Neutral Citation Number: [2016] EWHC 3354 (Admin)

Case No: CO/1207/2016

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/12/2016

Before :

MR JUSTICE OUSELEY

- -

Between :

THE QUEEN (on the application of) SUNILKUMAR BANSILAL PATEL	**Claimant**
- and -	
SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT	**Defendant**
- and -	
BILLY JOHAL	**Defendants**
- and -	
WANDSWORTH BOROUGH COUNCIL	

- -
- -

Robert Fookes (instructed by **Fortune Green Legal**) for the **Claimant**
Isabella Tafur (instructed by **The Government Legal Department**) for the **Defendant**

Hearing dates: 1st December 2016

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Approved Judgment

MR JUSTICE OUSELEY :

1. 161, Wimbledon Park Road in the London Borough of Wandsworth, is a corner shop with residential accommodation in part of the ground floor; the first floor is wholly in residential use. There is a detached garage in the garden to the rear of the shop/residential building. Mr Patel, the Claimant, occupies the shop and the residential accommodation under a lease from the parents of Mr Johal, the second Defendant. Underlying this case, but not directly part of it, is Mr Johal's desire to terminate the lease so that his parents might occupy the whole premises as their home.

2. Mr Johal applied for "prior approval", a relatively new form of planning -related consent, to change the use of the retail accommodation to residential use. Wandsworth LBC refused its approval on the grounds that the loss of the shop would lead to an inadequate provision of the sort of services provided by it. Mr Johal appealed, successfully, to the Secretary of State for Communities and Local Government, the first Defendant. The appeal was dealt with by an Inspector, by written representations. Mr Patel challenges her decision under s288 of the Town and Country Planning Act 1990, and was granted permission to bring the proceedings by Lang J.

3. Mr Patel challenges the decision on the grounds that (1) the relevant area for the purposes of the prior approval exceeded the permissible limits, (2) the rules of natural justice had been breached in three respects, (3) the policies of the development plan should at least have been taken into account but were not, (4) the fact that the premises were registered as an Asset of Community Value was a material consideration ignored by the Inspector, and (5) she had failed to comply with the public sector equality duty in s149 of the Equality Act 2010.

The legislative and policy framework

4. "Planning permission may be granted by a development order"; s58(1) of the 1990 Act. "A development order may either (a) itself grant planning permission for development specified in the order for development of any class specified; …"; s59(2). The range of permissions has enlarged over recent years, as have the qualifications to be met before the permission can treated as granted under the relevant Development Order here.

5. The relevant Order is the Town and Country Planning (General Permitted Development) (England) Order 2015 SI No.596. Article 3(1) provides: "Subject to the provisions of this Order…, planning permission is hereby granted for the classes of development described as permitted development in Schedule 2." Subparagraph (2) makes the grant of any such permission subject to "any relevant exception, limitation or condition specified in Schedule 2."

6. Schedule 2 Part 3 contains the specified classes. Class M is the relevant one: "retail…to dwelling house." Under the heading "Permitted development", it provides:

> "**Permitted development**
>
> M. Development consisting of—

> (a) a change of use of a building from—
>
> (i) a use falling within Class A1 (shops) or Class A2 (financial and professional services) of the Schedule to the Use Classes Order; …or
>
> (iii) a mixed use combining use as a dwelling house with—…
>
> (bb) a use falling within either Class A1 (shops) or Class A2 (financial and professional services) of that Schedule (whether that use was granted permission under Class G of this Part or otherwise), to a use falling within Class C3 (dwelling houses) of that Schedule, and
>
> (b) building operations reasonably necessary to convert the building referred to in paragraph (a) to a use falling within Class C3 (dwelling houses) of that Schedule.
>
> **Development not permitted**
>
> M.1 Development is not permitted by Class M if—
>
> (c) the cumulative floor space of the existing building changing use under Class M exceeds 150 square metres;
>
> (d) the development (together with any previous development under Class M) would result in more than 150 square metres of floor space in the building having changed use under Class M…."

