

# Choiceplace Properties Limited v Secretary of State for Housing Communities and Local Government v Barnet London Borough Council



No Substantial Judicial Treatment

## Court

Queen's Bench Division (Administrative Court)

## Judgment Date

27 April 2021

Case No: CO/1756/2020

High Court of Justice Queen's Bench Division Planning Court

**[2021] EWHC 1070 (Admin), 2021 WL 01615474**

Before: The Honourable Mr Justice Dove

Date: 27/04/2021

Hearing dates: Thursday 4th March 2021

## Representation

Ms Jenny Wigley (instructed by Simons Rodkin Solicitors LLP ) for the Claimant.  
Mr Charles Streeten (instructed by Government Legal Department ) for the Defendant.

## Approved Judgment

Mr Justice Dove:

## Introduction

1. This is an application pursuant to [Section 288 of the Town and Country Planning Act 1990](#) in relation to the decision of the defendant's duly appointed inspector dated 31 March 2020, in which he dismissed the appeal of the claimant against the interested parties' refusal of an application under [Section 192\(1\)\(b\) of the 1990 Act](#) in respect of a certificate of lawful use or development.

## The Facts

2. On the 4 July 2018 the claimant applied for planning permission at a site at 157A and 157B Holden Road, London, N12 7DU for development described as, "Demolition of 2 two-storey semi-detached houses and erection of a 3-storey block to provide 6 self- contained flats, provisional 6 car parking spaces and 10 cycle spaces, amenities space provision and associated refuse and cycle storage."

3. That application was considered by the interested party in an officers' delegated report and it was concluded that permission should be granted. On the 4 July 2018 the interested party granted planning permission for the development subject to 21 conditions. So far as the issues in this case are concerned the important condition is condition 1, which provides as follows:

"The development hereby permitted shall be carried out in accordance with the following approved plans:

Site Location Plan; Drawing no. P.01 Rev C; Drawing no. P.02 Rev C; Drawing no. P.03 Rev B; Drawing no. P.04; Drawing no. P.05; Drawing no. P.06 Rev A; Landscaping Scheme Drawing no. TH/A3/1497/LS; Arboricultural Impact Assessment & Method Statement by Trevor Heaps Arboricultural Consultancy Ltd Ref: TH 1497 dated 11th December 2017 including drawing no. TH/A3/1497/TPP; Sustainability Statement by Henry Planning; Planning statement by Henry Planning; Document titled "Holden Road, London, N12 8SP – Part M4(2) Category 2 Accessible and Adaptable Dwellings"

Reason: For the avoidance of doubt and the interests of proper planning and so as to ensure that the development is carried out fully in accordance with the plans as assessed in accordance with Policies CS NPPF and CS1 of the Local Plan Core Strategy DPD (adopted September 2012) and Policy DM01 of the Local Plan Development Management Policies DPD (adopted September 2012)."

4. Not long after the permission had been granted the claimant mobilised in order to implement the development. In December 2018, the claimant was advised by the architect that it had retained to prepare detailed construction drawings that the street scene drawing P.04 was inaccurate. In essence, the drawing, which was one of those listed in condition 1 along with the other drawings forming part of the pack accompanying the application, was in error in purporting to show that the proposed development would have a ridge height lower than the neighbouring building 159 Holden Road, when in fact the ridge height of the proposed building would be higher. Whereas the street scene in drawing P.04 showed the buildings stepping down in height from 159 via the proposal to 157, where the ridge height of 157 Holden Road was shown to be lower than the application site proposed building, in fact the proposed building was taller than both of them. This discrepancy was quickly advised to the interested party and a discussion ensued in relation to how matters should proceed.

5. The interested party indicated that their view was that the development which had been granted permission could not be constructed in accordance with the planning permission and in particular condition 1. An impasse ensued, with both the claimant and the interested party obtaining their own counsel's opinion in relation to whether or not the permitted development could be lawfully implemented. Ultimately, the claimant sought to resolve the position by making an application for a certificate of lawful use or development on 22 July 2019. It was contended, on behalf of the claimant, that the planning permission was capable of being implemented, notwithstanding the fact that the neighbouring buildings in the street scene elevation drawing were not to the correct scale.

