel. Given the interest in the application by English Nature and others, as can be seen from the planning history file, it seems highly unlikely that the LPA was unaware that the residential caravans existed on site when they were considering this application, but chose not to limit the previous residential caravan permission. This is presumably because there were no identified conflicts between the hotel and the caravan site, and both would continue to co-exist.

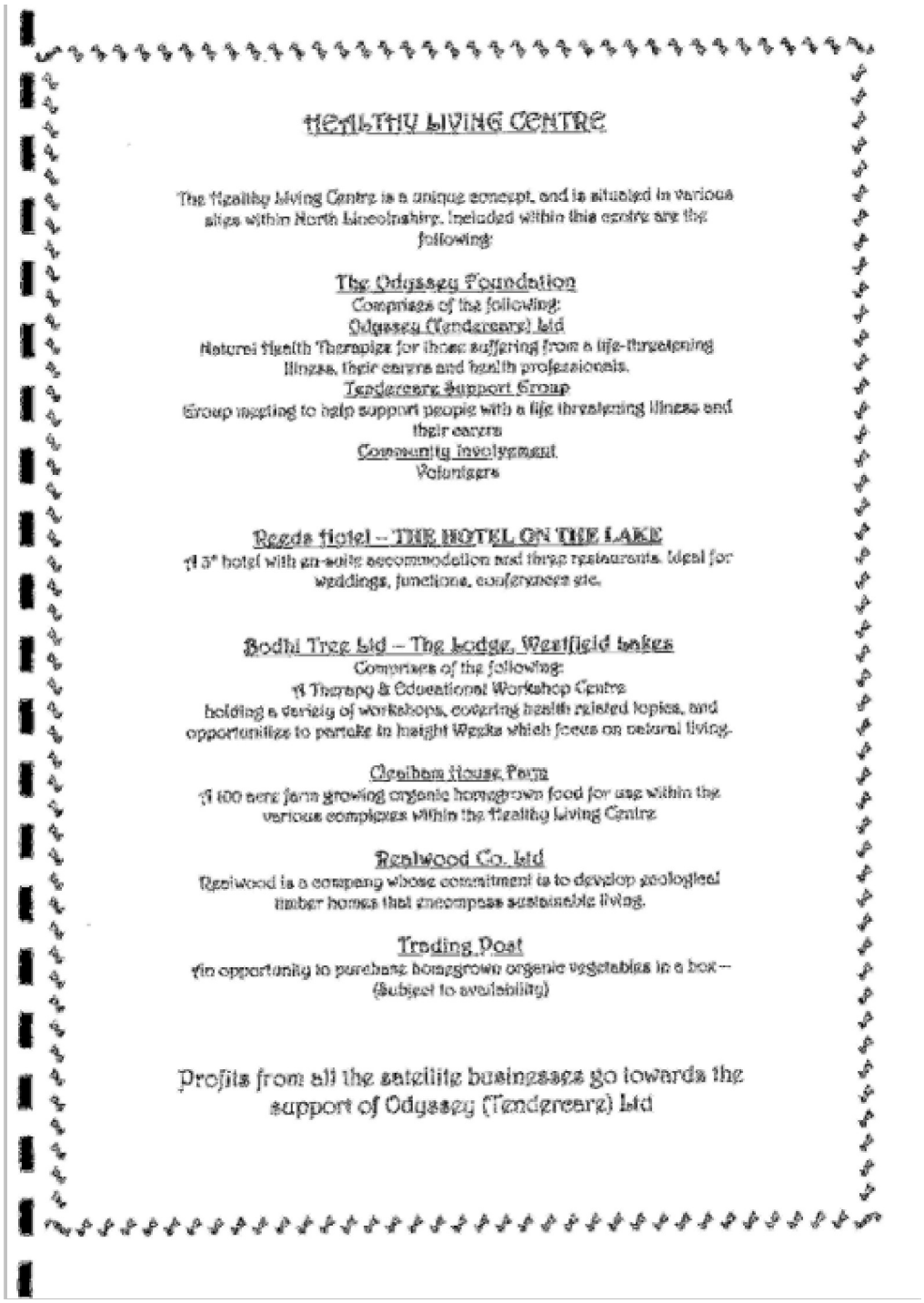
4.11. Indeed, the Council did identify a conflict with Permission Ref: 97/0118, and sought to revoke it. They could have easily sought to revoke the 1991 Permission at the same time; the LPA chose not to do so. The fact is the decision is silent on the continued operation of the caravan site, as shown on the approved drawings, demonstrates that the LPA has no issue with the on-going operation of the caravan site.

4.12. As noted above with the Council tax records, the caravan site continued to operate well after the hotel extension was completed.

4.13. It is also not correct to state that the applicant had no intention of continuing with the caravan site after the hotel was extended.

4.14. Finally, it is noted in the package of documentation recently provided by your planning admin team, Page 232 contains the following information surrounding the applicant's intended operations of the site, which they referred to as the 'Healthy Living Centre':

[5] The 2000 Permission contains the following text in the introduction found on the Decision Notice: *"...that permission for this development in accordance with the plans and written particulars submitted has been granted..."*



HEALTHY LIVING CENTRE

The Healthy Living Centre is a unique concept, and is situated in various sites within North Lincolnshire. Included within this centre are the following:

The Odyssey Foundation
Comprises of the following:
Odyssey (Tendercare) Ltd
Natural Health Therapies for those suffering from a life-threatening illness, their carers and health professionals.
Tendercare Support Group
Group meeting to help support people with a life threatening illness and their carers
Community Involvement
Volunteers

Regda Hotel – THE HOTEL ON THE LAKE
A 3* hotel with en-suite accommodation and three restaurants. Ideal for weddings, functions, conferences etc.

Bodhi Tree Ltd – The Lodge, Westfield Lakes
Comprises of the following:
A Therapy & Educational Workshop Centre
holding a variety of workshops, covering health related topics, and opportunities to partake in Insight Weeks which focus on natural living.

Cleatham House Farm
A 400 acre farm growing organic homegrown food for use within the various complexes within the Healthy Living Centre

Realwood Co. Ltd
Realwood is a company whose commitment is to develop ecological timber homes that encompass sustainable living.

Trading Post
An opportunity to purchase homegrown organic vegetables in a box – (Subject to availability)

Profits from all the satellite businesses go towards the support of Odyssey (Tendercare) Ltd

4.15. The "Realwood Co. Ltd" referred to above was in fact integral to the applicant's overall proposals for the site. It is clear that the profits of that business would support another business controlled by the applicant. Realwood Co. Ltd became the holder of the 2000 Caravan Site Licence. It was clear with the applicant's supporting literature for the hotel extension application that the applicant intended to provide both the expansion of the hotel and "timber homes" on site (in other words, caravans), for which they sought a permanent residential site licence. The caravan site licence was granted after the

application was made to extend the hotel[6], and so the Council was fully aware of the applicant's intentions regarding the caravan site (the licence was only for 10 caravans, but even one caravan was sufficient to sustain the 1991 Permission going forward). It is certain that the applicant did not envisage a conflict; rather they found that they were complementary to their intended use of the site and their business plan reflected that.

4.16. The approved Block Plan for the 2001 Permission for the temporary marquee (Ref: 2001/1029) also shows the same caravan bases, continuing the view that the applicant wanted the caravans to continue to be on site alongside the expanded hotel.

The 2003 Permission

4.17. Turning to the 2003 Permission (Ref: PA/2003/1628), this was for a small, 90sqm expansion to provide a single storey dining room and link corridors, located between the existing hotel and an ancillary conference building. Its location was quite some distance from the caravan bases. English Nature did not oppose the development if it was subject to a condition regarding construction work. The plan attached to the appropriate assessment is not clear, but it shows the location of the proposed development marked by a star.

4.18. The application package is entirely silent about the existing hotel (as expanded), as much as it is about the existing caravan site. No inference can be drawn from an absence of reference to the caravan site when the scale of the hotel was not even referred to. In fact, it was a focused application for development of a limited scale, and the supporting documentation reflects that.

Council Tax Records

4.19. The Council Tax records post-dating the 2000 Permission provide actual documentary evidence of a continuation of both uses on site post grant of the extension. Permanent residential caravans co-existed on site after the Reeds Hotel was expanded, demonstrating that actually there was no conflict between the two uses.

4.20. In fact, Caravan Unit 15 was re-registered for Council Tax after the hotel was expanded, which suggests that residents of the caravan site did not find that there was a conflict, and were happy to re-locate to the site to live at permanently.

Aerial Photographs

4.21. The aerial photographs supplied in Appendix 18 of our Supporting Statement demonstrate that residential caravans were on site until 2016. However, I would draw your attention to the period between 1999 and 2003, as one can see that a new caravan was stationed in the Western Field (see aerial photographs in Appendix 18a). This would not have been possible if there was indeed a conflict between the expanded hotel and the caravan park, as suggested. Rather, the owner saw there being no conflict and invested in both operations at the time, as described in the application documentation that was submitted

[6] The 2000 Caravan Site Licence was issued on 16th August 2000 and the application subject to the 2000 Permission was made on 1st August 2000.

when seeking approval for the hotel extension.

4.22. A good example of this is the NCAP aerial photograph taken on 16th August 2003, as follows:

4.23. It shows the completed expansion of the hotel to the west, and at least four static caravans remaining on site: two to the east of the hotel and two to the north-west. As a matter of fact, the caravan site remained operational after the hotel expansion was completed.

4.24. From the evidence provided in this section, it is hoped that the Council can now agree that the expansions to the hotel for additional rooms and a conference venue and the small restaurant structure did not result in any perceived or actual conflicts with the operation of the caravan site.

5. Query No 4: References to Caravans in Supporting Information of Applications

5.1. It was queried why the Habitat Regulations Assessment (HRA) for the 2000 hotel extension fails to reference the presence of the caravan site or caravans (the officer's email refers to the incorrect permission reference, but we assume that the officer meant to refer to the 2000 Permission). We have considered the HRA for both the 2000 and 2004 Permission Ref: PA/2003/1628 for the avoidance of doubt.

The 2000 Permission

5.2. As noted above, however, the caravan park was referred to in the Proposed Site Layout Plan, a key drawing of the 2000 Permission. It was clearly shown on the drawings. Furthermore, as also noted above, the documentation supplied by the applicant clearly referred to the intention to retain the caravan park, which would be operated by the sister company - the Realwood Co. The applicant provided details about how those operations would co-exist alongside the expanded hotel, which aligns with the proposed layout drawing itself.

5.3. It is acknowledged that the HRA does not refer to the caravan site. However, there are other shortcomings with that HRA. It also does not refer to the extent of the existing hotel, for example. The HRA's entire focus is on the proposed development itself, and it cannot be claimed that it was comprehensive or definitive in its assessment. We do not know the author's intentions with the HRA, the extent of research that was carried out in preparing it, or whether the author intended to be comprehensive (the evidence suggests otherwise). No conclusions can be drawn either way about the HRA itself.

5.4. What is clear is that the applicant submitted a Proposed Site Layout plan that showed the caravan bases being retained and even referred to them in their supporting information. If the Author of the HRA overlooked these facts, that is unfortunate, but it is not representative of what the planning permission itself granted.

The 2003 Permission

5.5. By the same token, the 2003 Permission was for a small dining room extension, which had no direct relationship with the caravan site. The HRA prepared does not seem to assess the impacts of the proposed development along with the other activities that were taking place on site. For example, it does not refer to the recently expanded hotel, which was an operation that was directly related to the restaurant use that was being proposed.

5.6. The reality is an omission in the HRA to the caravan site is not definitive of its absence. It relies on an assumption that the author was intending to be a) comprehensive regarding its description of the site, which is doubtful given the evidence above; and b) they were familiar with everything taking place on site and wished to record it, which is clearly not the case.

5.7. Rather, the applicant has supplied aerial photographs, Council Tax records, a statutory declaration, etc, that the caravan site existed in 2000 and 2003, and that it continued to

operate thereafter. Any inferences drawn from the HRA would be misplaced as a result.

6. Query No 5: Material Change of Use

6.1. Finally, in Mr Skelton's email dated 13th November 2024, it was stated:

> *"I note the information below however I can only refer you back to your own evidence and in particular Mr Harwood's advice at his para 13 (ii) where he says:*
>
> *'A lawful planning use will be lost if a material change of use of that land takes place, subject to limited exceptions in the Town and Country Planning Act 1990, s 57. The reason is that making a material change of use requires planning permission (s 57(1)) unless an exception applies, so making a material change back to the original use requires a further grant of planning permission.'*
>
> *Mr Harwood refers to the Stockton case (relying on Pioneer Aggregates) where it is noted at paragraph 25-*
>
> *'Accordingly, in a case in which there had been a change of use on the facts which was not permitted by any planning permission, to resume the use which had been permitted would require fresh permission'.*
>
> *In this context, it also strikes me that there would be no purpose to the exception at s57(4) of the 1990 Act if it were the case that permission was not required to revert to the previous lawful use in any event."*

6.2. We have obtained further information on this. Mr Harwood has confirmed that his advice as summarised above is correct. A material change of use is from one use (use X) to another (use Y). A reversion to a previous use would require fresh permission, unless it is subject to an enforcement notice requiring its reversion. It appears that the note from Norton Rose Fulbright that was previously referred to is probably incorrect.

6.3. Given this advice, we can update our position regarding the various parts of the application.

The Case Law

6.4. Before doing so, it is helpful to refer to the case law regarding material change of use.

6.5. The basic tests to establish if a material change of use has occurred have been established by a number of court decisions, notably East Barnet UDC v British Transport Commission [1962] and Palsar v Grinling [1948]. The way that this question has been assessed has been clarified by the Court of Appeal in the case: *Hertfordshire County Council v The Secretary of State for Communities and Local Government, Metal and Waste Recycling Limited [2012] EWCA Civ 1473* (referred to as the 'Hertfordshire' case, see Appendix 4). At arriving at their unanimous judgment to uphold an earlier decision of the High Court (see Appendix 5 for that judgment) to dismiss the Council's challenge to an Inspector's decision to quash an Enforcement Notice, the Lord Judges confirmed:

> *"25. In assessing whether there is a change of character in the use, its impact*

of the use on other premises is a relevant factor. It is necessary, on the particular facts, to consider both what is happening on the land and its impact off the land when deciding whether the character of the use has changed.

"26. When the judge said, at paragraph 41, that: "of itself, an increase in noise impact, however severe, cannot be a material change in the use of the land," he was, in my view, saying no more than that impact cannot be considered in isolation from what is happening on the land."

6.6. On change in the character of the use, the High Court judgment states at Paragraph 40:

"Although the concept of a material change of use can be expressed clearly enough as a concept, it is elusive in practice, perhaps even illusory. But one point is clear from all the authorities, and the Inspector expresses it correctly…: the change relied on has to result in a material change of the use of the land, and it can only do that by bringing about a definable change in the character of the use made of the land."

6.7. The court considered the extent to which environmental effects can be taken into account in Paragraphs 41 and 42:

"41. I have no difficulty in seeing that significant environmental effects, experienced on or off-site, may support the contention that a material change of use of land by intensification has occurred. There are plenty of authorities to that effect. But I do not see how effects, whether on or off-site, can themselves constitute a material change in the use of the land. The concept focuses on the use made of a particular piece of land. I do not see how an increase in lorries, for example, arriving in the road at unsocial hours, or creating problems at a junction a mile away, or an increase in noise or dust experienced off-site from activities on-site, is capable of itself or themselves, whatever the degree of increase, of constituting a material change of use on a particular site. It may be very relevant to the argument that there has been a material change in the character and use of land. For example, a specialist gas bottle disposal facility might be treated as a materially different use from a general scrapyard because of its noise impacts. But of itself, an increase in noise impact, however severe, cannot be a material change in the use of the land."

"42. The relevance of impacts comes in evidencing a material change of use of the land, a definable change in its character, but one which is defined by a material change in use, not by a change however severe or minimal, in the effects of a use."

6.8. It is clear, therefore, that the starting point in considering whether there has been a material change of use is deciding whether there is a definable change in the character of the use of the land (or building) itself. Any planning consequences arising from the proposed development can be considered to be contributing material factors in

determining whether any change in the definable character of the use is material. However, if there is no identified change to the on-site character of the use, then the planning consequences, no matter how severe, could not on their own change the definable character of the use. On this basis, it is a pre-condition that there must have been a change in the on-site character of the use for there to be a material change of use. Once it is accepted that there is a change in the definable character of the use, in deciding whether such a change is material, it is relevant to then look at the effects.

6.9. It is noted that the absence of a material change of use (i.e. one which has materially altered the definable character), the extant planning permission remains 'capable of being implemented' to quote Langstaff J at Paragraph 32 of the *Stockton* judgment ([2010]EWHC 1766 (admin), see Appendix 6 for a copy). This relates to a challenge by a Local Planning Authority against an Inspector's decision to issue a Certificate of Lawfulness to allow the caravan site subject to the 1961 Permission to be recommenced. The case confirms that the absence some of other use would not replace the extant planning permission, in line with *Pioneer Aggregates* (see Supporting Statement Paragraph 1.28). For our site, if there is no material change of use identified, the extant 1991 Permission remains the lawful use.

6.10. Whether a material change of use is of course a fact and degree judgment for the Council applying a balance of probabilities to the evidence. However, to assist the Council, we apply the evidence that relates to the site using the tests set out by *Hertfordshire*.

AppleTree Lodge

6.11. From the evidence provided by Lincolnshire Wildlife Trust, the applicant now accepts that the Lodge, a caravan chalet unit on site, was itself subject to a material change of use to an office use around 2004. There is evidence of a change, and that change is material - the unit could not be used for human habitation for example and therefore fell outside of the statutory definition of a 'caravan'. The change in character therefore appears to be material, as the use of the internal elements of the 'caravan' are no longer used for residential or holiday occupational purposes. Externally, there is no change. It is not known whether there were any off-site impacts that might influence whether the change was material; it is not known whether visitors were received, for example.