7. There are other exclusions of which (g) is noteworthy: the development is not permitted in a safety hazard area or in a military explosives storage area, (impliedly in retail use). Listed buildings are excluded as well. There is no exclusion in respect of Assets of Community Value.

8. M2 sets out the conditions subject to which the permission is granted. It provides:

> "M.2(1) Where the development proposed is development under Class M(a) together with development under Class M(b), development is permitted subject to the condition that before beginning the development, the developer must apply to the local planning authority for a determination as to whether the prior approval of the authority will be required as to—…(d) whether it is undesirable for the building to change to a use falling within Class C3 (dwelling houses) of the Schedule to the Use Classes Order because of the impact of the change of use—
>
> (i) on adequate provision of services of the sort that may be provided by a building falling within Class A1 (shops) or, as the case may be, Class A2 (financial and professional services)

> of that Schedule, but only where there is a reasonable prospect of the building being used to provide such services, or
>
> (ii) where the building is located in a key shopping area, on the sustainability of that shopping area, and
>
> (e) the design or external appearance of the building, and the provisions of paragraph W (prior approval) of this Part apply in relation to that application."

9. Thus permission is granted for this form of development only if prior approval has been obtained on the specified issues. The language of M2 suggests that before prior approval is sought, a determination is to be sought as to whether prior approval is necessary at all. But I am told that the application for prior approval covers what might seem to be the two aspects in one go, and it is how the application was made here, without controversy.

10. Paragraph W is headed "Procedure for applications for prior approval under Part 3", but it covers more than procedure. It provides, so far as material:

> "W.(1) The following provisions apply where under this Part a developer is required to make an application to a local planning authority for a determination as to whether the prior approval of the authority will be required.
>
> (3) The local planning authority may refuse an application where, in the opinion of the authority—
>
> (a) the proposed development does not comply with, or
>
> (b) the developer has provided insufficient information to enable the authority to establish whether the proposed development complies with, any conditions, limitations or restrictions specified in this Part as being applicable to the development in question."

11. Article 2 of the Order defines a "building" so that it includes part of a building; it also means "buildings".

The Decision Letter

12. The Inspector treated the application for prior approval as relating to "a change of use from retail (Class A1) to one residential unit (Class C3)." She set that out in the summary, in [1] summarising the decision, and in [3] where she noted that this was how the Council had amended the application, and how it had been described on the appeal form. This, she said, was more accurate than the description of the development on the application form: "scheme to convert an existing A1 corner shop back to residential use". There was no issue before her in relation to the building measurements; she pointed out that the Council were satisfied that the proposal

complied with the criteria in Class. M.1, and she saw no reason to disagree. The main issue related to the two questions in M.2.(d)(i); and in fact it was the first one which was really at issue: whether there would be an undesirable impact on the adequate provision of services of the sort provided by the shop.

13. At [8], the Inspector referred to the substantial number of objections submitted in respect of the application and appeal, which made it clear that the current business was valued by the local community and was considered important in meeting their day to day needs. But, as she said, what she had to assess was not the loss of a particular business or a particular use but whether the loss of the retail unit would have an undesirable impact on the adequate provision of services within an area.

14. She then turned to that issue:

> "9. Concern about the adequate provision of services is focused on the area to the north west of No 161 where the Council consider there are no retail units. To support this, the Council have produced a map which plots the nearest alternative retail provision using a 400m radius as a measure of accessibility. This 400m radius is taken from policy DMTS 7 of the Wandsworth Local Development Framework Development Management Policies Document (2012) which recommends that 400m is a reasonable walk distance to a shop. However, as this is an appeal seeking prior approval, subject to satisfying the requirements of Class M, consideration of compliance with development plan policy is not required."

15. This last sentence gave rise to ground 3 before me.

16. At paragraph 10, she turned to the site visit:

> "10. When I visited the site, as requested, I took the opportunity to visit the alternative shops suggested by both parties and the general area. I observed, as mentioned by the appellant, that there is an Esso petrol station which is not included on the Council's map. The petrol station is located close to the junction of West Hill and Sutherland Grove and whilst it is a sui generis use it includes a retail shop that sells convenience goods that would meet the day-to-day needs of the local community. When plotted the petrol station provides a retail facility to the north west of No 161. Whilst a limited number of properties would still fall outside of the 400 metre radius advocated by the Council, it is estimated that all the properties would fall within a 550 metre radius of an alternative facility."