6. The application was considered by the interested party by means of a delegated report which evaluated the application in the following terms:

"Drawing P.04 submitted by the Applicant to show the proposed street scene places the height of the proposed building between the ridge heights of the neighbouring properties - forming a stepped relationship in line with the gradient of the carriageway.

...

On close examination, P.05 and P.06A provide spot heights for the existing and proposed ground level and both adjoining ridge heights and a scalable elevation (on P.06A) for the proposed building – giving a resultant ridge height which would be taller than both neighbouring properties. This elevation is also consistent with the height of the proposed building as depicted in the approved elevations drawing (P.03). However, it is only by reading the two plans P.03 Rev B and P.06 Rev A together that the combined height of 58.8m can be appreciated. Instead, the "street scene" drawing (P.04) – the purpose of which is to show the height of the proposed building in relation to neighbouring properties – shows its height as being between the two neighbouring properties.

On P.04, it would appear that whilst the proposed building is shown as of a corresponding height when measured @ 1:200 (which is the given scale), nothing else has been provided to the same scale on that drawing.

Taking the point on the pavement to the front adjacent to the boundary with 157 (being 49.07) as a constant between P.04 and P.06A, then the ridge heights of 157 and 159 (on P.04) are both c2.2m higher than they are (with regard to the difference between the constant spot height and the given ridge heights on the topographical survey).

Furthermore, the ground level of the proposed building is c6.06m lower than it should be (with regard to the difference in levels between the existing and proposed topographical data on P.05 and P.06A).

When looking at the difference between the ridge line of the proposed building and that of No 159 on P.04, the proposed building is shown as being set 1.2m lower.

Effectively, the remainder of P.04 (other than the proposed building inserted into the street scene) has been stretched, giving the appearance that the height of the proposed building is between the ridge heights of Nos 157 and 159.

The legal opinion offered on behalf of the Applicant is effectively that because the discrepancies lie outside of the site, they are irrelevant – because those factors could change outside of their control.

However, the LPA demur that any approval is made with regard to the context provided by the Applicant at the time the decision is made. If the context is in fact materially different to that provided, it may mean that a different decision might have been reached (which might be to the advantage or disadvantage of the proposal).

The key point of P.04 is to show the relative proportions between the three properties. This is a material consideration. The street scene drawing limits the scaling of the proposed development by reference to those neighbouring properties. Notably, P.04 does not provide any annotated measurements itself – the only way to measure what is permitted by it, is by reference to the neighbouring properties."

7. As a consequence, the certificate of lawful use or development was refused on 25 September 2019. The claimant then appealed to the defendant. The appeal was determined by way of the written representations procedure and the observations and conclusions of the Inspector appointed by the defendant to determine the appeal were as follows:

"3. The problem is that while the proposed building is shown drawn to its correct height in all three plans, in the street scene (P.04), where the proposed building is shown sitting between its neighbours, the neighbouring buildings are shown as too large. With the slope of the ground shown and allowing for all three buildings to be excavated into their plots, the proposal appears to be slightly taller than No 157, which looks as if it is downhill, but lower than No 159 which is uphill. This is made clear on both street elevation views from the front and right side. The existing buildings have a similar relationship, although they are slightly lower in height than the proposal. The effect of the errors in scale are that the proposal will actually be taller than No 159 and significantly taller than No 157.

4. The question is therefore, whether the planning permission can be implemented lawfully. There is no doubt that the planning permission refers solely to the building to be erected and it would seem the building to be erected is shown accurately on all the plans. However, the plans are included within condition 1 which requires the development to be carried out in accordance with those plans. The issue is therefore could the Council enforce against a breach of that condition if the development were to go ahead?

...

8. In my view the starting point is that when interpreting a condition it should be asked what a reasonable reader would understand the words to mean. In this case it is clear to me the development should be built in accordance with the plans. At its simplest this is impossible because to build it in accordance with P.03 and P.06 the building will not look like the building shown in P.04. In other words the plans are inconsistent. The condition doesn't require the development to be in accord with some of the plans, or parts of the plans, but with the approved plans, and I think it reasonable to imply the word "all" there, again on the basis that is what an ordinary reading of the condition implies.