6.12. The question becomes whether a smaller unit can be identified, because it is physically or functionally separate (in accordance with the *Burdle 1972* tests). It is clear that the office use was contained to the lodge (we set out details below), and so a smaller unit can be identified within the wider site. A material change of use has occurred in relation to the Lodge itself by way of physical and functional separation to the wider site.

6.13. It remains open to the Council to accept that the material change of use of that unit was lawfully established; we set out that it may not have been because it may have been interrupted by a flood event that took place in 2013. It is noted, however, that CompaniesHouse records indicate that there was a continuation of the Lodge's use as the registered address for a company immediately beyond this date, as opposed to the hotel, which was known to be vacant for some three years before re-opening.

6.14. As such, the Council can exercise its powers under TCPA Section 191(4) and modify the CLEUD to either reference the lawfulness of the office use associated within the lodge, or exclude the lodge from any CLEUD issued.

The Eastern Field

6.15. In contrast, there is no evidence of a change, let alone a material one in the Eastern Field.

6.16. In the 1990s, there were caravans stationed within this area. With the 2000 Permission, the applicant confirmed their intention to retain the caravan site through the approved drawings and references provided in the application submission. Aerial photographs confirm that caravans were in this area.

6.17. The Eastern Field excluding the Lodge hosted many caravans on it until around 2003/2004 and thereafter, two caravans were stationed adjacent to it for many years thereafter. On the face of it, its character remained as a caravan site[7] at least until 2009, when the last caravan was removed. The aerial photographs demonstrate that the bases remained on site and were maintained (they remain clear of vegetation, for example).

6.18. Indeed, this view is supported by the Council Tax records (see Supporting Statement Paragraph 4.46 for a discussion regarding there being at least four caravans registered for Council Tax into the mid-2000s, and this would include some caravans on the Eastern Field). Apart from the change to Appletree Lodge, there are no other changes that can be identified in the aerial photographs. This reflects the Statutory Declaration of Michael Lee that the caravan site remained during that period (see submission dated 5th November 2024).

6.19. Whilst it is possible that the land was occasionally crossed by occupants of the Lodge, this does not amount to a change of the character of the use. There is no evidence of it taking place on a regular basis, such as by way of seeing evidence of tracks in the grassland in the aerial photographs that would suggest that the occupants accessed the land consistently to the extent that the character of the use might change. In any event, that change (if it exists) does not appear to be material. Any access appears to be *de minimis* and without any consequences.

6.20. No change to the definable character can be identified (by way of a new use taking place) and so no material change of use has occurred.

6.21. When the applicant was first informed that the LPA was alleging a material change of use had occurred to the land - that it was now being used for ancillary purposes to the hotel, the applicant requested to see the LPA's evidence. The EIR/FOI reply details are set out in Supporting Statement Paragraph 4.13, and it indicates that the LPA actually holds no evidence of a change of use (that the definable character of the site's use had changed),

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[7] The Court of Appeal was clear that a caravan site remained a caravan site regardless of the numbers found within it, unless some other use could be identified. Sullivan J at *Reed* Court of Appeal judgment Paragraph 21: *"A caravan site with four caravans rather than two caravans upon it still has the character of a caravan site..."* It reflects the approach established in *Hertfordshire*.

let alone one which was material. The lack of evidence from the Council is demonstrable to the overall lack of evidence of any change in the character of the Eastern Field. It represents a "hunch" by officers, but which lacks any credibility, and it is certain that the LPA has not applied the *Hertfordshire* tests to whether the change that they alleged took place is a material one.

6.22. The fact remains that the caravan park in the Eastern Field continued until at least 2010, and more likely to 2016, when the last caravan was removed from site. No evidence is available that any other activity has taken place on this land, which might indicate that there was a change of use, and certainly nothing so material that it amounted to a material change of use by altering the definable character of the land.

6.23. Based on *Stockton*, a nil-use of the site means that the 1991 Permission remains extant so the absence of caravans on the land itself does not mean that the 1991 Permission was replaced. In the absence of any evidence of a material change of use, the underlying lawful use is a caravan site for up to 70 residential static caravans.

The Western Field

6.24. We have also identified no material changes of use taking place in the Western Field, which is in fact intrinsically linked to the Eastern Field. Caravans were found on site as recently as 2016, and there has been no evidence of any other activities taking place on this land since the caravans were removed, as shown in the aerial photographs for the site.

6.25. There is no change identified, let alone a material change that amounts to a new use arising from this land. It remains governed by the 1991 Permission.

6.26. It is understood that the Western Field is not in dispute, and therefore we do not need to add any further information on this. However, if this understanding is incorrect, please let us know and we can provide more information.

Conclusions

6.27. The question of whether there has been a material change of use of parts of the areas governed by the 1991 Permission has been raised. Whether a material change of use has taken place is a matter of planning judgment; however, for there to be a material change of use, a change to the definable character of the use has to be identified and furthermore, that change has to be material, having regard to the nature of the change and any off-site impacts.

6.28. With regard to Appletree Lodge, it has been demonstrated that a material change of use has occurred, and the Applicant is willing to accept that this should be excluded from their requested CLEUD area.

6.29. The applicant does not consider that there is any evidence of a change taking place to the static caravans which were stationed adjacent to the Lodge; they were likely to be registered for Council Tax in accordance with the evidence (four caravans were registered and only four existed on site, two of which were stationed adjacent to Appletree Lodge). They were likely to be operated in line with the 1991 Permission.

6.30. Any incidental use of the land by the occupants of Appletree Lodge appears to be *de minimis*; it did not alter the character of the use of the land.

6.31. No identified change has been found with regards to the wider Eastern Field.

6.32. The Western Field was occupied by caravans until 2016, after which the site remained vacant. There is no evidence that any material activities took place on the land, which might alter the character of the use. The use of land remains in accordance with the 1991 Permission as a result.

6.33. No material change of use can be identified across any parts of the application site except Appletree Lodge. It is open to the Council to certify that part of the site as being in Class E office use.

7. Conclusions

7.1. This Statement has been prepared to address queries raised by the officer in recent correspondence. They relate to five separate matters, as follows:

- Whether 1991 Permission was Implemented?
- Whether Council Tax demonstrates residential occupation of the units?
- Whether the hotel expansion and the residential caravan site are compatible uses?
- Whether the intention to retain the caravan site was referred to in documentation, such as the HRA with the 2000 and 2003 Permissions?
- Whether a material change of use has occurred on the site?

7.2. The applicant can provide thorough answers to each question posed.

7.3. It is clear that the 1991 Permission was implemented. It did not contain any "true" pre-commencement conditions that prohibited or forbade any development authorised by the permission. It was silent as to the occupancy of existing units. We have provided evidence that those units were converted to residential use following the grant of the permission via Council Tax records. Furthermore, Conditions 4 (landscape planting) and 8 (external appearance of the caravans) were likely discharged prior to implementation in any event. Finally, a roadway was constructed through the SSSI according to the permission, and the Council was aware of this when it processed applications on site during that time. We conclude that the 1991 Permission was implemented.

7.4. As regards to whether Council Tax can demonstrate whether a caravan is being used for permanent residential purposes, this is dictated by statue, which is clear that only caravans which are used throughout the year for permanent residential purposes as a sole or main residence qualify for being subject to Council Tax. Such tax is calculated daily, and so the Tax is a very good proxy for occupation. In the case of Westfield Lakes, at least 17no residential caravans were registered for Council Tax when the scheme came into place on 1st April 1993, and at least four were registered on site in the 2000s. That would indicate that the 1991 Permission remained in active use for a long period of time.

7.5. It also indicates that there is unlikely to be a conflict between the hotel expansion and the caravan site, as Council Tax was being collected on various properties still being used for caravan site purposes after the hotel was extended. In any event, the application plans showed the retention of the caravan site and furthermore the application documentation set out quite clearly that the applicant intended to operate the expanded hotel alongside the caravan site.

7.6. The Council has questioned why the caravan site is not referred to in various documentation associated with planning applications. This is not correct; the approved site layout plan of the 2000 Permission shows the retention of the caravan site, and so does the application documentation attached to the same permission. The HRAs for the 2000 and 2003 Permission were prepared by the Council, and there is no indication as to

why the LPA did not refer to the caravan site in these assessments, but we do not know the purpose or intention of the HRAs, which do not appear to be comprehensive. It might have simply been author error.

7.7. The Council has previously raised whether there was a material change of use occurred on site. The relevant tests are found in *Hertfordshire*, a Court of Appeal case from 2012, which confirmed that a material change of use can only occur where a change to the definable character of the use can be identified and further that the change was material. The Applicant accepts that one has taken place at the Appletree Lodge and that can be excluded from the application. That change was isolated to the Lodge itself, there is no evidence that any change occurred beyond its boundaries, and the office use, which was contained within the Lodge itself, can be physically and functionally delineated, in accordance with the *Burdle* tests.

7.8. It does not accept that the two caravans stationed next to the Lodge had been subject to a material change of use; they were registered for Council Tax for example, being used as permanent residential dwelling, which as we described above, statutorily confirms their occupancy. Neither does it accept that the Eastern or Western Fields were subject to any changes in their character of use, and certainly not one which was material. Any incidental activities on the site were *de minimis*, and did not alter its character of use, let alone amount to a material alteration. In accordance with the High Court at *Stockton*, a nil-use of a caravan site retains its lawful use as a caravan site, and a reinstatement of caravans is not "development", as the caravan site permission remains "capable of implementation" to quote the courts.

7.9. We therefore conclude that the 1991 Permission remains extant over the area to which the applicant has sought a CLEUD, except for the Appletree Lodge. The Council can alter the First Schedule to also r refer to the Lodge as being in Class E alongside the remainder of the application area being subject to the 1991 Permission. The Second Schedule could be modified to delineate the Lodge as being in a separate planning use. It has the powers to do this under TCPA Section 191(4), but in our view, the Certificate should be issued.

Appendices

Appendix 1: Copy of Report for District Joint Planning Advisory Sub-Committee

REPORT FOR DISTRICT JOINT PLANNING ADVISORY SUB-COMMITTEE

TO BE HELD AT BARTON UPON HUMBER ON TUESDAY 9 JULY 1991

7/113/91

BARTON UPON HUMBER
Planning permission to remove condition 2 of planning permission BA/3/72B and 7/RET/16/80 to allow all year round residential use of the existing caravan site.
Westfield Lakes Site,
Far Ings Road.
O.S. Sheet No. 0123

[redacted]
Westfield Lakes Hotel
Far Ings Road
Barton upon Humber

PROPOSAL

This application seeks a variation in the terms of earlier permissions which have been granted. Those permissions permit development of 88 units on a nine month residential basis or for a 365 day holiday use. What is requested is a lifting on the restriction so that all-year round residential use may be undertaken.

Initially, the applicant stated he would like to site as many as 88 units on the site, the maximum number permitted by present permissions. During consideration of the application this has been reduced to 65 units in addition to the existing five already there which enjoy a permanent residential permission.

At present there are around 20 caravans/mobile homes on the site in total.

"AWAY FROM BARTON TOWN CENTRE"

PLANNING FRAMEWORK

Humberside Structure Plan: The site is in (open countryside) for settlement policy purposes where there is a presumption against development unless it is essential to meet a specific agricultural or other special local need.

Barton Clay Pits Subject Plan: The Westfield Lakes complex is within an area where nature conservation interests have precedence but where some recreational uses can be accommodated, according to the Plan. Some development here could reduce pressure on more sensitive areas to the east and west.

Policy 3 states that permission for further caravan development beyond existing commitments and outside the area identified for more intensive use will not be granted. Existing permissions granted on land outside this defined area which are not implemented or which lapse will not normally be renewed.

(At the time the Clay Pits Policy was prepared the planning permissions at Westfield Lakes permitted a total of 254 chalets and caravans for recreational occupation).

The site is part of the Humber Bank Site of Special Scientific Interest.

Various planning permissions granted in the 1960's and 1970's gave planning permission for holiday and recreational caravan and chalet developments at Westfield Lakes as well as residential occupation for nine months of the year on some of these units. The current position is that existing planning permissions would allow 63 chalets on the site for holiday use, or 76 caravans and 12 additional chalets with either 365 day holiday use or full residential use between the 1 March and 31 November, and five designated plots for all-year residential use.

CONSULTATIONS

County Planning Authority: Do not agree with the applicant that this proposal is for a relatively minor change to the existing planning status of the land. The County Council takes the view that this proposal could create a new quite large permanent population, with attendant service needs, well outside any existing centre in direct conflict with Structure Plan settlement policies. This is made even more unacceptable because the site is in the middle of an area allocated for conservation and recreational purposes. On this basis the County Planning Authority objects strongly to the proposal and in the event of Glanford wishing to grant permission has requested a meeting of the Joint Advisory Sub-Committee.

Local Highway Authority: Acknowledge that there has been no previous highway objection to the various applications on this site in the past. The private road serving the site is about 2.8m wide with three passing bays and the public highway, Far Ings Road, also has a restricted carriageway width of just under 4m. If new residential development were proposed on this scale or even if the application was for the permanent occupation of caravans and chalets at this scale, the Local Highway Authority would object on the grounds of an inadequate access. However, it does also acknowledge that existing traffic generation from the present number of caravans and the other activities at Westfield Lakes does not seem to cause any highway problems.

NRA (Anglian Region): No objections in principle, although no development will be allowed within 9m of the landward side of the foot of the river defences. N.R.A. also draw attention to the North-East Lindsey Drainage Board's concern that the site may not be suitable for all-year round caravan parking because of the possibility that flooding might occur, although there is no objection on surface water disposal grounds.

Barton Clay Pits Planning Application Sub-Committee: Comment as follows:-

"The Group consider that the application would contravene Policy 1 of the Barton Clay Pits Subject Plan, i.e. that to the west of the Humber Bridge only quiet and relatively informal recreation will be allowed and Policy 3 that further caravan development beyond existing commitments will not be granted. The Group believe that to grant further permission for twelve month residential use of this site would be a development beyond both of these policies.

We are of the view that the development is too large in scale and the policy within the Clay Pits should be to cater for tourists and day visitors, not for settlement.

We are also concerned that a large scale development of this kind may not be suitable for vehicular access, particularly of emergency vehicles.

We are also concerned that a settlement of this scale may have an adverse effect upon the natural history of the area in particular causing disturbance to the Far Ings Nature Reserve. For all of these reasons the Advisory Group are not in favour of the application."

Lincs and South Humberside Trust for Nature Conservation: Points out that the site is surrounded by the Barton and Barrow Clay Pits S.S.S.I. which is notified principally for its breeding bird community. The Trust itself owns much of the land adjoining the area and manages it as a nature reserve open to the public. The Trust considers a change to all-year residential use of the site would seriously disturb the bird populations, especially during the quieter autumn and winter months when the area supports a considerable population of wintering wildfowl and a large hirundine roost in the reedbed areas. Included among these is an established population of bearded tits which is a protected species under Schedule 1 of the 1981 Wildlife and Countryside Act. So despite the extant permission for 88 units on the site the Trust believes the granting of permission for all-year round residential use would be contrary to the Barton Clay Pits Subject Plan, in particular policies 1, 2 and 3. Therefore, the Trust has entered a strong objection.

English Nature: The consultation response sets out detailed information about the status of the surrounding S.S.S.I. and relevant development plan guidance. As well as a structure and Local Plan, English Nature refer as well to the County Council's Caravan and Camping Plan which is currently under review, and a policy in the consultation draft which states that sensitive areas and conservation areas will be protected from caravan and camping development, as well as other policies in the draft which are considered to be of general application. With reference to the existing permissions on the site, English Nature urges the Council to consider revocation or modification of these, and believes that notwithstanding the reduction in the total number of units, the development now proposed represents a material change to the existing situation. English Nature has asked for early notification if the Council intends to grant permission and urges a number of conditions should be attached to modify and control the use of the site in this event, covering the following points:-

agreement regarding the establishment of a landscape barrier to the west of the site;

the specification of a similar landscape barrier, perhaps incorporating a ditch or moat on the southern boundary of the site to protect the adjacent reedbed;

a condition limiting the age of occupants to over 55 years of age; and

a condition specifying that occupants shall not keep cats or dogs or other pets likely to cause disturbance to the wildlife.

In addition English Nature would also like to be consulted about details of the sewerage and foul water disposal systems to ensure the S.S.S.I. is not damaged.

In summary, English Nature believe that the establishment of 70 units for full residential use will be damaging to the S.S.S.I. and contrary to policies in the Camping and Caravan Plan and the Barton Clay Pits Subject Plan.

TOWN COUNCIL — Make the point that this is a large development and would be a substantial increase in the number of residential homes over the present circumstances. Also concern was expressed about access which at the moment is by way of a small lane with a single vehicular access including speed retarders to ensure the safety of anglers using the ponds either side of the access road. The Town Council would prefer to have the entire scheme indicating the number of units presently used, a reasonable possible increase, adequate means of access and improved services and parking areas for residents. If the existing but closed entrance from Westfield Lakes on to Far Ings Road opposite the end of Gravel Pit Lane were re-opened this would require adequate surfacing and some form of protection from the ponds either side. In conclusion the Town Council feels this is a major development and needs looking at carefully.

PUBLICITY — The application has been advertised as a departure from the development plan for the area.