That paragraph gave rise to the natural justice issues in ground 2.

17. Ground 5 and the public sector equality duty arose from paragraph 11:

> "11. I am aware of the concerns raised by the Council and a number of third parties that for some users, particularly

> children, the elderly or those with mobility issues that the distance to alternative facilities would be significant. However, I consider that given the limited increase in distance that some people would need to travel to alternative shops the provision of shops within the area would remain adequate albeit that they would be reduced."

18. She then turned to consider the NPPF in [12]- [13]:

> "12. Paragraph 70 of the Framework advocates that planning policies and decisions should guard against the unnecessary loss of valued facilities and services, particularly where this would reduce the community's ability to meet its day-to-day needs. With regards to No 161 many local residents have emphasised the importance to the local community of the additional services that the current tenants of No 161 provide to the local community. Amongst other things, these include signing for parcels, holding spare keys and checking on the welfare of elderly residents. Whilst it is clear from the comments submitted that these services are valued by the local community, Class M.2.(d) (i) refers to the adequate provision of services of the sort that may be provided by a building falling within Class A1 and I consider that these services, whilst of obvious benefit to the local community, are above those necessary to meet day-to-day needs and those that a corner shop/newsagents would normally provide.
>
> 13. If the retail unit at No 161 were no longer to operate I consider that the an [sic] adequate provision of shops providing a variety of services in the local area would still be maintained and the community's ability to meet their day to day needs, in accordance with the requirements of paragraph 70 of the Framework would be retained. Consequently, the proposal would comply with the requirements of the Framework."

19. She concluded in [16] that the provision of services within the area would be reduced but would remain adequate and therefore the change was not undesirable.

20. She then turned to other matters at [18], the first of which was the listing of the site as an asset of community value. This she said reflected the strength of local feeling over the current use. She continued: "However whilst M.1.(g) provides a list of situations for buildings where development is not permitted by class M, ACV are not included in this list and therefore as stated in the PPG it is not a matter I can take into account when determining this appeal." This gave rise to ground 4.

Ground 1: validity of the application or approval

21. There was a degree of muddle in the application as originally submitted, but the real focus of Mr Fookes' submission was that the 150 sq.ms. limit to the grant of prior approval had been exceeded. It was wrong to focus solely on the square metres of the

shop taken by itself, which was of the order of 42 sq.ms. Indeed, it would have been wrong to focus on the area of the two storey building itself. The application put that measurement at 130 sq.ms; the Council report put it at 131 sq. ms, and this was adopted by the planning consultant for Mr Johal on the appeal, and not revised by the Council. The applicant, Council and Inspector, submitted Mr Fookes, ought to have added in the floorspace within the detached garage to the rear. Had they all done that, they would have realised, on the basis of the evidence of two surveyors instructed by Mr Patel for the purposes of this s288 challenge, that the 150 sq.ms. limit had been exceeded, albeit by a very small amount. One surveyor put the total at 150.1826 sq.ms, and the other at 150.53 sq.ms. Accordingly, the approval was unlawful.

22. I cannot accept this submission. It depends entirely on the admissibility of the evidence of the two surveyors. This evidence is not admissible. Mr Fookes submitted that it came within the category of error of fact as error of law as laid down in *E and R v SSHD* [2004] EWCA Civ 49, [2004] QB 1044, and applicable to planning appeals on the basis of a public interest in ensuring that development control is carried out on the correct factual basis. There is no precise code but, *E and R* [66], there must have been a mistake as to an existing fact, the mistake must be established in the sense that it is uncontentious and objectively verifiable; the appellant or his advisers must not have been responsible for the mistake, and the mistake must have been material to the reasoning.