9. Starting from this point, it could be argued that the P.04 is merely illustrative, the building either side could change shape or size or even be demolished, but that seems to me to be rather missing the point. Firstly, P.04 is clearly not illustrative, it is not a simple sketch purporting to show a view, but is an allegedly scale drawing with the heights of the neighbour at No 159 drawn on to specifically compare to the proposal. Secondly, whether the neighbours can change is irrelevant. The drawing shows the proposed building in a relationship to the neighbours at the time the application was made regardless of any theoretical future changes. That relationship should have been replicable on site on the date the permission was granted and it was not.

10. If we delve further into the extrinsic evidence to see if there is anything else to suggest that reliance on P.04 would be excessive or in some way unreasonable then it becomes clear, for the reasons given in the Council's opinion, that the street scene drawing was important in the determination of the application, which was only allowed by the committee by a narrow margin. Furthermore it is only by detailed analysis of various spot heights across several of the drawing that the errors were revealed. The Council should be able to rely on accurately scaled drawing, especially when the drawing in question is important to determining the acceptability of the proposal.

11. One of the appellant's opinions refers to Burhill Estates, but that is a 1992 case where a barn that was associated with a planning permission for a new dwelling was destroyed in a storm. Could the dwelling still be erected? The Court found it could as the plans showing the adjacent barn were illustrative and did not qualify the permission. In the current appeal the plan in question is not merely illustrative and is included within the permission thanks to condition 1.

12. There is some discussion as to other remedies that may be open to the Council, but that is not relevant to the narrower question before me of whether the planning permission can be implemented in accordance with all the approved drawing. For the reasons given above I do not consider it can."

8. In light of the conclusions that the Inspector had reached, the appeal was dismissed. The law

9. The provisions of [Section 192](#) of the 1990 act are as follows:

"192 – Certificate of lawfulness of proposed use or development.

(1) If any person wishes to ascertain whether

(a) Any proposed use of buildings or other land; or

(b) Any operations proposed to be carried out in, on, over or under land

would be lawful, he may make an application for the purpose to the local planning authority specifying the land and describing the use or operation in question.

(2) If, on an application under this section, the local planning authority are provided with information satisfying them that the use or operations described in the application would be lawful if instituted or begun at the time of the application,

they shall issue a certificate to that effect; and in any other case they shall refuse the application."

10. [Section 195 of the 1990 Act](#) provides a right of appeal against a refusal to grant a certificate of lawful use or development. It was essentially common ground at the hearing between the parties that the starting point for the consideration of the issue was condition 1, in the sense that the question of whether or not the planning permission could lawfully be implemented depended upon the interpretation of condition 1 to the planning permission and the issue of whether or not the development could "be carried out in accordance with" the approved plans listed in the condition.

11. The correct approach in relation to the interpretation of conditions on a planning permission is now well settled. The principles were distilled by Lord Hodge in the case of *Trump International Golf Club Ltd v Scottish Ministers* [2016] Phase 1 *WLR* 85 ; [2015] *UKSC* 74 at [paragraph 34](#) :

"When the court is concerned with the interpretation of words in a condition in a public document such as a section 36 consent, it asks itself what a reasonable reader would understand the words to mean when reading the condition in context of the other conditions and of the consent as a whole. This is an objective exercise in which the court will have regard to the natural and ordinary mean of the relevant words, the overall purpose of the consent, any other conditions which cast light on the purpose of the relevant words, and common sense. Whether the court may also look at the other

documents that are connected with the application for the consent or are referred to in the consent will depend on the circumstances of the case, in particular the wording of the document that is interpreting. Other documents may be relevant (as in condition 7 set out in para 38 below) or there is an ambiguity in the consent, which can be resolved, for example, by considering the application for consent."