COMMENT — On the face of it the scale of this proposal raises various conflicts with the existing uses and policies for the development of the Clay Pits area. But the application has to be looked at against the background of the existing planning permissions as well, which are extant and which, if fully implemented, will in themselves introduce a significant amount of new caravans or chalets and generate much activity in this area. They have not been developed to their full potential in the past, presumably because of financial constraints, and the current owners are trying to rationalise things so that they can prepare a viable package for development of the Westfield Lakes complex in the future. They are hoping to be able to develop the site with "park homes" which they say are built to an exceptionally high standard and are particularly attractive to retired persons or people over 55 years of age who no longer live with their families. In this respect Members may draw comparisons with a proposal two years or so ago to extend the Parklands Mobile Home site on the western side of Scunthorpe.

The real question to address is, given the nature of the development and occupation which can legitimately be undertaken on this site under present permissions - including residential

occupation of 88 caravans and chalets for nine months of the year - is a development of 65 park homes (and the retention of the five residential homes already there) going to be any more detrimental in terms of visual impact or demand on services? Whilst many would argue that this is the wrong place for such a development, the circumstances here are not strictly the same as those where such a proposal emerges on a "greenfield" site. The reduction in numbers now proposed would allow scope for further landscaping to take place within the development to break up the massing of the chalets and, as the Clay Pits Plan recognises, development here ought to help reduce pressure elsewhere in the Clay Pits area and further afield. Although the site is detached from the urban area of Barton it is still reasonably convenient and a wide range of local services is available there.

The alternative view is that this application represents the establishment of, in effect, a small settlement outside the town which is therefore contrary to the development plan policies. This is the stance taken by the County Council. It could be argued that the existing development which is permitted is not going to be implemented anyway and so it should not be used as a basis for justifying the present proposal. Certainly, if permission is to be granted then it will be important to ensure that the Council has sufficient control over the design, materials and colours of the units as these will all be critical in assisting the development to blend with the landscape in the long-term. The development may also displace some recreational caravan development which might have taken place here otherwise, to other parts of the Clay Pits.

Although the issues are finely balanced, the proposal could be supported as it will give the Planning Authority the opportunity to achieve improvements in the present position governed by the extant planning permissions as well as helping to fulfil a need for this type of accommodation which has become more apparent over recent years.

CURRENT POSITION AND FUTURE ACTION

On 20 June 1991 the Planning Committee (East) resolved it was mindful to grant planning permission and therefore the application is now being referred to this District Joint Planning Advisory Sub-Committee. Afterwards, both the County and the District will reconsider the matter before Glanford takes the decision. The Planning Committee (East) intends to deal with the application at its meeting on Thursday 11 July.

PARA 5.6 Dec. C.S.

CONDITIONS

The Committee has resolved that the permission it is mindful to grant should be subject to the following conditions:-

1. At no time shall there be more than a total of seventy (70) caravans and/or chalets and/or mobile homes on the site.

2. All the chalets or mobile homes to be stationed on the site shall conform with BS.3632(1989) Specification for Park Homes (Mobile Homes).

(Caption?)

Include this bit in the main

3. No additional caravans, chalets or mobile homes shall be brought onto the site before a plan has been submitted to and agreed in writing by the District Planning Authority to show details of the layout of the development and proposals for its landscaping. The landscaping proposals shall include indications of all existing trees and hedgerows on the site, and details of any to be retained, together with measures for their protection during the course of development.

4. All the approved landscaping shall be carried out within twelve months of the date of this decision (unless a longer period is agreed in writing by the district planning authority). Any trees or plants which die, are removed or become seriously damaged or diseased within five years from the date of planting shall be replaced in the next planting season with others of similar size and species, unless the District Planning Authority agrees in writing to any variation.

5. The layout of the development shall include provision for one vehicle parking space within the curtilage of each residential unit and additional parking for visitors on the basis of a minimum of one space for every ten units.

6. Not more than twenty five (25) new units shall be constructed on the site before the access to Far Ings Road at the south-eastern boundary of the site has been suitably surfaced in accordance with details to be submitted to and agreed in writing by the District Planning Authority beforehand.

7. No additional units shall be constructed on the site until a scheme has been submitted to and agreed in writing by the District Planning Authority indicating the external finishes and colours of the additional units.

REASONS

1. To define the extent of the permission for the avoidance of doubt.

2. In the interests of residential amenity.

3-4. To enhance the appearance of the development.

5-6. In the interests of road safety.

7. To assist the development to blend with the surrounding landscape.

Appendix 2: Copy of the White High Court Judgment

Michael Mark Anthony White, Michael Thomas White v South Derbyshire District Council


No Substantial Judicial Treatment

Court
Divisional Court

Judgment Date
8 November 2012

CO/133/2012

High Court of Justice Queen's Bench Division Divisional Court

[2012] EWHC 3495 (Admin), 2012 WL 4888697

Before: Lord Justice Gross Mr Justice Singh

Thursday, 8 November 2012

Representation

Andrew Hogan (instructed by Straw & Pearce Solicitors) appeared on behalf of the Appellants.
Jonathan Mitchell (instructed by the Solicitor, South Derbyshire District Council) appeared on behalf of the Respondent.

Judgment

Mr Justice Singh:

Introduction

1. This is an appeal by way of case stated from the decision of District Judge Jones, sitting at Derby Magistrates' Court, dated 20 May 2011, whereby each of the appellants was convicted of permitting land to be used for the purposes of a caravan site without being the holder of a site licence, contrary to section 1 of the Caravan Sites and Control of Development Act 1960 .

2. The informations were laid by the respondent local authority on 14 October 2010. The offence was alleged to have been committed on or after 1 June 2010.

3. As the District Judge observed, this was an unusual case. The prosecution evidence was in an agreed format and no live evidence was presented to the Magistrates' Court. No evidence was adduced on behalf of the defence. Submissions were made on the law.

4. The appellants were given an absolute discharge, but were ordered to pay the costs of the prosecution.

Factual Background

5. Since the late 1980s the relevant land, which is situated at Weston Hill, Weston on Trent, Derbyshire, has been used as a caravan site. The previous owner was a Mrs PA Hill, who was granted a caravan site licence by the respondent on 14 November 2001. That licence was granted in accordance with conditions based upon Government model standards dating from 1989. The licence was issued by Denise Blyde, an officer of the respondent authority.

6. Since 18 May 2007 the appellants have been the freehold owners of land known as Weston Hill Chalet Park at the site. The site licence was transferred from Mrs Hill to the appellants on 3 March 2008. It was again Denise Blyde who made the transfer in accordance with section 10 of the 1960 Act.

7. It was common ground between the parties that, at the time of the original grant of the licence in 2001, the land did not have an express grant of planning permission pursuant to the provisions of the Town and Country Planning Act 1990 . However, it was also common ground that, if an application had been made for a certificate of lawful use and development, it would have been granted, since the land had been used as a caravan site for at least ten years.

8. On 8 September 2009 a certificate of lawful use and development in respect of the land was granted to the appellants.

9. The District Judge appended a written judgment to the case stated and stated that it forms part of that case. At paragraph 34 of his written judgment the Judge set out his findings as follows:

(1) The agreed evidence demonstrates that, at the time the licence was granted, there did not exist a permission to grant due to the repeal of the established user provisions;
(2) That on a proper construction of the statute, a licence could only have been granted if, at the time, there had been in place a permission;
(3) That, given it is agreed evidence that there was in fact no permission in place at the relevant time, there could not be a valid grant;
(4) Accordingly, if that is the case, then the licence transferred in 2007 is also invalid;
(5) Therefore, on 4 June 2010, both defendants were operators of the site without a valid licence.

10. I will return to the questions which have been stated for the opinion of this Court at the end of this judgment.

Material Legislation

11. The following provisions of the Caravan Sites and Control of Development Act 1960 are relevant.

12. Section 1 provides:

> (1) Subject to the provisions of this part of this Act, no occupier of land shall after the commencement of this Act cause or permit any part of the land to be used as a caravan site unless he is the holder of a site licence (that is to say, a licence under this part of this Act authorising the use of land as a caravan site) for the time being in force as respects the land so used.

> (2) If the occupier of any land contravenes subsection (1) of this section he shall be guilty of an offence …
>
> (3) In this part of this Act the expression 'occupier' means, in relation to any land, the person who, by virtue of an estate or interest therein held by him, is entitled to possession thereof or would be so entitled but for the rights of any other person under any licence granted in respect of the land …
>
> (4) In this part of this Act the expression 'caravan site' means land on which a caravan is stationed for the purposes of human habitation and land which is used in conjunction with land on which a caravan is so stationed."

13. Section 3 provides:

> (1) An application for the issue of a site licence in respect of any land may be made by the occupier thereof to the local authority in whose area the land is situated …
>
> (3) A local authority may on an application under this section issue a site licence in respect of the land if, and only if, the applicant is, at the time when the site licence is issued, entitled to the benefit of a permission for the use of the land as a caravan site granted under part III of the Act of 1947 [i.e. the Town and Country Planning Act 1947 ; that would now be a reference to the equivalent provisions in the Town and Country Planning Act 1990] otherwise than by a development order.
>
> (4) If at the date when the applicant duly gives the information required by virtue of subsection (2) of this section he is entitled to the benefit of such a permission as aforesaid, the local authority shall issue a site licence in respect of the land within two months of that date or [such longer period as is agreed in writing] … "

14. It is unnecessary to set out other provisions in detail. Section 5 confers power on the relevant authority to attach conditions to a site licence. Section 7 enables a person aggrieved by any such condition to appeal to the Magistrates' Court. Section 9 confers power on the Magistrates' Court to revoke a site licence in certain circumstances, where there has been a conviction for breach of a condition attached to a site licence and there had already been two or more previous such convictions. Section 10 , as I have indicated, provides for the transfer of a site licence.

15. The Town and Country Planning Act 1990 contains the following relevant provisions.

16. Section 57 lays down the basic rule that planning permission is required for the carrying out of any development of land. Development consists of either operational development, as defined in the Act, or a material change of use of land.

17. Section 58 confers power on planning authorities to grant such planning permission.

18. Section 171B lays down time limits for the enforcement of breaches of planning control. The relevant time limit in subsection (3) , which applies to development consisting of a material change of use such as the present, provides that no enforcement action may be taken after the end of the period of ten years beginning with the date of the breach.

19. Section 191 deals with the subject of a certificate of lawfulness of existing use and development and provides as follows:

> (1) If any person wishes to ascertain whether —
>
> (a) any existing use of buildings or other land is lawful; …
>
> (2) For the purposes of this Act uses and operations are lawful at any time if —
>
> (a) no enforcement action may then be taken in respect of them (whether because they did not involve development or require planning permission or because the time for enforcement action has expired or for any other reason); and
>
> (b) they do not constitute a contravention of any of the requirements of any enforcement notice then in force …
>
> (4) If, on an application under this section the local planning authority are provided with information satisfying them of the lawfulness at the time of the application of the use, operations or other matter described in the application, or that description as modified by the local planning authority or a description substituted by them, they shall issue a certificate to that effect; and in any other case they shall refuse the application …
>
> (6) The lawfulness of any use, operations or other matter for which a certificate is in force under this section shall be conclusively presumed.
>
> (7) A certificate under this section in respect of any use shall also have effect, for the purposes of the following enactment as if it were a grant of planning permission —
>
> (a) section 3(3) of the Caravan Sites and Control of Development Act 1960 ; … ”

The Appellants' Grounds of Appeal

20. On behalf of the appellants, Mr Hogan argues that the respondent could not succeed in a prosecution such as the present in circumstances where it sought to rely on the unlawfulness of its own act, in granting the licence to Mrs Hill in 2001, in order to found that prosecution. Although the licence was said by the respondent to be ultra vires and therefore void, no proceedings had been taken by anyone to have it quashed in the Administrative Court. Although the respondent could not apply for judicial review of its own decisions, it is common ground that the Mayor or an individual member of the council could do so. In an appropriate case the Administrative Court will entertain such an application as it may be necessary to do so in order to vindicate the rule of law.

21. He further submits that, even if otherwise the respondent should succeed, there would be a breach of the Convention rights and, accordingly, pursuant to the strong obligation of interpretation in section 3 of the Human Rights Act 1998 , the 1960 Act should be construed in such a way as to lead to the appeal being allowed. In this context he relies in particular on

the right to peaceful enjoyment of possessions in Article 1 of the First Protocol , which is one of the Convention rights set out in schedule 1 to the 1998 Act.

The Submissions for the Respondent

22. On behalf of the respondent authority Mr Mitchell submits that, when it purported to grant a licence to the appellants' predecessor in title in 2001, it had no power to do so. This is because, as is common ground, there was no relevant planning permission (in the extended sense, which includes a certificate of lawful use or development) in place at the time. He submits therefore that the licence was "invalid on its face".

23. He submits that no injustice is done in such a case because the appellants have it within their own power to apply for a site licence and so regularise their position. There is no fee for such an application and it would be granted.

24. He further submits that the appellants can gain no comfort from reliance on section 3 of the Human Rights Act . He submits that the appellants' human rights are simply not in issue in this case.

Discussion

25. The present appeal raises in a stark form a conundrum which arises from the basic principle of English public law that an ultra vires act is void and therefore to be treated as a nullity. Nevertheless, that act may have been relied upon by innocent third parties in the meantime.

26. In *Smith v East Elloe Rural District Council [1956] AC 736* , at 769, Lord Radcliffe said:

> "An order, even if not made in good faith, is still an act capable of legal consequences. It bears no brand of invalidity upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders."

That case was concerned with a statutory time limit and a partial ouster clause, which was held to be effective even though, on a strict view of the ultra vires doctrine, it might have been said that a void decision is a nullity and therefore could be ignored.

27. What is clear is that, once a court of competent jurisdiction has decided that an act is ultra vires, it will normally be treated as having no legal effect. In *Hoffmann-La Roche and Co v Secretary of State for Trade and Industry [1975] AC 295* , at 365, Lord Diplock said:

> "It would … be inconsistent with the doctrine of ultra vires as it has been developed in English law as a means of controlling abuse of power by the executive arm of government if the judgment of a Court in proceedings properly constituted that a statutory instrument was ultra vires were to have any less consequence in law than to render the instrument incapable of ever having had any legal effect."

That case was concerned with delegated legislation but the principle would apply also to other decisions or acts of the executive.

28. This was more recently confirmed by the *House of Lords in Boddington v British Transport Police [1999] 2 AC 143* . That case concerned the question of whether a defendant in criminal proceedings is entitled to raise by way of defence the suggested invalidity of a byelaw under which he is prosecuted. At page 156, citing the above passage from Lord Diplock with approval, Lord Irvine of Lairg, Lord Chancellor, said:

> "… Lord Diplock confirmed that once it was established that a statutory instrument was ultra vires, it would be treated as never having had any legal effect. That consequence follows from application of the ultra vires principle, as a control on abuse of power; or, equally acceptably in my judgment, it may be held that maintenance of the rule of law compels this conclusion."

29. Earlier in his opinion, at page 154, Lord Irvine had considered the distinction between an act which is void and an act which is voidable. He observed that the decision of the House of Lords in Anisminic Ltd v Foreign Compensation Commission [1969] 1 AC 147 had made obsolete the historic distinction between errors of law on the face of the record and other errors of law. It did so by extending the doctrine of ultra vires, so that any misdirection in law would render the relevant decision ultra vires and a nullity. He continued that, today, therefore, the old distinction between void and voidable acts no longer applies.

30. In Boddington , at pages 171 to 172, Lord Steyn expressed a similar view about the fundamental principle of ultra vires, citing Lord Browne-Wilkinson in *R v Hull University Visitor, ex parte Page [1993] AC 682* , at 701. He continued:

> "This is the essential constitutional underpinning of the statute based part of our administrative law. Nevertheless, I accept the reality that an unlawful byelaw is a fact and that it may in certain circumstances have legal consequences. The best explanation that I have seen is by Dr Forsyth who summarised the position as follows in 'The Metaphysic of Nullity — Invalidity, Conceptual Reasoning and the Rule of Law' [in Forsyth and Hare (editors), The Golden Metwand and the Crooked Cord, 1998] at page 159:
>
> > 'It has been argued that unlawful administrative acts are void in law. But they clearly exist in fact and they often appear to be valid; and those unaware of their invalidity may take decisions and act on the assumption that these acts are valid. When this happens the validity of these later acts depends upon the legal powers of the second actor. The crucial issue to be determined is whether that second actor has legal power to act validly notwithstanding the invalidity of the first act. And it is determined by an

> analysis of the law against the background of the familiar proposition that an unlawful act is void.'"

31. That analysis can now be found in the well known textbook on Administrative Law by the late Sir William Wade and Professor Forsyth (10th edition), at pages 253 to 254. At page 253 it is said that:

> "The truth is that the court will invalidate an order only if the right remedy is sought by the right person in the right proceedings and circumstances. The order may be 'a nullity' and 'void' but these terms have no absolute sense: their meaning is relative, depending upon the court's willingness to grant relief in any particular situation … the problems of nullity are soluble by the formulation of principles and by their logical application, not by abandoning the field to free discretion."

32. Further support for the relative, as opposed to an absolute, view of voidness can be found in Boddington in the opinion of Lord Browne-Wilkinson, at page 164, and in the opinion of Lord Slynn of Hadley, at page 165.

33. Returning to Wade and Forsyth, later at page 253 it is said that:

> "An important step in developing a principled and practical approach to these conundrums has been the development of the theory of the second actor. This theory, which has attracted significant judicial support, seeks to explain how an unlawful and void administrative act may nonetheless have legal effect. It is built on the perception that while unlawful administrative acts (the first acts) do not exist in law, they clearly exist in fact. Those unaware of their invalidity (the second actors) may take decisions and act on the assumption that these (first) acts are valid. When this happens the crucial question is whether these latter, or second acts, are valid."