12. Earlier in his judgment Lord Hodge had referred in paragraph 27 to the observations of Lord Denning in the case of *Fawcett Properties Ltd v Buckingham County Council [1961] AC 636* as follows:

"In *Fawcett Properties Ltd v Buckingham County Council [1961] AC 636* , a case concerning a condition in a planning permission, Lord Denning stated, at p 678:

"a planning condition is only void for uncertainty if it can be given no meaning or no sensible or ascertainable meaning, and not merely because it is ambiguous or lead of absurd results. It is the daily task of the courts to resolve ambiguities of language and to choose between them; and to construe words so as to avoid absurdities or to put up with them. And this applies to conditions in planning permissions as well as to other documents."

13. These principles of interpretation were further reiterated in the more recent Supreme Court case of *Lambeth LBC v SSHCLG [2019] 1 WLR4317; [2019] UKSC 33 at paragraphs 15 to 19* . Additionally, these principles were again reiterated and applied by the Court of Appeal in the recent case of *DB Symmetry Ltd v Swindon Borough Council [2020] EWCA Civ 1331 at paragraphs 59 to 70* .

14. In support of the submissions made on behalf of the claimant, Ms Wigley placed some reliance upon the case of *Burhill Estates v Woking BC [1995] JPL147*. This was a case relating to a planning permission which had been granted in outline for the erection of two dwellings with access drives. The application was accompanied by two plans, and the permission granted was subject to conditions requiring the submission of reserved matters (excluding siting and access) and a further condition which stated:

"The development hereby approved shall be carried out and completed in all respects strictly in accordance with the submitted and approved plans."

Three years after the grant of outline planning permission the claimant applied for approval of the reserved matters, and at the same time applied for listed building consent in relation to a listed barn within the application site. The application was granted and a similar condition imposed tying the consent to the submitted and approved plans. Again, the development was not commenced and a further application was made for renewal of the detailed approval which was granted, it being described as "renewal of reserved matters application 86282 subsequent to our outline approval 83/40 for erection of detached dwelling on land adjacent to listed barns".

15. Prior to the commencement of the construction of the single dwelling that was permitted, the listed barn was blown down in a gale. Discussions commenced between the claimant and local planning authority in relation to the question of whether or not the permission could be implemented. The view of the local authority was that the reserved matters application could no longer be implemented because of the collapse of the listed barn which formed part and parcel of the proposal. In the light of this impasse, Burhill Estates issued an application in the High Court claiming a declaration. Glidewell LJ is reported to have reached the following conclusion in relation to the dispute between Burhill Estates and the local planning authority:

"A planning permission was a public document. It must (and this was trite) law make reasonably clear to all interested persons, including, of course, people who were not concerned in the obtaining of the planning permission, neighbours and possible intending purchasers, what was the development that was permitted, and what were the restrictions or conditions on carrying out of that permitted development. In his view, simply looking at drawings 12386 and 25382 would not suffice to inform, for example, a possible purchasers that the construction of the house was linked with the retention of the barn so that it was only permitted to be constructed so long as the barn remained in existence. But if the original planning permission has not made that clear, as in his view had not, if something in the detailed approval sought to impose such a restriction, then as a matter of law that would be an invalid restriction because it would detract from the outline permission by imposing a restriction on its exercise which was not contained in the original permission. In his judgment a grant of detailed approval might not in law detract from the permission which required such approval."

16. Against the background of this authority it is further contended by Ms Wigley on behalf of the claimant that it is well settled on the authorities, in accordance with the *Grampian* doctrine, that a local planning authority is unable to impose requirements on land outside the application site and the control of the applicant by way of condition.

## Grounds and Submissions

17. The claimant advances the challenge on the basis of two grounds. Ground 1 is the contention that the Inspector erred in law, in particular in paragraph 9 of the decision letter, when he interpreted condition 1 of the planning permission as requiring or prescribing the relationship between the proposed development and its neighbouring buildings. It is submitted that the drawing P.04 could not prescribe anything in relation to the scale or dimensions of the buildings on the adjoining land, and in so far as the drawing depicted solely the proposed new building it provided an entirely accurate and scale version of the proposed development. In so far as it contained a drawing of the adjacent buildings and the proposed development in its wider context, the drawing was only ever purely illustrative, on the basis that the application could only ever control and prescribe the development proposed on the application site. In summary, the development permitted was accurately described by all of the drawings, including drawing P.04, and the depiction of the adjacent dwellings was illustrative and not a matter over which there was any control as part of the process of granting planning permission.