34. An example of that analysis in practice, which preceded the literature to which I have *referred, can be found in the decision of the Court of Appeal in Percy v Hall [1997] QB 924* . In that case the question was whether a person who had been arrested by a constable pursuant to a byelaw which was later found to be ultra vires could sue the constable for false imprisonment. The Court of Appeal held that he could not. In giving the main judgment, Simon Brown LJ, as he then was, said at pages 947 to 948:

> "The central question raised here is whether these constables were acting tortiously in arresting the plaintiffs or whether instead they enjoy at common law a defence of lawful justification. This question, as it seems to me, falls to be answered as at the time of the events complained of. At

> that time these byelaws were apparently valid; they were in law presumed to be valid; in the public interest, moreover, they needed to be enforced. It seems to me one thing to accept, as I readily do, that a subsequent declaration as to their invalidity operates retrospectively to entitle a person convicted of their breach to have that conviction set aside; quite another to hold that it transforms what, judged at the time, was to be regarded as the lawful discharge of the constable's duty into what must be later found actionably tortious conduct … I see no sound policy reasons for making innocent constables liable in law, even though such liability would be underwritten by public funds."

35. As the decision in Boddington itself illustrates, there will be circumstances in which the courts will allow a person to raise an ultra vires argument even in a case which is not brought by way of judicial review. Another case which illustrates that principle is *DPP v Head [1959] AC 83* , which was considered in Boddington . At page 153, Lord Irvine, Lord Chancellor, recalled that in DPP v Head , at page 104, Lord Somervell had posed the question: "Is a man to be sent to prison on the basis that an order is a good order when the court knows it would be set aside if proper proceedings were taken?" Lord Irvine was of the clear view that the answer to that question must be "No". He said: "It would be a fundamental departure from the rule of law if an individual were liable to conviction for contravention of some rule which is itself liable to be set aside by a court as unlawful."

36. However there will be exceptions even to that exception, where it will not be unjust to insist that, if an administrative act has not been challenged in the usual way in the Administrative Court, even a defendant to criminal proceedings may not raise a collateral challenge to it by way of defence. Examples can be found in Quietlynn Ltd v Plymouth City Council [1988] 1 QB 114 and *R v Wicks [1998] AC 92* , which were explained in Boddington by Lord Irvine at pages 160 to 161. In particular, at page 161, he emphasised the following important feature of both cases:

> "They were concerned with administrative acts specifically directed at the defendants, where there had been clear and ample opportunity provided by the scheme of the relevant legislation for those defendants to challenge the legality of those acts, before being charged with an offence."

37. The present case raises a question which has not been the subject of direct authority: can a public authority which has acted ultra vires rely on the unlawfulness of its own act in order to found a criminal prosecution? However, the authorities to which I have referred provide helpful guidance as to the underlying policy of the law in this area which assists in the resolution of that problem. In particular, cases such as Percy v Hall indicate both that a void act may have some legal effect for some purposes, and that the law will strive to protect innocent third parties who have relied upon the apparent validity of that act.

38. The respondent in the present case has been unable to show the Court any authority in which the prosecution has been entitled to rely on the unlawfulness of its own act so as to found a criminal prosecution.

39. Mr Mitchell relied on the decision of the *Court of Appeal in Credit Suisse v Allerdale Borough Council [1997] QB 306* . In that case a bank sought to sue a local authority on a guarantee which it had given but which turned out to be ultra vires. It was held that the local authority could not be liable in those circumstances. However, that case was, as Mr Mitchell readily acknowledged, a civil case and far removed from the facts of the present case. In my view, it does not assist his argument here.

40. Mr Mitchell placed particular reliance on two old cases which were criminal cases: The King v Downes (1790) 3 TR 560 and Pearson v Broadbent (1872) 36 JP 485 . Those were cases in which a licence to sell liquor was held to be void in the context of criminal proceedings and so the defendant was guilty of an offence. However, the licence in each case was granted by justices of the peace, not by the very same authority which later brought the prosecution. Mr Mitchell sought to meet this difficulty for his argument by suggesting that the justices were acting as part of the Crown and that, since the prosecution was also brought by the Crown, it could be said that it was the same authority that was seeking to rely on the unlawfulness of its own earlier act. I do not find that suggestion persuasive. In my view, the justices, even when acting as a licensing authority and not sitting as a court of law, were not to be regarded as being the same authority as the prosecuting authority, even if (in a broad sense) both can be said to be part of the Crown.

41. Mr Mitchell also submitted that the site licence which was granted to Mrs Hill in the present case in 2001 was clearly invalid on its face. The licence said on its face that it was being granted on the basis that the applicant was "entitled to the benefit of … existing use rights". The words "permission (Ref. No …)" had been struck out by the person granting the licence. Mr Mitchell submits that it would have been apparent to a reasonable person reading that licence that it was invalid because it referred to a ground for granting it (existing use rights) which had been the subject of transitional provisions in the 1960 Act but which had been repealed in 1993. He submits that the reasonable reader would have known that the only basis on which a site licence could be granted in 2001 was that there was a permission in place, permission being understood in the wider sense, to include a certificate of lawful use and development. He submits that a reference number would then have been given.

42. In my judgment, this is to assume too much of a reasonable reader. It not only requires that reader to go behind what the author of the document herself has said. It also requires the reader to be familiar with the underlying legislation, both the 1960 Act and the 1990 Act, and to be aware of a change in the legislation which took place in 1993. In my view, the invalidity of this site licence was not apparent on its face. To the contrary, it would have required the reasonable person to go considerably behind the face of the document in order to understand the reason for its invalidity.

43. Finally, Mr Mitchell submitted that, although a criminal prosecution might seem to be unattractive, it was the only weapon in the respondent authority's armoury in order to enforce the law and to regularise the legal position. I do not accept that submission. As is common ground, there could in fact have been, and may still be, an application for judicial review brought by the Mayor or an individual councillor. Such an application would have been well out of time but the time limit in judicial review proceedings can in principle be extended in the court's discretion. It would not be appropriate for this Court to pronounce in any way on what might or might not be the attitude of the Administrative Court if an application for judicial review were to be brought. That would have to be considered by that Court on its merits. However, it will suffice to note, in the present appeal, that such an opportunity was and is in principle available to the respondent authority. It was not required to bring a criminal prosecution because there was no other way of regularising the legal position. I am far from persuaded that it would have been appropriate to resort to the criminal law in a case like the present, which arose from the respondent's own unlawful act, even if there were no other avenue open to a public authority.

44. Accordingly, I accept Mr Hogan's primary submission and, for that reason, this appeal must be allowed.

Human Rights

45. In the light of what I have said in relation to Mr Hogan's primary submission, it is not strictly necessary to deal with the human rights argument which was advanced by him in the alternative. Nevertheless, since the Court heard argument about it, I will address it briefly.

46. Mr Hogan submits that the provisions of section 3(3) of the 1960 Act must, so far as possible, be read and given effect in a way which is compatible with the Convention rights, pursuant to the obligation in section 3 of the Human Rights Act . In particular, he submits that the words "entitled to the benefit of a permission for the use of the land as a caravan site granted under [the 1990 Act]" should be interpreted in such a way that no actual grant of planning permission (or a certificate of lawful use or development) was required in November 2001. It would suffice that such a certificate would have been granted if one had been applied for.

47. He accepts that there is authority which is against him on this issue of construction: *Balthasar v Mullane [1985] 17 HLR 561* , a decision of the Court of Appeal. However, he submits that that case was decided before the coming into force of the Human Rights Act and, therefore, must now be regarded as having been superseded by the will of Parliament as expressed in that Act.

48. I am unable to accept those submissions. First, I cannot see that the legislation as interpreted in Balthasar is incompatible with any Convention right. Mr Hogan placed particular reliance on the right to peaceful enjoyment of possessions in Article 1 of th . He submitted that a transferable licence could in certain circumstances be a possession. However, it is difficult to see how a failure to grant a licence can be regarded as an interference with a licence, especially in circumstances where a person has not applied for a licence and, if one had been applied for, it would have been granted.

49. Secondly, to interpret section 3(3) of the 1990 Act as suggested would introduce unnecessary and unfortunate complexity into what should otherwise be a simple process. It would require a local authority to make enquiries of the underlying facts of a type that should not be necessary.

50. Thirdly, I do not consider that section 3(3) should be given a new interpretation, which would be of general application, in order to cater for the present case, which is on any view an unusual one.

51. Finally, I would find it impossible to read section 3(3) in the way suggested, even having regard to the strong nature of the obligation in section 3 of the Human Rights Act , since it clearly requires a permission to be "granted" and provides that a licence may be granted "if, and only if" the conditions set out in that subsection are fulfilled.

Answers to the Questions in the Case Stated

52. I would answer the questions which have been stated for the opinion of this Court in the following way.

(a) Whether on the facts in this case and a proper construction of section 3 of the Caravan Sites and Control of Development Act 1960 , I was correct in concluding that the respondent had had no power to grant the licence on 14 November 2001? Yes, but this does not necessarily answer the question whether the appellants could be convicted in the circumstances of this case.
(b) Whether on the facts in this case, I was correct in finding that the licence was invalid on its face? No.
(c) Whether in the event that I was correct in determining that the licence was invalid on its face, I had jurisdiction to determine as I did that the licence did not have to be treated as valid, that it was a nullity and that it was of no effect for the purposes of these proceedings? Even if this question arose, the licence was not invalid for all purposes and, in the circumstances of this case, should not have been disregarded.
(d) Whether in the event that on a proper construction of section 3 of the Caravan Sites and Control of Development Act 1960 the respondent had no power to issue the licence on 14 November 2001, I was entitled to conclude on the facts in

this case that the human rights of the applicants or others did not require me to construe the legislation so as to render the grant of the licence valid? Yes.

Conclusion

53. For the reasons I have given, I would allow this appeal and quash the convictions in this case.

54. I would like to thank both counsel for their well-presented and concise submissions.

Lord Justice Gross:

55. I agree with Mr Justice Singh that, for the reasons he has given, this appeal must be allowed. I too would like to express my gratitude, both to Mr Hogan and to Mr Mitchell, for the assistance they have given. I add only a very few words of my own.

56. As explained by Mr Justice Singh, this appeal has presented a most curious set of facts. On their own case, and as emphasised in submissions to this Court, the respondent prosecuted the appellants with reluctance and a degree of embarrassment. The respondent was frustrated that the appellants declined its repeated offers to regularise the licence position, and resorted to criminal proceedings because it could not think of an alternative.

57. So far as concerns the appellants, their stance with regard to the licence position strikes me, with respect, as troubling even making every allowance for their averred concerns about litigation with third parties.

58. As has been much discussed and is the source of no little complexity, an ultra vires administrative act is void, but not necessarily for all purposes — in particular, between the time of the act and the time, if any, when it is set aside, reflecting a reluctance to push the doctrine of nullity to extremes: see Administrative Law, Wade and Forsyth, 10th edition, at page 239.

59. To me, this is such a case. At all events, I am unable to accept that it can be right for the respondent prosecutor to rely on its own unlawful act (the grant of an invalid site licence) to found the prosecution. If need be, I am amply satisfied that the site licence was not invalid on its face. It follows that the appeal must be allowed.

60. I have reached this conclusion without reluctance. Certainly, at least on facts such as those of the present case, the criminal law should not be invoked merely because of the prosecutor's frustration at the perceived absence of public or civil law alternatives.

61. In any event, and though I wish to say nothing to pre-judge any future proceedings, I am far from persuaded that the respondent had no alternative to criminal proceedings.

62. MR HOGAN: Thank you very much, your Lordships. Counsel will draw up a minute of order to reflect the findings that you have made. There follows the issue of costs.

63. LORD JUSTICE GROSS: Yes.

64. MR HOGAN: Hopefully you have received skeleton arguments from both myself and Mr Mitchell.

65. LORD JUSTICE GROSS: No. I received one from you, which I have now misplaced, but that is as I — I have received nothing at all from Mr Mitchell.

66. MR MITCHELL: Well, I can only apologise, my Lord, because my clerk assured me at 9.30 this morning that it had been lodged and filed.

67. MR JUSTICE SINGH: I have had my one through.

68. LORD JUSTICE GROSS: It may not be your fault.

69. MR MITCHELL: Can I pass up to your Lordships … (Handed).

70. I can only apologise, your Lordships, because it was dealt with, by me, by 6 o'clock last night and certainly I was told this morning that it had been lodged and filed. My clerk will be spoken to in due course, when I get back from Nottingham.

71. LORD JUSTICE GROSS: No. It may be, as I have said …

72. MR MITCHELL: My Lord, can I suggest that I just give you a moment to read the written submissions?

73. LORD JUSTICE GROSS: Yes. I did read Mr Hogan's submissions. My Lord has it, so I will just take a moment.

74. Mr Justice Singh has very kindly prepared a note of his judgment, which is remarkably similar to the judgment he has given orally; and he is happy for you to have a copy of that.

75. MR MITCHELL: We are very grateful.

76. MR HOGAN: Thank you, my Lord.

77. LORD JUSTICE GROSS: So we will provide that to you, while we read this. (Handed).

78. MR JUSTICE SINGH: While that is being handed, can I just stress that that is not the judgment. The judgment is what I have delivered in court. But for your convenience, I hope that it would be helpful to have that note.

79. MR MITCHELL: It would help.

80. MR HOGAN: It would be of great assistance. Thank you. (Handed). (Pause).

81. LORD JUSTICE GROSS: Yes.

82. MR MITCHELL: My Lord, it is a fairly full written argument. Mr Hogan has—

83. LORD JUSTICE GROSS: Anything to add to it?

84. MR MITCHELL: No. Mr Hogan has responded to it.

85. LORD JUSTICE GROSS: Also very fully.

86. MR MITCHELL: I do not intend to, therefore, delay you further by going through it again in oral submissions. I will rely on what you have just read in writing. Can I just make one comment about Mr Hogan's submissions and, in particular, paragraphs 15 and 16 of those written submissions?

87. LORD JUSTICE GROSS: Yes.

88. MR MITCHELL: Simply to observe that other than representation made on instructions from the Bar, no evidence has been presented to the Court to support the submissions there made. But that is the only comment that I wish to make in respect of that.

89. LORD JUSTICE GROSS: Mr Hogan's submission, I think, leaves it open as to whether he wants costs from you or costs from central funds.

90. MR MITCHELL: I have no difficulty with that.

91. LORD JUSTICE GROSS: You might not; but what is the right order, if he is entitled to costs?

92. MR MITCHELL: If he had succeeded below, he would undoubtedly have been entitled to an order for costs from central funds.

93. LORD JUSTICE GROSS: Yes.

94. MR MITCHELL: Costs here are in your Lordships' gift and normally go as between the parties; and so I accept that a normal Costs Order in this Court would be an order that the local authority would be bearing the — as the unsuccessful party, it would be bearing the costs here.

95. LORD JUSTICE GROSS: Yes.

96. MR MITCHELL: You can see from the submissions that I make to your Lordship that I submit that the appropriate order—

97. LORD JUSTICE GROSS: Yes, I know that. It is just that if he succeeded, you would accept that here, the right order would be against you.

98. MR MITCHELL: In the normal course of events, subject to your Lordships considering my argument on—

99. LORD JUSTICE GROSS: Of course, of course. And what about — if he is entitled to costs, what about the costs below?

100. MR MITCHELL: If he is entitled to costs, as to the costs below, he would undoubtedly have been entitled to an order that those costs be paid out of central funds.

101. LORD JUSTICE GROSS: Yes. Anything you want to add, Mr Hogan?

102. MR HOGAN: Your Lordship, just on that last point of order, I would agree that the costs here primarily are sought against the council. The costs below would commonly come out of central funds.

103. LORD JUSTICE GROSS: Thank you.

104. MR HOGAN: But the position that my clients are in is that they are not really concerned who pays their costs.

105. LORD JUSTICE GROSS: No, no, but I—

106. MR HOGAN: I know. But that would be the correct position in the Court.

107. LORD JUSTICE GROSS: Yes, that is what I thought. Anything else you wish to add?

108. MR HOGAN: No, you have my written submissions.

109. LORD JUSTICE GROSS: Thank you very much. We will rise.

(A short break)

110. LORD JUSTICE GROSS: This is the judgment of the Court as to costs.

111. In the ordinary course of events, costs follow the event, so a successful party will get its costs. But the Court retains a discretion to make a different order, reflecting the conduct of the parties, as is amply set out in CPR Part 44 .

112. Here, it was perfectly apparent that there was, to put it no higher, a problem concerning the invalid site licence. At some stage, that problem needed to be addressed. In fairness to the respondent, it issued numerous invitations to the appellants to resolve the matter and ultimately, wrongly as we have held, only prosecuted with effect from 1 June 2010.

113. There was neither then, nor is yet now, any evidence as to why the appellants resisted these invitations to resolve the matter in some different, more reasonable way. What we have heard have been submissions, as distinct from evidence, from Mr Hogan.

114. As it seems to us, the Court's order for costs should reflect to some extent our concerns as to the manner in which this case developed and, in particular, the fact that, to a limited extent, it can properly be said that the appellants brought the initial prosecution on themselves — even though, as we have held, ultimately that prosecution was the wrong way for the respondent to proceed.

115. If it is right to say that to some extent the appellants brought the initial prosecution on themselves, it is, however, necessary to distinguish the position on appeal. Once they had been convicted, they faced the choice of either living with the conviction or appealing to set it aside. They have appealed, the respondent opposed the appeal, and the appellants have been successful.

116. As it seems to us, we propose to reflect these facts and to do justice in this case by making the following order.

117. We quash the previous order as to costs in the Court below. We replace it with an order that the appellants should get 50 per cent of their costs below from central funds. With regard to the appeal to this Court, however, for the reasons we have given, the appellants are entitled to their costs, to be taxed, if not agreed; and they are entitled to 100 per cent of those costs, subject of course to taxation, from the respondents.

118. LORD JUSTICE GROSS: Sorry, Mr Mitchell. Not much comfort for you, but some comfort for the general body of taxpayers.

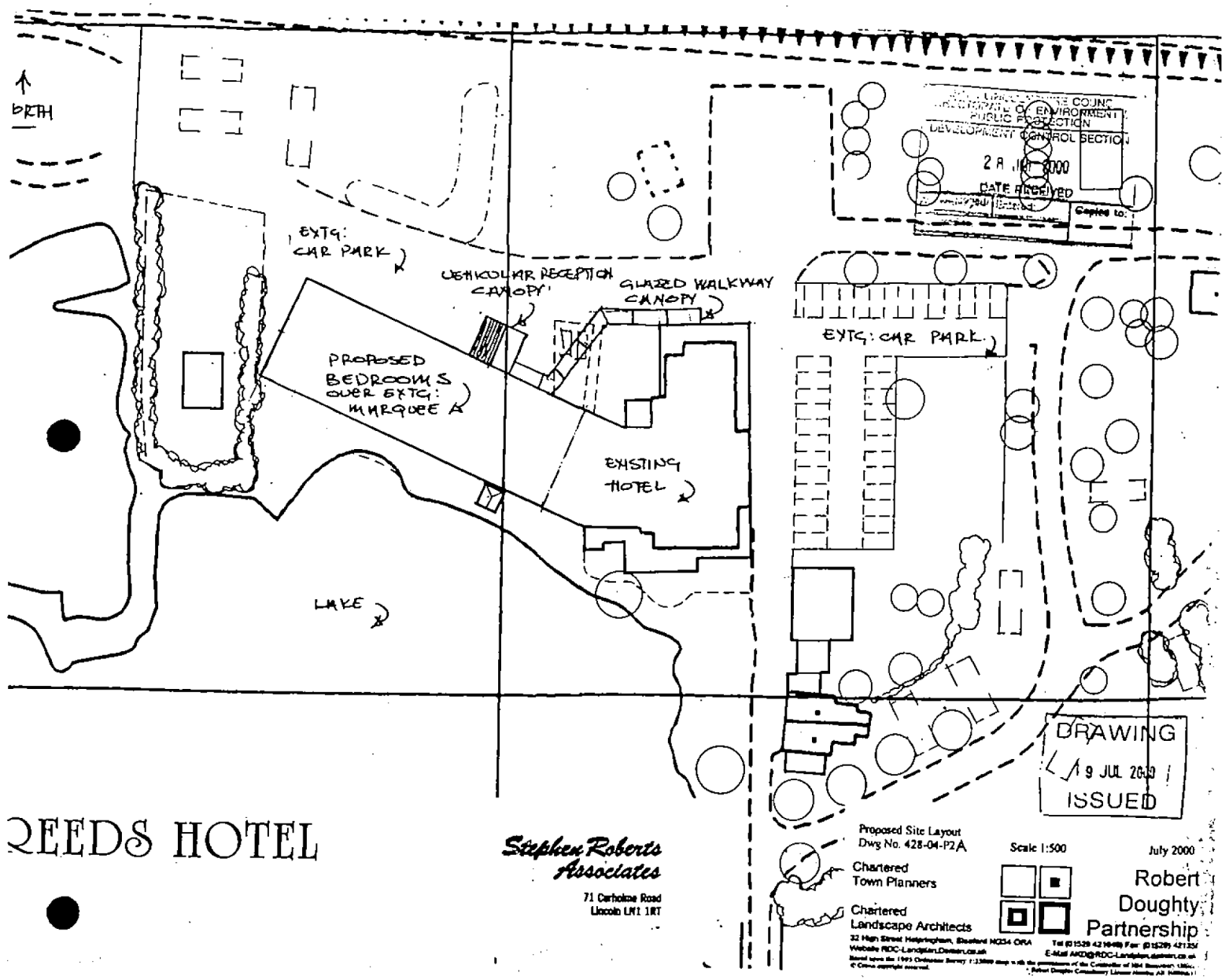
119. MR MITCHELL: It just depends which part of the general body of taxpayers it comes out of.

120. MR HOGAN: My Lords, my clients have asked me to express their very deep gratitude to you for dealing with this case so patiently and so courteously over the last day and a half, as it has meant a lot to them.

121. LORD JUSTICE GROSS: Well, that is very courteous of them and we thank them. But I am sure that you and they will appreciate how much assistance we have had, both from Mr Hogan for you, and from Mr Mitchell, for the manner in which he has conducted this hearing. We really are grateful to you both.

122. Thank you very much.

Appendix 3: Copy of the Proposed Site Layout Plan for the 2000 Permission Ref: PA/2000/0973



REEDS HOTEL

TITLE 2000/0973 BARTON

NOT TO SCALE

N

North Lincolnshire Council
Directorate of Environment and Public Protection
Church Square House, Scunthorpe

Appendix 4: Copy of the Hertfordshire Court of Appeal Judgment

Hertfordshire County Council v The Secretary of State for Communities and Local Government, Metal and Waste Recycling Limited

Positive/Neutral Judicial Consideration

Court
Court of Appeal (Civil Division)

Judgment Date
15 November 2012

Case No: C1/2012/0529

Court of Appeal (Civil Division)

[2012] EWCA Civ 1473, 2012 WL 4888788

Before: Lord Justice Pill Lord Justice Toulson and Lord Justice Munby

Date: 15/11/2012

On Appeal from Queen's Bench Division the Administrative Court

Mr Justice Ouseley

[2012] EWHC 277 (Admin)

Hearing date: 4 October 2012

Representation

Mr Matthew Reed (instructed by Hertfordshire County Council Legal Services) for the Appellant.
Mr Daniel Kolinsky (instructed by Treasury Solicitors) for the First Respondent.
Mr Anthony Dinkin QC and Ms Clare Parry (instructed by Mullis and Peake) for the Second Respondent.

Judgment

Lord Justice Pill:

1. This is an appeal by Hertfordshire County Council ("the Council") against a decision of Mr Justice Ouseley dated 1 February 2012 ([2012] EWHC 277 (Admin)) whereby he dismissed an appeal by the Council from a decision of the Secretary of State for Communities and Local Government ("the Secretary of State") given by an Inspector on 2 June 2010. The Secretary of State allowed appeals by Metal and Waste Recycling Limited ("M and WR") under section 174 of the Town and Country Planning Act 1990 ("the 1990 Act") against Enforcement Notices for breaches of planning control issued by the Council, finding that there had been no breach of planning control.

2. Development controlled by the 1990 Act is defined in section 55 , which provides, in so far as is material:

> "'development', means the carrying out of … any material change in the use of any buildings or other land."

The relevant breach of planning control complained of was a change of use of land at Wallace Way, Hitching, Herts.

3. Upon a breach of planning control, a local planning authority may take enforcement action under Part VII of the 1990 Act. Section 173(1) provides, in so far as is material:

> "An enforcement notice shall state—
>
> (a) the matters which appear to the local planning authority to constitute the breach of planning control; … "

4. There were two Enforcement Notices, dated 11 May 2009. They each referred to the relevant land. Enforcement Notice A alleged a material change of use: "without planning permission the material change of use of the land from a scrap-metal yard with an average yearly material throughput of 74,500 tonnes, to a scrap-yard, (including as part of this use an end of life vehicle recycling facility), with an average yearly material throughput of 181,000 tonnes, the totality of the new use having a different nature and character from the former use." The reasons for issuing the Notice included:

> "While the land benefits from an extant planning permission, issued by North Herts Districts Council in 1972, for use as a scrap metal-yard, since 2004 the level of operations on the land has increased substantially."

The allegedly adverse impact of the increase is then set out and is related essentially to the increase in throughput; more noise, more dust, more vehicles.

5. Enforcement Notice B claimed that buildings had been erected without planning permission. The same reasons are given. The Inspector permitted a correction to the volumes of material stated in Notice A. The corrected Notice provided:

> "…the material change of the use of the land from a scrap-metal yard with an average yearly material throughput of 121,174 tonnes, to a scrap yard, (including as part of this use an end of life vehicle recycling facility), with an average yearly material throughput of 231,716 tonnes, the totality of the new use having a different nature and character from the former use".

Thus the throughput had almost doubled.

6. It is common ground that the Notices stand or fall together. If a change of use is established, planning permission, which had not been obtained, was required (section 57(1)) of the 1990 Act) and there was a breach of planning control (section 171A). If the change of use allegation fails, Notice B fails with it.

7. The Inspector gave her decision following an 8-day public local inquiry. By virtue of section 174(1) of the 1990 Act, M and WR had a right of appeal against the Notices. Having corrected the Notices, the Inspector allowed the appeal on ground (c) in section 174(2) of the 1990 Act, holding that "the material change of use alleged by the corrected Notice has not taken place." There was no "breach of planning control" within the meaning of section 174(2)(c) of the Act.

8. The Council contend that there was a material change of use ("an MCU") of the land which justified the enforcement action taken. In demonstrating an error of law by the Inspector (and by the judge), it seeks to establish four propositions, first, that there can be an MCU merely by intensification of the use, secondly, that an MCU can be established merely by reference to the effect of the use on neighbouring properties, thirdly, that in considering an MCU, it is necessary to look at what is actually carried on and not at what potentially could have been carried on under the existing permission and, fourthly, that, in assessing the effect of operations on site on neighbouring land, it is immaterial whether the impact results from decisions of the operator or as a result of the actions of third parties, such as government requirements.

9. It is not disputed that intensification of a use is capable of constituting an MCU. That was accepted in Guildford Rural District Council v Fortescue [1959] QBD 112 , Lord Evershed at page 124, in *Lilo Blum v Secretary of State and Anr [1987] JPL 278* , by Simon Brown J, and in *R v Thanet District Council [2001] 81 P & CR 37* by Sullivan J. What is necessary, however, and accepted by the parties to the present appeal, is that the test for deciding whether there has been an MCU is whether there has been a change in the character of the use. In *East Barnet Urban District Council v British Transport Commission [1962] 2 QB 484* at 491, Lord Parker CJ stated:

> "It seems clear to me that under both Acts [Town and Country Planning Acts, 1932 and 1947] what is really to be considered is the character of the use of the land, not the particular purpose of a particular occupier."

10. In Lilo Blum , Simon Brown J stated, at page 280:

> "It was well recognised law that the issue whether or not there had been a material change in use fell to be considered by reference to the character of the use of the land. It was equally well recognised that intensification was capable of being of such a nature and degree as itself to affect the definable character of the land and its use and thus give rise to a material change of use. Mere intensification, if it fell short of changing the character of the use, would not constitute material change of use."

In Thanet District Council , Sullivan J stated, at paragraph 54:

> "The question left open might well be a vexed question, for the reasons advanced by the respondents. It is easy to state the principle that intensification may be of such a degree or on such a scale as to make a material change in the character of a use; it is far more difficult to apply it in practice. There are very few cases of 'mere intensification'. Usually the increase in activity will have led to some other change: from hobby to business, from part to full-time employment, or an increase in one use at the expense of other uses in a previously mixed use."

11. The general test applied by the Inspector, at paragraph 68, is, in my view, in accordance with authority:

> "In the light of judicial pronouncements, and after considering the approaches of the parties, it seems to me that what must be determined is whether the increase in the scale of the use has reached the point where it gives rise to such materially different planning circumstances that, as a matter of fact and degree, it has resulted in such a change in the definable character of the use that it amounts to a material change of use. It is necessary to first look at the effects of what has been done at the site."

Ouseley J, at paragraph 46, correctly referred to:

> "… the need to identify a material change in the definable character of the use of the land."

12. The Council's attack is focussed on the findings of the judge rather than on those of the Inspector and it must be kept in mind that it is the lawfulness of the Inspector's decision which needs to be assessed. M and WR accepted, before the Inspector, that off-site effects were a material factor in considering MCU. At paragraph 11, the Inspector summarised M and WR's submissions:

> "The question to be asked is whether the effects of that increase in throughput, including effects off-site, are such that there has been a definable change in the character of the use of the land. If off-site effects are being relied upon they must be such as to have caused some fundamental change in the character of the use of the land. Mere intensification, even with adverse side effects, is not enough."

13. The Inspector considered "the effects of the increase in throughput", under headings accepted to be relevant, "noise", "noise from on-site operations, excluding explosions", "explosions", "noise from lorries", "other issues arising from lorry movements", and "dust".

14. Having stated the test to be applied, the Inspector made detailed findings of fact and stated her general conclusion at paragraph 70:

> "Taking all the various effects as a whole, they cannot be said, as a matter of fact and degree, to have produced a materially different situation in planning terms than previously existed."

The conclusion was restated at paragraph 71:

> "I concur with [M and WR's] general proposition that the primary way a planning authority should control the extent of any use is through the imposition of conditions. This site is a long established scrap metal yard which has been operating under an effectively unrestricted planning permission since the 1970s with no conditions attached to control matters such as the number of lorry movements or hours of operation. The effects of the intensification need to be such as to have caused a material change in the character of the use. There have been changes in the effects of the operation upon the surrounding area and, in some instances, the very substantial increase in throughput has been a contributory factor. However, many of the identified impacts upon local residents and businesses derive from extraneous factors and not the increase in throughput. I conclude that the increase in throughput has not had such materially different planning consequences as to take it, as a matter of fact and degree, beyond the normal fluctuations in activity that could reasonably be expected to be experienced by the business. It has not resulted in a change in planning effects of such magnitude so as to cause a material change in the definable character of the use of the land. I find, on the balance of probabilities, that the material change of use alleged by the corrected notice has not taken place. The appeal succeeds on ground (c)."

15. The Inspector's detailed assessment, under the headings stated above, followed that approach. She accepted, for example, that "the increase in early morning traffic has seriously impacted upon the living conditions of residents in Cadwell Lane" (paragraph 45). As a planning judgment, the Inspector was in my view entitled to reach the conclusion at paragraph 70, already cited, of her determination. I agree with the respondents' submissions, as did the judge. Ouseley J stated, at paragraph 33:

> "The Inspector looked at those impacts which she concluded were attributable to the increase in throughput, but reached her unassailable and well reasoned conclusion on that point adverse to the County Council."

The increase in tonnage was very substantial but, the test being as to whether the character of the use had changed, the Inspector was entitled to conclude that it had not. On a consideration of the increase in throughput simpliciter, the Notices failed. The premises were used as a scrap yard, albeit on a larger scale.

16. Where the Inspector's conclusion may be open to challenge is in some of the Inspector's reasoning, as to whether she was entitled to take into account, for example, the impact of early morning movements of vehicles, that "are likely to be due to extraneous factors that are outside the control of the site, rather than on-site operational reasons."

17. The Council now seeks to rely on a combination of factors, throughput combined with factors such as the increased use of gas bottles and canisters and legislation involving drivers' hours of work. These, it is submitted, together give rise to an MCU.

18. In relation to explosions, the Inspector stated, at paragraph 29:

> "…The increase in explosions cannot simply be regarded as being derived directly from the greater intensity of the use."

She continued at paragraph 30:

> "…[M and WR] accepts that [explosions] have the potential to impact on the amenity of the local community when they occur. However, it must be borne in mind that explosions only occur intermittently and each individual event is relatively short-lived. Taking this factor into account and given the questionable relationship between throughput and explosions, I am unable to conclude that the increased throughput has materially changed the level of impact resulting from explosions."

19. Lorry use was considered at paragraphs 41 and 45:

> "41. It is necessary to consider the impact of this increase in HGV traffic upon the living conditions of local residents. Some residents have complained of noise from HGVs during normal working hours. However, the impact of the increase in HGVs during the day must be considered against the background of the general increase in traffic, including HGVs not connected with the site. When considered in this context, the increase in two-way movements across the day is not such that it is likely to impact significantly upon residents' living conditions. The main concerns of the Council and local residents relate to sleep disturbance experienced by local residents caused by HGV vehicles arriving during the early hours.
>
> 45. [M and WR] acknowledges the potential for disturbance to be caused by early morning movements. The increase in early morning traffic has seriously impacted upon the living conditions of residents in Cadwell Lane. Whilst not all such incidents can be attributed to vehicles travelling to and from the site, any such exceedance must be regarded as a significant event in terms of amenity. However, the appellant submits that the increase in night time/early morning HGV movements and queues in Wallace Way is not related to throughput. He contends that the problem is caused by new legislation as to how long drivers can drive before taking a break, significant changes in tachograph regulations and changes of practice in the haulage industry. It seems to me that whilst it is wholly regrettable that vehicles associated with the site arrive at these unsociable times, the available evidence suggests that there is no causal link between this unfortunate practice and the increase in

> throughput. In my view, these early arrivals are likely to be due to extraneous factors that are outside the control of the site, rather than on-site operational reasons. There is no substantial evidence to suggest that they relate to the capacity of the site to accept the increased levels of material to be processed during normal working hours. I conclude that there has not been any material change in the impact of noise disturbance from HGVs that can be attributed to an intensified scrap yard use."

20. It becomes necessary to consider an objection raised by the Secretary of State and M and WR. The Council's case before the Inspector was based on an "intensification of use which has had significant effects on the locality" (Inspector's report paragraph 10). That is consistent with the contents of the Enforcement Notice. That being so, it is submitted, it is not now open to the Council to introduce different arguments to establish a change in the character of the use, such as the increasing use of gas bottles and canisters, which are more vulnerable to explosion, and changes in legislation which have required vehicles associated with the site to arrive at unsociable hours.

21. The Council submits that if those factors had been taken into consideration, the finding of fact as to the material change of use would have been different. The respondents submit that, on the wording of the Enforcement Notice and the way the case was presented to the Inspector, the Council can rely only on the increase in throughput in seeking to establish a change in character of the use which would amount to an MCU.