18. In response to these submissions Mr Streeten, on behalf of the defendant, makes the preliminary submission based on the officers' delegated report that the plans are internally inconsistent, in that drawing P.04 is inconsistent with the spot heights

shown in other drawings. The drawing had, in effect, been stretched and therefore the Inspector was correct to conclude that the development could not be implemented in accordance with condition 1 on the basis that the plans were inconsistent.

19. Mr Streeten goes on to submit that the conclusions reached by the Inspector in relation to condition 1 were entirely lawful and appropriate. It is not, he submits, open to the claimant to contend that drawing P.04 was simply illustrative. P.04 is not a sketch or an artist's impression: it is a technical architectural drawing, drawn to a scale of 1:200, which purports to depict all of the buildings existing and proposed upon it to that scale in order to present the proposal in a scale drawing in the context of the buildings adjacent to it. The fact that the application for planning permission cannot affect the neighbouring buildings is, he submits, nothing to the point. The drawing purports to place the proposal in the context of the height of its neighbours thereby addressing the need to regulate the height of the proposal in relation to the existing street scape. The Inspector was therefore correct to conclude that, in the light of the error in the plans, the claimant was unable to produce a development consistent with condition 1 and in accordance with the drawings which were approved.

20. In relation to ground 1, Ms Wigley makes the supplementary submission that the Inspector fell into error when he sought to examine extrinsic evidence, and in particular the importance in the consideration of the merits of the application of the relationship of the development to the street scene. She submits that paragraph 10 of the decision letter demonstrates the Inspector becoming engaged in an irrelevant consideration, namely the consideration of the merits of the scheme. That material was irrelevant to the question of whether or not the certificate should be granted. In response Mr Streeten submits that it is clear from the decision letter that the matters raised in paragraph 10 are presented in the alternative to the Inspector's main conclusions. Moreover, in light of the inconsistency in the plans he submits that it was open to the Inspector to consider the extrinsic evidence in respect of the merits.

21. Turning to ground 2, Ms Wigley submits that in his decision the Inspector erroneously confused his view of the merits of a potential judicial review of the planning permission with an examination of the legal effect of the planning permission as it stands. It is submitted by Ms Wigley that whilst a planning permission can, of course, be vulnerable to being quashed by judicial review, that had not occurred in the present case, and therefore the permission was legally unimpeachable on its face. Ms Wigley submits that the Inspector, at paragraph 10 of the decision letter, becomes distracted by matters which may have given rise to good grounds for a judicial review being applied for, but which had no place in the question which he had to determine as to whether or not a certificate should be granted. In response to this submission Mr Streeten observes that at paragraph 12 of the decision letter the Inspector effectively addresses the matter raised by the claimant, and makes clear that it is only the narrower question of whether or not the planning permission can be implemented in accordance with the approved drawings which is the matter which he has to resolve. Mr Streeten therefore submits that there is no substance in the contention that the Inspector took into account matters that were not pertinent and related to judicial review.

## Conclusions

22. The issue in this application is essentially the same as that which was before the Inspector namely whether, notwithstanding the accepted error in drawing P.04, the development could nonetheless be carried out in accordance with the approved plans which were the subject of condition 1. Was the Inspector justified in concluding that the development could not be carried out in accordance with the plans as required by condition 1 or did he err in reaching that conclusion? In this connection the reason for imposing the condition provides some context for what the reasonable reader might understand carrying out the development "in accordance with" the approved drawings to mean, referring as it does to the avoidance of doubt and the interests of proper planning. In approaching this issue, it is also not insignificant that the application for the certificate in itself was described in the following terms:

"Certificate of lawfulness to confirm that planning permission Ref:80/1845/FUL granted 4th July 2018, can be implemented in accordance with all the approved drawings."