22. The Court gave indications favourable to the respondents' view in the course of submissions. The Court also gave indications that, in considering the interrelationship of throughput with other factors such as the frequency of explosions and the change to early morning arrivals, the Inspector's reasoning may have been suspect. As a result, Mr Reed, for the Council, in his submissions in reply, sought leave to amend the grounds of appeal to add a new paragraph, later supplied in writing:

> "It was unreasonable of the Secretary of State to find, having identified an increase in disturbance from explosions at paragraph 28 of the decision letter and an increase in early morning HGV traffic noise at paragraph 45 of the decision letter, that an increase in operations did not materially affect the increase in such occurrences. An increase in throughput or intensity of use necessarily increased the prospect of such occurrences and the Inspector could not have reasonably found otherwise."

23. Both respondents oppose the application to amend because of the very late stage at which the application is made, because the case was put to the Inspector in a different way and for the basic reason that the further factors were not included in the alleged "breach of planning control" in the Enforcement Notice, as required by section 173(1) of the 1990 Act. Only throughput was relied on.

24. I have no hesitation in upholding the respondents' objections and refusing the application to amend. It is not appropriate to give the Council an opportunity at this stage of the procedure to seek enforcement on other grounds.

25. The judge went on to hold that, even if other considerations are taken into account, the Inspector was entitled to conclude that a change of use was not, on the evidence, established. Much of the Council's criticism is directed to those parts of his judgment dealing with the extent to which changes in effect are capable of creating a material change of use and with the

materiality of changes affecting the use of the site which are extraneous to the operator's activities. I do not find it necessary to consider those issues in any detail. M and WR rightly accept that it is permissible to consider off-site effects when assessing whether an MCU has been established. In assessing whether there is a change of character in the use, its impact of the use on other premises is a relevant factor. It is necessary, on the particular facts, to consider both what is happening on the land and its impact off the land when deciding whether the character of the use has changed.

26. When the judge said, at paragraph 41, that: "of itself, an increase in noise impact, however severe, cannot be a material change in the use of the land," he was, in my view, saying no more than that impact cannot be considered in isolation from what is happening on the land. As Elias J put it in R (on the application of Stephen John Manning) v South Lakeland District Council [2005] EWHC 242 (Admin), at paragraph 8:

> "Perhaps the key point here is that the impact of a particular use is an integral part of the character of that use, so that even though the relevant use itself may not change, save in the intensification itself, that will, in an appropriate case, be capable of constituting a change in character."

27. I do respectfully question some of the Inspector's reasoning when considering the combined effect of, and relationship between, throughput and other factors affecting impact. Having accepted, for example, that an increase in explosions was the result of the increasing percentage on site of gas bottles and canisters, the failure, at paragraph 30, to conclude that the increased throughput had contributed to the level of impact resulting from explosions is questionable. Increased throughput would appear to mean more gas bottles and canisters and consequently more explosions. But if the change to gas bottles and canisters, and changes resulting from legislation on lorry timings were to be relied on by the Council, they should have been identified in the Notices as contributing to the material change of use. If it did occur, it was not caused by throughput alone. Issues as to the relevance of changes beyond the control of the operator could then have been considered.

28. Any flaws in dealing with factors other than increased throughput do not in the circumstances entitle the Council to obtain a quashing order. I add that it may be unlikely in any event that the decision would have been quashed on the facts found. In reaching conclusions on explosions and in relation to noise from lorries, the Inspector also relied on other relevant factors, for example, the limited impact of explosions (paragraph 30) and the general increase in traffic, including HGVs not connected with the site (paragraph 41), when concluding that there was not "a materially different situation in planning terms".

29. I would dismiss this appeal.

Lord Justice Toulson:

30. I agree.

Lord Justice Munby:

31. I also agree.

Appendix 5: Copy of the Hertfordshire High Court Judgment

Hertfordshire County Council v The Secretary of State for Communities and Local Government, Metal and Waste Recycling Limited

Positive/Neutral Judicial Consideration

Court
Queen's Bench Division (Administrative Court)

Judgment Date
1 February 2012

CO/7181/2010

High Court of Justice Queen's Bench Division the Administrative Court

[2012] EWHC 277 (Admin), 2012 WL 280432

Before: Mr Justice Ouseley

Wednesday, 1 February 2012

Representation

Mr Matthew Reed (instructed by Solicitor to Hertfordshire County Council) appeared on behalf of the Appellant.
Mr Daniel Kolinsky (instructed by Treasury Solicitors) appeared on behalf of the First Respondent.
Mr Anthony Dinkin QC and Ms Clare Parry (instructed by Mullis and Peake) appeared on behalf of the Second Respondent.

Judgment

Mr Justice Ouseley:

1. Hertfordshire County Council challenges the decision of the Secretary of State for Communities and Local Government given by an Inspector on 7 June 2010, dismissing appeals made by Metal and Waste Recycling Limited against two enforcement notices served by the County Council in respect of an alleged material change of use and operational development made without planning permission on a scrapyard in Wallace Way in Hitchin.

2. Metal and Waste Recycling Limited has operated a scrapyard at the site since the 1970s with the benefit of a planning permission which was not subject to any conditions relevant to the issues here. It replaced an old fragmentiser used for dealing with scrap metal with a new one in 2006, and around that time its throughput increased notably. Lorries arrived at unsocial hours. Dust was created.

3. The County Council served Enforcement Notice A alleging a material change of use without planning permission caused by an increase in throughput and its effect. It was arguing that the material change of use had been caused by an intensification in the use. It required the use to return to operations as they had been conducted before 2006, with various controls imposed, rather resembling conditions, through the medium of steps required to be undertaken to remedy that breach of planning control.

4. Enforcement Notice B alleged that a number of buildings, including the replacement fragmentiser, had been erected without the planning permission they required and should be removed.

5. After an 8-day inquiry and considering the evidence, the Inspector rejected the County Council's argument on the material change of use essentially because most of the significant effects of which residents and local businesses complained were not caused by the increase in throughput. She rejected the County Council's arguments on operational development because the buildings were permitted development, not requiring specific planning permission, and she also concluded, in the light of her decision on Enforcement Notice A, that the scrapyard use was not unlawful.

6. Hertfordshire County Council, with permission, challenges those decisions. Mr Matthew Reed, appearing for the County Council, contends that the Inspector wrongly excluded from her judgment as to whether a material change of use had taken place by way of intensification those effects attributable to changes related to the scrapyard use other than the increase in throughput. The argument on behalf of the second respondent, Metal and Waste Recycling Limited, has involved some consideration of the concept of material change of use by intensification.

7. The County Council contended that the buildings were not permitted development because the scrapyard use should be regarded as falling outside the scope of an industrial process within the meaning of the Town and Country Planning (General Permitted Development) Order 1990 , S1 No 418, and the scrapyard use was not lawful.

8. The terms of Enforcement Notice A are important. The breach of planning control as amended alleged:

> "… without planning permission the material change of the use of the Land from a scrap-metal yard with an average yearly material throughput of 121,174 tonnes, to a scrap yard, (including as part of this use an end of life vehicle recycling facility), with an average yearly material throughput of 231,716 tonnes, the totality of the new use having a different nature and character from the former use."

9. The reasons for the issue of the Enforcement Notice refer to the impact which that breach of planning control has had: new buildings were built, including the new fragmentiser "to service this substantial increase in throughput". The steps which Enforcement Notice A required Metal and Waste Recycling Limited to take to remedy the breach of planning control read like the imposition of a series of conditions. These were intended to limit the monthly throughput, the days and hours of operation, and the number and hours of heavy goods vehicle use. They required the buildings which were said to be required to service the increased throughput to be demolished. Those buildings were also the subject of Enforcement Notice B.

10. Mr Reed, for the County Council, agreed that paragraph 10 of the Inspector's decision letter accurately summarised his submissions. In view of the arguments, I set them out:

> "10. The increase in throughput at the time of the installation of the fragmentiser has been used by the Council to describe the extent of the material change of use. However, it accepts that the significant increase in throughput, itself does not amount to a material change of use. The Council

> has had regard to the planning consequences of that increased throughput in reaching its conclusion that there has been a material change of use. The essence of the council's case on this ground is that there has been an intensification of use which has had significant effects on the locality. It contends that the proper question to consider is not whether the description of the use remains the same but whether the character of the use falling under that description remains the same. The Council relies upon case law to support its contention that in deciding whether the current use is materially different from the previous use, it is appropriate to have regard to the impacts of the current use in comparison to the former use. The Council's position is that there can be a material change of use by reference only to changes in impacts."

11. Metal and Waste Recycling's submissions in contrast were:

> "11. The appellant strongly rejects the Council's submission that there can be a material change of use by reference only to changes in impacts. He accepts that a comparative exercise is necessary based on the effects of the increase in throughput, but submits that the fact that there are more HGVs, general activity, explosions, noise or dust is not sufficient to constitute a material change of use. The question to be asked is whether the effects of that increase in throughput, including effects off-site, are such that there has been a definable change in the character of the use of the land. If off-site effects are being relied upon they must be such as to have caused some fundamental change in the character of the use of the land. Mere intensification, even with adverse side effects, is not enough."

12. Fundamental to the County Council's case is the contention that although the significant increase in throughput was by itself insufficient to constitute a material change of use, the planning consequences of that increase demonstrated a material change of use. Metal and Waste Recycling contended that the adverse impacts from the increase in throughput were not sufficient to demonstrate a material change of use by intensification. A definable change in the character of the use of the land was required.

13. The Inspector's decision letter then considers in sequence the particular impacts relied on by the County Council. In paragraph 68 and following, she set out accurately the effect of a number of authorities cited to her on the scope of intensification. She said:

> "In the light of judicial pronouncements, and after considering the approaches of the parties, it seems to me that what must be determined is whether the increase in the scale of the use has reached the point where it gives rise to such materially different planning circumstances that, as a matter of fact and degree, it has resulted in a such a change in the definable character of the use that it amounts to a material change of use. It is necessary to first look at the effects of what has been done at the site."

14. She then drew together her unchallenged conclusions of fact and degree, and her conclusions as to the cause of the impacts relied on, in paragraphs 69 to 71. So far as dust was concerned, she said:

> "There is no evidence to indicate that any dust created by the site would cause a risk to human health. I have concluded there has been a material increase in dust experienced by local businesses which has emanated from the site since the increase in throughput occurred. However, there is no substantial evidence that the increase in dust identified by local residents at their homes derives specifically from the appeal site or can be directly attributable to the increase in throughput."

15. She then turned to the explosions caused by the quantity of gas bottles in the waste handled at the site. She said:

> "The evidence also does not support the conclusion that the increase in throughput has materially changed the level of impact resulting from explosions at the site."

16. There had been a significant increase in the number and size of heavy goods vehicles going to the site. She said about that:

> "Nevertheless, the size of vehicles and the use of containers to transport material from the site can be attributed to changes in export markets and practices of the haulage industry, rather than the increase in throughput."

17. The impact, however, of that increase in the number and size of HGVs was more complex. She had previously found that there had also been an increase in HGV movements generally on the road which led to the industrial estate and to the scrapyard. She continued:

> "There is additional road traffic noise but the main disturbance caused to residents is by HGV vehicles going to and from the site during the *'night time'* period. The available evidence indicates that this relates to drivers' working practices and the need to comply with regulations and is not directly caused by the increase in throughput. There has not been any material change in the impact of noise disturbance caused by HGVs that can be attributed to the intensified scrap yard use. The increase in HGVs going to and from the site as a result of the increase in throughput has not given rise to any material harm to the safety of people using the public highway."

18. , In paragraph 70 she turned to on-site noise:

> "As regards the noise emanating from the site, it must be recognised that prior to the carrying out of the noise attenuation measures, the new fragmentiser was initially identified as the source of the elevated noise levels giving rise to complaints. However, the situation is obviously very different with the acoustic shield and the other noise attenuation measures in place. There have been no significant alterations in the noise characteristics of the other on-site activities. The evidence does not reveal any significant adverse planning consequences arising from the noise generated by the on-site operations following the increase in throughput. Taking all the various effects as a whole, they cannot be said, as a matter of fact and degree, to have produced a materially different situation in planning terms than previously existed."

19. Her overall conclusions are in paragraph 71:

> "I concur with the appellant's general proposition that the primary way a planning authority should control the extent of any use is through the imposition of conditions. This site is a long established scrap metal yard which has been operating under an effectively unrestricted planning permission since the 1970s with no conditions attached to control matters such as the number of lorry movements or hours of operation. The effects of the intensification need to be such as to have caused a material change in the character of the use. There have been changes in the effects of the operation upon the surrounding area and, in some instances, the very substantial increase in throughput has been a contributory factor. However, many of the identified impacts upon local residents and businesses derive from extraneous factors and not the increase in throughput. I conclude that the increase in throughput has not had such materially different planning consequences as to take it, as a matter of fact and degree, beyond the normal fluctuations in activity that could reasonably be expected to be experienced by the business. It has not resulted in a change in planning effects of such magnitude so as to cause a material change in the definable character of the use of the land. I find, on the balance of probabilities, that the material change of use alleged by the corrected notice has not taken place. The appeal succeeds on ground (c)."

20. Mr Reed's challenge to her conclusions in relation to intensification proceeds on a narrow front. He contends that in her judgment as to whether a material change of use by reason of intensification had occurred, the Inspector had focused exclusively on impacts caused by the increase in throughput, with the result that she had ignored impacts caused by changes, whether on or off-site, which were caused other than by that increase in throughput: for example, by changes in the number of gas bottles in the arisings, or changes in the drivers' working hours.

21. The Inspector's detailed conclusions show that there were serious noise problems created initially by the installation of the new fragmentiser, largely resolved by later attenuating measures. This was then, in her view, not materially different from what previously had existed (see paragraph 23). She was unable to conclude that the increase in throughput had caused a change in the impact of explosions; yet, as paragraph 29 shows, she thought it likely that there was some increase, not attributable to the increase in throughput. This aspect of the impact was, said Mr Reed, ignored in her assessment of whether there was a material change of use by intensification.

22. In relation to lorry noise off-site, she appears in paragraphs 39 and 40 to conclude that the increase in heavy goods vehicles entering the site is directly related to the increase in throughput, but that the disturbing impact of their noise was attributable to their arrival at the site at unsociably early hours. At paragraph 45 of the decision letter she attributes this impact not to an increase in throughput, but to changes in drivers' working practices, which would have occurred whether the throughput had increased or not; (these are not drivers employed by Metal and Waste Recycling Limited).

23. Accordingly, submitted Mr Reed, that aspect of the impact of change was ignored because it was not attributable to the increase in throughput. The same applies to her conclusion about the increase in the annoying use of bleepers. This increase was caused by the turning movements of container lorries, which was not so much a function of the increase in throughput, but of changes in the way in which waste was handled off-site. That impact was accordingly put to one side.

24. The increase in dust, so far as it affected the nearby industrial estate, was caused by the increased throughput. But so far as residents were concerned, she could not conclude that the dust they experienced derived from the site at all or from an increase in throughput.

25. So, reading paragraph 71 of the decision letter with that background, Mr Reed is plainly right to submit that the focus of the Inspector's conclusions on whether a material change of use by intensification had occurred, at least so far as impacts were relevant, focused on the impacts caused by the increased throughput and excluded impacts caused by other changes. Those which were excluded from account in particular included part of the impacts of gas bottle explosions, at least part of which were attributable to the increase in the numbers of such bottles in the arisings anyway, lorry noise in the early hours, which were attributable to the change in drivers' working practices, and the noise of the reversing bleepers.

26. The crucial question, however, is whether that approach was an error of law, as Mr Reed submits. He contends that the materiality of a change of use by intensification can, though it may not have to be, judged solely by the change in impacts on or off-site which a use may have, even where the use remains one of the same generic type — here a scrapyard use. The character of the use can be judged and determined by those effects. It is not necessary for them to be attributable to a specific on-site change such as here: the significant increase in throughput which occurred in 2006, at the same time approximately as the new fragmentiser was installed. Hence the Inspector was wrong to exclude those effects which she did exclude from her judgment of whether there had been a material change of use by intensification.

27. Mr Reed submitted that Enforcement Notice A had conveyed the approach he contended for through its use of the words “the totality of the new use having a different nature and character from the former use”. He did however accept that that was not how the case was being put to the Inspector.

28. I reject Mr Reed's contentions. I take the last point first because it is significant for both of his arguments in relation to Enforcement Notice A. The material task of the Inspector on this aspect of the Enforcement Notice appeal was to decide whether the matters alleged in the Enforcement Notice constituted a breach of planning control. The allegation in the Enforcement Notice, after argument before me by Mr Reed, may not be as clear as it was to the parties and the Inspector at the inquiry.

29. The former use was the scrapyard use with a particular throughput. The new use was the scrapyard use with the higher throughput. That increase was the material change of use. The significance of the reference to “totality” as encompassing changes unrelated to an increase in throughput, which occurred off-site or which would have occurred on-site anyway to the

same or at least to some degree, was simply not raised before the Inspector. Those changes were not understood by the parties to be relevant of themselves to the material change of use by intensification.

30. It is perfectly clear from the second page of the Enforcement Notice, which refers to the planning reasons behind its issue, that the case was concerned with the effect of the increase in throughput. The issues as recorded and debated before the Inspector, and as judged by her, were whether the effects on or off-site relied on by Hertfordshire County Council were caused by the increase in throughput. That is clear from the record of the County Council's argument in the third sentence of paragraph 10 of the decision letter above, which Mr Reed accepted faithfully recorded his submissions. He took me to his closing submissions in support of his argument, but it is perfectly clear, as he accepted, that they are structured in the same way in order to focus on the effects caused by the increase in throughput.