23. It is important to understand the nature and content of drawing P.04, the drawing in which there was an admitted (albeit inadvertent) error as described above. On drawing P.04 there are four separate drawings, all of which in accordance with the label on the plan are described in terms of scale as being at "1:200[A1]". Those four drawings are, firstly, a drawing of the existing street elevation including the existing buildings on the application site proposed to be demolished and then, secondly, a proposed street elevation showing the building proposed in the context of the existing buildings depicted in the first drawing. There are two further companion drawings to the street elevations on P.04 which are taken at 90 degrees to those street elevations, and show the relationship between the eaves heights of the various buildings between 161 and 171 Holden Road at 90 degrees to the street scene.

24. Ms Wigley is undoubtedly correct in her submission that the claimant's application for planning permission could propose no changes whatever in respect of the existing buildings outside the application site and beyond the control of the claimant. However, in my judgment Mr Streeten is correct in his submission that this is nothing to the point in relation to the issues which the Inspector had to determine. I am unable to accept the submission that the depiction of, in particular, 157 and 159 Holden Road in drawing P.04 was "purely or simply illustrative". What the drawing shows, in a manner which was intended to be accurate and to scale, is the relationship of the proposed development to the existing heights of adjacent buildings unaffected by the proposed development from two separate perspectives. They show the proposed development in a relationship in respect of the heights of those buildings that simply cannot be developed, and if built the development would not be in accordance with the plan.

25. In my judgment, there is no reason why the depicted heights of the existing buildings should be regarded as illustrative or somehow excluded from the requirements of condition 1 on the planning consent. As was pointed out during the course of argument, a relationship between a proposed development and the existing height of either adjacent structures or indeed adjacent ground levels is a matter to be accurately depicted on plans accompanying planning permission for good reason. It is at the very least to be assumed to be an accurate depiction, in the absence of any specific text on the drawing indicating that elements of it are not to scale. The Inspector was correct in pointing out that the drawing showed a relationship between the proposed development and surrounding buildings which should have been capable of replication on the site at the time permission was granted and it was not. In short, the development is not capable of being implemented in accordance with the approved drawings because it is not capable of being implemented in a manner which replicates the street elevations both longitudinally and axially which are purported to be shown to scale on drawing P.04. To reach that conclusion does not involve any suggestion that the planning application granted might be capable of controlling the scale or appearance of adjacent dwellings beyond the application on site; it is simply a reflection of the inaccuracy in the plans leading to an inability to construct a development which accords with that which is depicted upon them.

26. It appears to me to be clear that the conclusion reached by the Inspector on this issue within paragraph 9 is clear and freestanding. His observations in paragraph 10 of the decision letter are reached after he has concluded that the development cannot be implemented in accordance with the approved plans, and paragraph 10 is simply, as Mr Streeten describes, an alternative conclusion arrived at for the sake of completeness rather than a basis for his earlier resolution of the issue in paragraph 9. It follows that for all of these reasons I am unable to accept any substance in the claimant's ground 1.

27. Turning to the question of ground 2, I am wholly unpersuaded by the submission that in reaching his decision the Inspector became distracted by the question of whether or not there may have been grounds for an application for judicial review in respect of the errors contained within the planning permission. It is clear in my judgment that the kernel of the Inspector's decision is contained within paragraphs 8 and 9 of the decision letter. His conclusions in that connection were reached entirely freestanding of any extrinsic evidence. The observations which he passes in paragraph 10 of the decision letter are in reality made for the sake of completeness, and it is clear, when reading the decision letter fairly and as a whole,

that the Inspector does not purport to address the questions which he had determined on the basis of any arguments as to whether or not an application for judicial review might have succeeded. Indeed, in paragraph 12 of the decision letter (in a manner complimentary to paragraph 4), the Inspector is very clear in respect of the question which he needed to determine in order to resolve the appeal. This is the question which he has effectively answered in paragraphs 8 and 9. In the circumstances, in my judgment, there is no substance in the claimant's ground 2.

28. In the light of all of the reasons I have set out above I am satisfied that this application must be refused.

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