31. Metal and Waste Recycling Limited focused its own submissions to the inquiry within that same framework, a framework selected by the way in which the County Council sought to present its case on the application to the facts of what it saw as the meaning of its Enforcement Notice. Not surprisingly, that is the framework which the Inspector adopted for her consideration of Hertfordshire County Council's argument that there had been a material change of use by intensification.

32. Hertfordshire County Council lost before her because it lost many of the significant arguments of fact and degree as to whether the effects relied on were wholly or significantly attributable to the increase in throughput. It is perfectly clear that it had thought that the installation of the fragmentiser was the cause of the increase in throughput, and that the amenity impacts which occurred on and off-site were the consequence of that increase in throughput. But it failed on that ground because the evidence of Metal and Waste Recycling Ltd on those matters was preferred.

33. The Inspector looked at those impacts which she concluded were attributable to the increase in throughput, but reached her unassailable and well reasoned conclusion on that point adverse to the County Council.

34. In my judgment, it is not open to the County Council to criticise the Inspector for adopting the basis for decision-making which it had urged upon her, and for failing to adopt a basis which it did not urge upon her. She cannot be said to have misinterpreted the nature of the allegation in the Enforcement Notice, nor to have omitted from consideration material factors to the issue of whether there had been a material change of use as formulated in the Enforcement Notice or as contended for by Hertfordshire County Council.

35. In any event, I am not persuaded that the factors she excluded were material considerations, however the case had been presented. The concept of a material change of use by intensification requires, as a necessary but not sufficient condition, an increase in the scale of all or some of the activities on-site, leaving aside how or where that has to manifest itself. It is that increase which has to cause the change of use. To the extent that effects are relevant, it is the effect from that increase which matter. A change in the nature of activities on the site, or a change in the relative proportions of mixed uses on the site may give rise to some material change of use other than by way of intensification. But if such changes themselves do not bring about a material change of use as was the case here, the activities as varied can be carried on as part of the existing or permitted use. Their effects are permitted effects.

36. Similarly, in judging whether an increase in activity has led to an intensification of such a nature or degree as is necessary to constitute a material change of use, the level at which that activity did or could occur without giving rise to a change of use has to be ascertained. It is only what happens above that no doubt not very clearly defined baseline which can contribute

to the material change of use. In so far as the change in effect is relied on, the change in effect must exceed that which could be caused by the permitted use.

37. I do not doubt that a combination of intensification and other changes in activities can constitute a material change in use; but what could be done without the need for permission would still have to be ascertained. That is how the Inspector approached it. Gas bottle explosions for example would have occurred anyway, as would the use of container lorries and the unsociable hours of the arrival of HGVs outside the site as part of the permitted use. They were not, or largely not, related to the increase in throughput, and so rightly were or largely were excluded from consideration. So even if effects could prove that a material change of use had occurred, they had to be effects generated by activities beyond those which did not require planning permission.

38. Mr Anthony Dinkin QC, for Metal and Waste Recycling Limited, submitted, in support of the Inspector's conclusions, that in effect there had been a degree of intensification falling short of that which could show a material change of use; a material change of use by intensification could not be shown simply by reason of increased impacts, however grave. He pointed out that the County Council had accepted that the degree of increase by itself did not show that there had been a material change of use, and that its argument as to impact on and off-site was the crucial determinant for its argument. The on-site primary or generic use as a scrapyard was unchanged, as the Council had accepted, and there had been no change in the nature or type of activities undertaken on the site. Mr Dinkin rightly points out that the Inspector so concluded at paragraph 67 of the decision.

39. Mr Reed submitted that a material change of use by intensification could be shown by the effect of on or off-site impacts alone. That had happened here, and was why all impacts had to be considered.

40. Although the concept of a material change of use can be expressed clearly enough as a concept, it is elusive in practice, perhaps even illusory. But one point is clear from all the authorities, and the Inspector expresses it correctly in paragraph 68 of her decision, as I set out above: the change relied on has to result in a material change of the use of the land, and it can only do that by bringing about a definable change in the character of the use made of the land.

41. I have no difficulty in seeing that significant environmental effects, experienced on or off-site, may support the contention that a material change of use of land by intensification has occurred. There are plenty of authorities to that effect. But I do not see how effects, whether on or off-site, can themselves constitute a material change in the use of the land. The concept focuses on the use made of a particular piece of land. I do not see how an increase in lorries, for example, arriving in the road at unsocial hours, or creating problems at a junction a mile away, or an increase in noise or dust experienced off-site from activities on-site, is capable of itself or themselves, whatever the degree of increase, of constituting a material change of use on a particular site. It may be very relevant to the argument that there has been a material change in the character and use of land. For example, a specialist gas bottle disposal facility might be treated as a materially different use from a general scrapyard because of its noise impacts. But of itself, an increase in noise impact, however severe, cannot be a material change in the use of the land.

42. The relevance of impacts comes in evidencing a material change of use of the land, a definable change in its character, but one which is defined by a material change in use, not by a change however severe or minimal, in the effects of a use.

43. I add these words of caution about attempting to broaden material change of use by intensification as a substitute for proper conditions on planning permissions. Although authorities, in the *Court of Appeal for example in Fidler v the First Secretary of State [2004] EWCA Civ 1295* at paragraph 28, and earlier in, for example, *Lilo Blum v the Secretary of State for the Environment [1987] JPL2 78* per Simon Brown J, treat the principle of a material change of use by intensification as well

established, the fact remains that no decided case has been shown to me in which a material change of use by intensification has been found to have occurred.

44. In *Brooks and Burton Limited v the Secretary of State for the Environment [1977] 1 WLR 1294* , Megaw LJ pointed out on page 1306E-J that experienced planning counsel had found no reported case in which an intensification in existing use had been found to be a material change of use. That remained the position in front of me. Although earlier cases, mentioned in the authorities cited above say that the existence of a material change in use by intensification is well recognised, they do no more themselves than recognise that material change of use by intensification may exist. They have never actually found one.

45. This reflects what Sullivan J said in R v Thanet District Council v Kent International Airport Plc [2001] P&CR 2 at paragraph 54:

> "It is easy to state the principle that intensification may be of such a degree or on such a scale as to make a material change in the character of a use, it is far more difficult to apply it in practice. There are very few cases of 'mere intensification'. Usually the increase in activity will have led to some other change: from hobby to business, from part to full-time employment, or an increase in one use at the expense of other uses in a previously mixed use."

46. The precise description of the existing and changed uses is important. Mere generic descriptions may not always be sufficiently precise to reflect material planning differences. The statutory overlay, for example in relation to generic residential and industrial uses, may now qualify what might have been the role which the concept of intensification may have been thought able to play many years ago. But for all that, the cases have all emphasised the need to identify a material change in the definable character of the use of the land. None of them has suggested that this could be done simply by reference to examining impacts alone, relevant though they are to that crucial issue in a material change of use by intensification case.

47. Accordingly, I reject Mr Reed's submission that the Inspector ought to have examined impact alone. She had to examine something else as the starting point for her examination, however much the impacts might have been evidentially relevant.

Enforcement Notice B

48. Mr Reed contended that the fragmentiser constituted operational development for which planning permission was required. The Inspector concluded that it was development permitted under class B(a) in Part A to Schedule 2 to the GPDO 1995 . This permits, subject to immaterial exceptions, development consisting of the installation of replacement plant to be carried out on industrial land for the purposes of an industrial process. "Industrial land" means land used for carrying out an industrial process. "Industrial process" is defined in Article 1(2) as a process for or incidental to "(b) the altering, repairing, maintaining, ornamenting, finishing, cleaning, washing, packing, canning, adapting for sale, breaking up or demolition of any article". On the face of it, that is applicable here to the fragmentiser, as the Inspector found, and so the fragmentiser was permitted development.

49. Mr Reed repeats here the argument which failed before the Inspector. He points out that the Town and Country Planning (Use Classes) Order 1987 , SI No 764, it adopts materially the same definition of "industrial process". The Use Classes Order

treats changes of use within the defined use classes as immaterial, including changes within Class B1, light industrial, and within class B2, general industrial. The definition of "industrial process" applies to both of those classes.

50. However, a scrapyard use is explicitly excluded from all schedule classes, including class B1 and class B2 into which it would potentially fall. So a general industrial site cannot become a scrapyard without planning permission. It is illogical then, contends Mr Reed, if a scrapyard is treated as industrial land, or a place where an industrial process is carried on so that it has permitted development rights, but land in a general industrial use cannot change to a scrapyard use without specific planning permission. The same exclusion from the definition of the scope of the Use Classes Order should apply to permitted development so that scrapyards do not have permitted development rights.

51. I cannot accept that argument. First, Parliament has not put into the 1995 order the exclusion which it put into the 1987 order. That must have been a continuing conscious decision. No basis has been shown for interpreting that later instrument as impliedly incorporating the omitted exclusion — and it must have been deliberately omitted, even if there is no obvious reason for that, according to Mr Reed.

52. Second, there is, in my judgment, a real and obvious difference between treating a change of use from general industrial land to use as a scrapyard as material so that a new scrapyard needs permission, and giving permitted development rights to those scrapyards which already exist. That is what happened here. I accordingly reject Mr Reed's submission on that point, as did the Inspector.

53. It is not necessary to deal with his arguments on whether the scrapyard is a lawful use in the light of the conclusions I have reached in relation to Enforcement Notice A. Accordingly, this appeal is dismissed.

54. MR KOLINSKY: I am very grateful to your Lordship for his judgment. On behalf of the First Secretary of State I would seek an order for costs. The principle and the quantum are agreed, as I understand it. I would invite your Lordship to summarily assess the Secretary of State's costs in the agreed figure of £9,380.

55. MR JUSTICE OUSELEY: Yes.

56. MR DINKIN: May it please your Lordship, I am obliged also for your Lordship's judgment in the matter. My Lord, I do rise to ask your Lordship to consider whether, in the circumstances of this case, there should be some order for the claimant to pay the second respondent's costs. My Lord, I am fully aware of course that normally that is not the rule, two costs orders and so on, and perhaps the circumstances have to be somewhat exceptional to justify it. My Lord, I would respectfully invite your Lordship to consider whether my presence here was justified. Your Lordship has, I think, endorsed much of the submissions that I was making in respect of the material change of use issue as a fundamental point, leaving aside the Inspector's decision as such.

57. So, my Lord, in my submission, an important case for the second respondent. My Lord, I respectfully submit my presence was justified on that point if no other, and that there ought to be a contribution. My Lord, may I respectfully suggest one half? A schedule has been prepared, I do not know whether—

58. MR REED: Quantum is not agreed, so if Mr Dinkin asks for half his costs, I would want to see what that amount is.

59. MR JUSTICE OUSELEY: Half of something that is not agreed.

60. MR DINKIN: There is a schedule prepared.

61. MR JUSTICE OUSELEY: Let us deal with the principle first. I am always interested to see these schedules.

62. MR DINKIN: My Lord, this includes both the permission stage and the current stage, and the grand total is at the end, bottom line, and it is a contribution towards that that I respectfully invite your Lordship to consider in favour of the second respondents.

63. MR JUSTICE OUSELEY: Mr Dinkin, I am not going to make an order for costs in your favour. It is not sufficient, in order to persuade the court to exercise a jurisdiction which it exercises unusually and rarely, to persuade the court that you had a legitimate interest in attending and a perfectly proper role to play in the argument. Respondents in your position usually do have a separate interest from the Secretary of State, and usually bring, if I can put it crudely, something to the party, but that is not an adequate basis for requiring a second set of costs to be paid. I do not think this case brings it sufficiently into an exceptional category to warrant an order for costs in your favour.

64. MR REED: My Lord, I am obliged. My Lord, there is one further order that I would ask the court to make and it concerns the circumstances of an application for permission to appeal. Of course, this is a second appeal, and so if I am to make an application I have to do so before the Court of Appeal. My Lord, there is an issue of course as regards to timing of the transcript. My Lord, I would ask either that we have sufficient time from receipt of the transcript to lodge the application for permission, or if your Lordship is not with us on that—

65. MR JUSTICE OUSELEY: No, I am prepared to give you that. You will have two weeks after receipt of the approved transcript.

66. MR REED: My Lord, I am grateful. Does your Lordship want me to draft that order for the court and have that agreed with the other parties?

67. MR JUSTICE OUSELEY: No, it is a simple order.

68. MR REED: My Lord, that is the only further application that I have.

Appendix 6: Copy of the Stockton High Court Judgment

Council of the Borough of Stockton on Tees v Secretary of State for Community and Local Government


No Substantial Judicial Treatment

Court
Queen's Bench Division (Administrative Court)

Judgment Date
24 March 2010

Case No: CO/9889/2009

High Court of Justice Leeds Administrative Court

[2010] EWHC 1766 (Admin), 2010 WL 2731098

Before Mr Justice Langstaff

Date: Wednesday 24th March 2010

Representation

Mr Ponter appeared on behalf of the Claimant.
Mr Morshead appeared on behalf of the Defendant.

Judgment

Mr Justice Langstaff:

1. This is a statutory appeal pursuant to Section 288 of the Town and Country Planning Act of 1990 . It is brought by the local planning authority, who seek to set aside a decision of a planning inspector reached on 27 July 2009. The Inspector determined that land, in respect of which planning permission had been granted with conditions in 1961, used as a site for 80 seasonal chalets and caravans, was still capable of rendering lawful the use of the same site for 80 caravans in 2009, notwithstanding that for several years the use as a caravan park had simply ceased.

2. It was submitted to him by the appellant authority that this constituted abandonment. The consequence was that the applicant, for what was in this case a certificate of lawful use, required fresh planning permission which they would refuse. The planning inspector recorded the facts, so far as relevant, and his decision on the matter, which is relevant to this appeal from paragraphs 15 to 19 of his decision letter. He noted that the land was no longer in active use as a caravan site following a period of decline; all the structures on it had either been removed or destroyed, fallen into dereliction or otherwise disappeared in the dense woodland and undergrowth on the land.

3. He noted, however, that there had been no other use to which the land had been put; there had been no revocation of any planning permission; simply the lack of continuous use as a caravan site. In paragraph 18 he said this:

> "In this case, the use permitted by the 1961 permission has simply dwindled away such that it is now very many years since there was any appreciable use as a caravan site. Nevertheless, the 1961 planning permission was implemented, it has not been revoked and it has not been superseded by the use of the site for a different permitted or lawful purpose. The permission may therefore be

> relied upon for the use of the land as a caravan site for up to 80 caravans, subject to the use being undertaken in accordance with the 1971 [he must have meant 1961] permission."

And he therefore granted a certificate of lawfulness.

4. The appeal before me gives rise to a point of law which is easily stated but less easily resolved. It is essentially whether, in a situation in which there has been planning permission for a lawful change of use, and that planning permission has been implemented in that there has been such a change of use and the site is no longer used for its former purpose, the owner of the land requires a new planning permission should he wish to resume the formerly permitted use.

5. Mr Ponter, who appears for the local authority, submits in essence upon a proper construction of the relevant law and authorities, and in particular upon reliance on *obiter* observations of Wilkie J in the case of James Hay Pension Trustees Ltd v The First Secretary of State and Others [2005] EWHC 2713 (Admin) and a decision of HHJ Mole in the case of *M&M (Land) Ltd v Secretary of State for Communities and Local Government [2007] EWHC 489 (Admin)* , that the position is that a planning permission, once granted, may be considered spent if it is for a change of use and there has been that change of use, such that thereafter the use which is lawfully carried out may be discontinued and therefore a fresh planning permission required. For the Secretary of State Mr Morshead contends that there is no such principle in planning law as to regard a planning permission as spent and having no continuing effect once the development has been started or achieved, and that, upon proper application of the principles expressed by Lord Scarman, with whom their other Lordships agreed in the case of *Pioneer Aggregates (UK) Limited v the Secretary of State for the Environment and Others [1985] AC 132* , as interpreted by other cases since, the answer has to be that the planning permission could not in this case be abandoned and therefore it remained effective.

6. The starting point for both arguments is Section 75 of the Town and Country Planning Act 1990 . That, headed "The Effect of Planning Permission", provides as follows:

> "(1) Without prejudice to the provisions of this Part as to the duration, revocation or modification of planning permission, any grant of planning permission to develop land shall (except in so far as the permission otherwise provides) inure for the benefit of the land and of all persons for the time being interested in it."

7. The Pioneer Aggregates case was one which concerned the extraction of minerals from land. The company extracted limestone from the quarry from 1950 when planning permission was granted for that purpose until 1966. The company then wrote to the local authority giving notice that it would cease quarrying at the end of that year. Some twelve years later a new owner of the site wished to resume quarrying. He enquired of the planning authority whether planning permission would be necessary. The planning authority contended that the 1950 provision had been abandoned or, alternatively, on a construction of it, the permitted development had been completed and could not be resumed without the grant of a fresh permission. An enforcement notice was served when the company provoked it by some token quarrying.

8. The principle which was at stake was expressed in these terms by Lord Scarman at page 136F:

> "whether a planning permissions for the development of land can be abandoned by act of a party entitled to its benefit."

9. He went on to answer that question at page 145G in the negative:

> "There is no principle in the planning law that a valid permission capable of being implemented according to its terms can be abandoned."

10. He expressed his reasoning as follows. He noted (page 140 D) that earlier courts had refused to accept a principle that a planning permission could be extinguished merely by conduct and he expressed his agreement (140F) with that principle. That is set against general observations (see 139D to F). He expressed his conclusion in these terms: that there was no such general rule in planning law, but in certain exceptional situations not covered by legislation the courts had held that a landowner, by developing his land, could play an important part in bringing to an end a valid planning permission or making it incapable of implementation. This was his first reference to the capability of implementation of a valid planning permission. It was in the context of practical inability to do that which the planning permission permitted.

11. His reasoning for reaching that conclusion, at page 140 and page 141, was that the principle of abandonment was a common law principle which had no part to play in a scheme which was entirely statutory; that, where the statutory code was silent or ambiguous, resorting to principles of land law might be necessary, but such cases would be exceptional. He thought that the implication of this reasoning (see page 141 H) was that only the statute or the terms of the planning permission itself could stop the permission enuring for the benefit of the land and all persons for the time being interested in it.

12. At 142G to H:

> "Viewed as a question of principle, therefore, the introduction into the planning law of a doctrine of abandonment by election of the landowner (or occupier) cannot, in my judgment, be justified. It would lead to uncertainty and confusion in the law, and there is no need for it. There is nothing in the legislation to encourage the view that the courts should import into the planning law such a rule … "

13. He went on to identify that the authorities, at first sight and before analysis, might suggest three classes of exception. The first class he identified (page 143 B to F) was, he observed, concerned not with planning permission but with existing use. I note that an existing use, which has the benefit of being lawful by the length of time for which it is being used, is a different beast from a use which derives from planning permission. This is not only generally so but was specifically recognised by

Sullivan J in the case of R (Fairstate Ltd) v First Secretary of State and another [2004] EWHC 1807 (Admin) (see paragraphs 23 and 24).

14. Returning to Pioneer , Lord Scarman made the point that, in existing use cases, an existing use which had been deliberately ended before a resumption arose was not one which was existing at the date of resumption; and accordingly the resumption was a material change of use and thus required planning permission. That was an issue of fact.

15. A second class of case is immaterial for present purposes: that of the "new planning unit". Then he said this (144 B to F):

> "The third class of case comes nearer to the facts and law of the present appeal. These cases are concerned not with existing use rights but with two planning permissions in respect of the same land. It is, of course, trite law that any number of planning permissions can validly co-exist for development of the same land, even though they be mutually inconsistent. In this respect planning permission reveals its true nature — a permission that certain rights of ownership may be exercised but not a requirement that they must be.
>
> But, what happens when there are mutually consistent permissions (as there may well be) and one of them is taken up and developed? The answer is not to be found in the legislation … "

16. He went on to conclude that in such a case, where for instance there was permission for the building of house A on land and later permission for house B on the same land, then if house B were to be built, the earlier planning permission in respect of A could no longer stand. Thus he commented put at page 144:

> "The Divisional Court held that the two permissions could not stand in respect of the same land, once the development sanctioned by the second permission had been carried out. The effect of building on Site 'B' was to make the development authorised in the earlier permission incapable of implementation."

Again, the reference to capability of implementation is a reference to the practical ability to use the land as had been envisaged by the grant of planning permission, by reference to which the application is made.

17. What Mr Ponter emphasises is that, when the conclusion to which Lord Scarman came is examined, it contains the words "capable of being implemented" as the answer to the question he first posed:

> "there is no principle in planning law that a valid permission, *capable of being implemented* according to its terms, can be abandoned."

That, he suggests, is a reference to a permission which has not yet resulted in the development to which it refers being carried out. He submits that, on the facts of Pioneer , itself every shovel of gravel that was extracted from the limestone quarry was in itself a further act of development. Thus, assuming there was limestone remaining to be quarried, the planning permission remained capable of being implemented. But if the planning permission was simply for a change of use, he contended, it would be implemented, and fully so, at the moment that change of use had been effected. For his part, Mr Morshead contends that the words have to be understood in relation to the question posed and the way in which there had been references to the capability of implementation which, he submits, in that context, plainly gave rise to the qualification, if it be one, of the principle which Lord Scarman went on to express. This throws up starkly the debate between counsel before me

18. When Wilkie J considered the case of Hay , what he was concerned with was an appeal against an enforcement notice relating to use of the land as a vehicle servicing base, builders' yard and for storage. He determined the issue before him upon one of the issues raised by the parties. The question of abandonment of the use of land authorised by planning permission was not a matter which was critical to his decision; what he said about it was therefore *obiter* . At paragraph 38, however, he indicated that he would turn to that issue for the sake of completeness. He set out the contentions for the claimant and then the contentions made for the Secretary of State, which are diametrically opposed to the contentions which the Secretary of State makes before me, I am told, having now given the full and proper consideration of the issue which by implication he did not give to his argument in Hay .

19. He drew attention to the words of Lord Scarman in Pioneer and the defendant's distinction of that case from the facts of the case before him.. He said that:

> "…the development in the present case was implemented, or completed, as soon as the change in use was made. Accordingly, this present case does not fall within the terms of the general principle as stated by Lord Scarman in Pioneer ."

20. He also referred to the case of *Cynon Valley BC v The Secretary of State for Wales [1986] JPL 760* in support of that contention. He noted the defendant's argument that in that case the court had held that a planning permission granted in 1969 for use as a light industrial building was spent as soon as the change was complete, and that the general principles stated in Pioneer did not extend where the development was completed or spent. He commented:

> "In the case of development in the form of making a change of use, the Court of Appeal in Cynon Valley has indicated that the development is completed, or spent, as soon as the change is made. Accordingly, the defendant argues that the concept of abandonment can, in law, apply to a change of use once the change of use has been made."

21. The decision of HHJ Mole in M&M regards Cynon in similar terms. At paragraph 16 he considered that a planning permission has a single operation unless it is a planning permission of the sort that concerned the House of Lords in Pioneer Aggregates and, if it has a single operation, it will not have a continuing effect, and it therefore followed logically that a permitted use could be abandoned. He adopted the approach of Wilkie J in James Hay .

22. This therefore takes the argument back to the Court of Appeal's decision in Cynon . That was decided in 1986 reported in [1986] JPL 760. The case concerned the use of premises with planning permission as a fish and chip shop from 1958. The use changed in 1962 to use as a laundry; there was no planning permission for that change of use. In 1969 there was a change to light industrial use. That was permitted by general development order. In 1970 use as a laundry was resumed. That was unlawful. In 1978 the premises were acquired by an owner who wished to continue retailing fish and chips, but she let the premises to someone who carried on the business of an antique shop. It remained her intention to use the premises for the sale of hot takeaway foods as soon as she was able to do so. When she sought to recommence the use of the business for this purpose she was told she required fresh planning permission and, when she applied for it, that was refused. She appealed. The inspector held that no development requiring planning permission was involved because resumption of the fish and chip use — which included use as a Chinese takeaway, which is what she proposed to use it as — was permitted by, in effect, the earlier planning permission.

23. The case came before the Court of Appeal, Stephen Brown, Mustill and Balcombe LJJ. Balcombe LJ gave the judgment of the court. He noted the statutory provisions and the effect of the decision in Pioneer Aggregates , such that a valid planning permission capable of implementation according to its terms could not be abandoned. He turned (see 7F) to ask whether, since the planning permission could not have been abandoned, it was fully implemented or spent once the initial change of use took place in 1958 or thereabouts. There were rival submissions as to that. The court preferred the submissions which were made for the local authority that it was (see page 12 at letter H). In particular, they said:

> "We accept Mr Kelly's submission that, where the development for which planning permission is required is a material change of use, the permission is to change from use A to use B and is not merely a permission to use the property for use B for the indefinite future. We appreciate that most, if not all, planning permissions are expressed in the latter form, but that is no guide to the true construction of the 1971 Act."

24. It was persuaded that perusal of the decision of the House of Lords in Young led to an endorsement of the passage cited from the judgment of the Court of Appeal in that case. That was a case in which there had been a number of changes of use. Planning permission had originally been given for use as light industrial use by reason of the general development order in 1969. There was a subsequent change of use in 1970 for use as a laundry and in 1977 to storage and processing. Neither were held lawful because each required planning permission. Balcombe LJ commented:

> "There is implicit in this reasoning a conclusion that the planning permission granted in 1969 for use as a light industrial building was spent once the change was complete and did not cover the further change to light industrial use in 1977. The rest of Lord Fraser's speech, dealing with the construction of Section 23(9), follows on that implied assumption. Indeed, there would be no point in considering the effect of that Section if the 1977 development was already covered by the 1969 permission."

But they considered that meant that Lord Scarman's classification in Pioneer Aggregates had to be significantly qualified. This is the comment that was made:

> "This seems to us inescapable from the decision in Young and we are encouraged in reaching this conclusion and it follows the express finding of the Court of Appeal in Young's case."

25. Accordingly, in a case in which there had been a change of use on the facts which was not permitted by any planning permission, to resume the use which had been permitted would require fresh permission. It was argued persuasively before me by Mr Morshead that the reference at page 14 F to G drew a conclusion that the planning permission granted in 1969 for use as a light industrial building was spent "once the change was complete" and was a reference not to the change from previous use permitted by the planning permission from the moment that that development first began, but was a reference in the context to the change of use in 1970 and in 1977, when the new use started. Indeed, it is open to that possible conclusion, although I am bound to say that the wording does appear to be more consistent with the interpretation which Mr Ponter would urge me to give to those words, and that the change of use permission was spent once the change was complete from one use to another. But the point that was there being addressed was rather different. What was being considered, as it seems to me, was the question whether the planning permission, which was granted in 1969 for use as a light industrial building, was open to change from one form of light industrial use to another with the intervening change in respect of the laundry.

26. Such further authorities as I have been referred to establish these propositions. In the case of *Swale Borough Council v First Secretary of State & Anor [2005] EWCA Civ 1568 the Court of Appeal* were concerned with an application for a certificate of lawful use which had been refused and an enforcement notice issued, in respect of which there was an appeal. In the course of his judgment Keene LJ made passing reference to the principles of abandonment. He said this:

> "The concept of abandoning the use is, in my judgment, best confined to the topic of established use of rights where it is a well recognised concept: see *Hartley v Minister of Housing and Local Government [1970] 1 QB 413* ."

27. In Fair State, to which I have already referred, Sullivan J was concerned with a submission (see paragraph 15) that the principles set out by Lord Scarman in Pioneer applied also to an established use which had become immune from enforcement action under the 10-year rolling provision in Section 171B of the Town and Country Planning Act . The submission was that that should be equated with planning permission in that respect. It was there that he said, in passages to which I referred by number earlier:

> "23. In the Pioneer case, the House of Lords was considering the question whether or not a planning permission which was capable of implementation could be abandoned. It was concluded that such a permission could not be abandoned, but it is clear from the speech of Lord Scarman that he accepted that a use which had become immune from enforcement action could, in certain circumstances, be abandoned (see page 143B.)
>
> 24. Moreover, Mr Lewis at one stage accepted the proposition in Panton that a use which has become immune from enforcement action is capable of being abandoned. Thus it is plain that a use which has become immune and a use which has the benefit of a planning permission are not identical for all purposes under the 1990 Act."

28. There is no sense there, submits Mr Morshead, nor is there any sense in the earlier extract from the judgment of Keene LJ, that a planning permission is spent or exhausted or, to use the words that Lord Scarman used, that it is "no longer capable of being implemented" simply because there had in fact been the start of a change to another use. He supports that by reference to the words from Cynon which I have earlier cited, that, where there is permission for material change of use, the permission is to change from use A to use B and is *not merely* a permission to use the property for use B for the indefinite future. Plainly Balcombe LJ contemplated that that would normally be the effect of a planning permission.

29. Against this background of authority, what Mr Ponter submits is that, in accordance with M&M (Land) and the decision of Wilkie J in Kaye , relying as they do upon the interpretation he prefers of Cynon , a planning permission is to be regarded as spent or incapable of implementation in the sense in which Lord Scarman used it in Pioneer . Therefore, he submits, where there has been non-use of land for the originally permitted purpose for a significant period of time, in circumstances capable of supporting the common law concept of abandonment, a fresh planning application will be required. The planning inspector was therefore wrong.

30. Mr Morshead, interpreting Pioneer as I have noted, deriving no assistance from Cynon save by reference to the word "merely" which I have mentioned, but denying any assistance given thereby to the claimant and contending that M&M and James Hay are wrong in the principles they express (Hay wrong in the results so far as it deals with abandonment though M&M right in the result so far as the case is concerned) makes the overview points that there are no authorities in which it has been held that planning permission has been abandoned by mere non-use. Indeed, he notes, that is specifically what the House of Lords recognised as a general proposition would not be the case. Cases in which the abandonment of a use has given rise to an argument that new planning permission is required are cases in which the use concerned has not been one authorised by planning permission but has been one which was an established use which therefore, within the terms that Lord Scarman applied to it, was plainly open to abandonment.

31. He argues that, as a matter of principle, if one can abandon planning permission by non-use, there is, in effect, no rule against the abandonment of planning permission, but the exception — if this be an exception recognised in the appellant's argument — would completely "swallow up the rule", as he put it. There is no reason in principle to attract what is a further exception to the Pioneer decision. He points out that the observations of Wilkie J are technically *obiter* . He argues that, in any event, they are founded upon a misapprehension of that which Cynon truly required.

Discussions

32. In my view the starting point has to be the general principle in Pioneer in the light of the statute. There is no obvious rule within the principle itself which Lord Scarman espouses that would support the local planning authority's arguments in this case. Its arguments do not fall within any of the three excepted classes of cases Lord Scarman recognised, nor do they fall within the factual circumstances which gave rise to the Cynon case. Everything, as it seems to me, depends for its force upon the argument which Mr Ponter addresses as to the meaning of the words "capable of being implemented". This is not the same expression as "spent". I note that there is no reference in the Act to planning permission being spent, nor is there any reference in authority, other than that to which I have been taken, to that as a matter of principle, and I accept the argument by Mr Morshead that if there were such a principle that it would have been easy as an answer to refer to it in resolving many of the cases which have otherwise troubled the courts as to the application of the abandonment of principles.

33. I accept what Mr Morshead has submitted about the context within which those words came to be said. It follows that I do not think that Lord Scarman here was speaking about a planning permission which had been granted but as to which no action had been taken to start the development to which it related.

34. That being the view which I take of the decision of the House of Lords, plainly that is binding upon me. So, too, is the decision in principle in Cynon , but this is not a case in which the principle there expressed is directly relied on by the appellant. It does not answer the question I am posed. Insofar as the decision of Wilkie J on this point is concerned, it is worthy of respect, though *obiter* , and has given me some hesitation; but I do not see how it can stand easily with the views Lord Scarman and the House expressed in Pioneer .

35. It follows that in this case, bearing in mind that it is a case in which there has been no use of the land other than that permitted by the planning permission first granted for use as a caravan site, I consider that the planning inspector was correct in law to come to the decision which he did. It follows that this appeal must be dismissed. I should not, however, leave this judgment without recognising the very considerable skill with which both counsel have addressed me, deploying their arguments with economy, efficiency and persuasion, and I am grateful to them both for their presentations.

MR PONTER: Thank you my Lord. I have just taken a very careful note of that last paragraph, honestly. But, my Lord, thank you for delivering judgment this afternoon, that is obviously extremely helpful to both parties

MR JUSTICE LANGSTAFF: I am afraid it makes the judgment rather less elegant than it might have been, and I am conscious of some of the deficiencies which may have to be ironed out when I get the case back for approval.

MR PONTER: Well, my Lord, for our part we are extremely grateful that you were able to help in that way. The question of costs arises, the parties have exchanged schedules. There was going to be a conversation over lunch to see if we needed to have any argument about it. I don't know if that has happened.

MR MORSHEAD (?): My Lord, we have had the defendant's costs schedule today, and I see it is in the amount of £7931. I assume my learned friend makes an application in that sum. My Lord, yes, it is short by two-and-a-half hours waiting time apparently. My instructing solicitor has done the sums and I think the suggestion is that £800 need to be added to that.

MR JUSTICE LANGSTAFF: Two and a half hours waiting time?

MR MORSHEAD: That is what it says here. Yes, I am not sure that … well, anyway my Lord, if one adds one and a half hours…

MR JUSTICE LANGSTAFF: There has been a modest allowance in two and a half hours for the hearing. It has taken me probably …

MR MORSHEAD: I think that may be the point …

MR JUSTICE LANGSTAFF: … hearing. There was a waiting time before that, so … I think it probably does look as though nearly two hours waiting time.

MR MORSHEAD: That may be right. It may be that the two and a half hours is a reference to the waiting time and such slight extra time as has in fact taken place in disposing of the matter …

MR JUSTICE LANGSTAFF: I'll hear what Mr Ponter says about that. Mr Ponter, it looks as though two hours additional waiting time is claimed and that is because of the events this morning, which meant it took some time to get into court.

MR PONTER: Well, my Lord, we … where we were in the list…

MR JUSTICE LANGSTAFF: Yes.

MR PONTER: I do not have anything more to say about that, my Lord, and there is no dispute taken in respect of the sum claimed as far as the schedule is concerned either.

MR JUSTICE LANGSTAFF: Very well. So the addition of two hours … £200, does VAT have to go onto that?

MR MORSHEAD: My Lord, no it doesn't.

MR JUSTICE LANGSTAFF: Thank you, that makes £8,331 costs assessed in those terms, in that sum.

MR PONTER: My Lord, obviously we have to digest your Lordship's judgment, but, that being said, I am able to say that clearly the matter is of some general importance, and simply on that basis I would ask at this stage for permission to appeal.

MR JUSTICE LANGSTAFF: Well, as it seems to me, the case is not, as I observed, entirely easy. It is a pity that I had to give the judgment extempore for other reasons. There are issues of law which seem to be arguable, given arguably conflicting obiter statements, and some other compelling reason why the case should be heard, because plainly it is a point, or may be a point, of some importance. I can see that. So you may have your permission to appeal.

MR PONTER: I am very grateful, my Lord.

MR JUSTICE LANGSTAFF: Thank you very much.

MR PONTER: My Lord, thank you.

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