23. These requirements confound Mr Fookes' argument. I am not persuaded that any mistake has been proved, still less that the measurements are uncontentious or objectively verifiable. The two proffered by Mr Patel's surveyors differ from each other, and by more than the first exceeds the 150 sq.ms. This shows that this sort of measuring is not a precision exercise, which would lead all surveyors to come to the same precise result. The exceedances alleged are marginal, and one of them, if rounded down, would lead to no exceedance at all. Any exceedance depends on the individual rooms being measured to 4 decimal places, rather than rounded up or down from one decimal place. The floor space in the rooms, other than the garage, on the measurements provided by Mr Patel's first surveyor was 132.8 sq.ms. and 133.13 sq.ms. from the second surveyor; the Council used 131 sq.ms. The difference between the two surveyors instructed by Mr Patel in the measurements of those other rooms is greater than the 0.1826 sq.ms exceedance relied on by one surveyor; and the difference with the Council in relation to those other rooms is greater than the total exceedance. So while the addition of the garage floorspace *might* tip the figures, it would not do so if the Council/Appellant figure for the other rooms were correct.

24. Mr Patel, as the occupier of the floor space, knew that this was not a point being raised by the Council. It ought to have been obvious that the garage had not been included in the measurements from the plans in the application, even if not obvious from the figures themselves. Mr Patel was very well placed to check them, having sought advice. If mistake there was, it was his fault for not raising the point earlier. It is far too late for him to raise the point now. Parties must bring their case to the appeal procedure, and not wait, or try to catch up with what they could and should have done earlier, by way of s288 challenge, and a misuse of the role of error of fact as error of law.

25. It is also far too late, because even if all the measurements which his surveyors made had been placed before the Inspector, and accepted, it would simply have led to a

further argument about whether the garage should have been included anyway. Indeed, should all the rest of the accommodation have been included anyway? Mr Fookes has to succeed on both of those before this measurement argument becomes relevant.

26. There is clearly an argument to be had: the Council and Inspector have interpreted Class M as requiring a focus on the part of the building which looks like a shop, which they treated as the part in retail use. I am by no means clear that that is correct. Class M specifically contemplates a building in a retail use, and a building in a mixed retail and dwelling house use, changing to residential use. The 150 sq.ms. limit applies equally to both sorts of building. The mixed use concept includes but is not confined to the part which is in "actual" retail use, if the building is in mixed use.

27. Ms Tafur for the Secretary of State pointed out that, applying the definition of "building", it could include part of a building. So the retail use could be in a part of a building, the rest of which was in another use, but she submitted that the relevant part would be the part in retail use. In certain circumstances that may be correct, but it misses the real point. That is whether there is a mixed use in the building or part of the building in question, or whether there is a separate retail use and a separate residential use in the building or part of the building in question. Where the building is in a mixed use, one cannot avoid the issue by confining attention to part of the mixed use only. That is a prior question to be resolved. Ms Blackmore for Mr Johal suggested that the "mixed use" was designed to deal with buildings where the two uses were genuinely intermingled and not readily separable, such as live/work, or a small office in the house. Class M however makes it clear that the mixed use concept applies to a mixed use building or part of a building; to my mind the most obvious examples of this would be many a conventional corner shop, where the shopkeeper's life is not lived "genuinely intermingled" among the groceries in the shop. Hers is not a very easy concept to apply to the corner shop with accommodation above or behind, with differing access and storage arrangements, but in which there would clearly be a public area where customers were expected, back areas which could take many configurations, and an area where the occupiers reside which might or might not include storage, back office and other shop related facilities.

28. The application of the provisions of Class M may well therefore involve a consideration of what the planning unit comprising the relevant building actually is. That will involve issues of fact and degree, as *Burdle v SSE* [1972]1 WLR 1207 makes clear. The question may have to be asked whether there are two units within a single area of occupation, comprising physically separate and distinct areas which were used for substantially different and unrelated purposes, or whether, if neither use is ancillary to the other, there is a composite use, with different activities not confined within separate and physically distinct areas. This may give rise to issues about the extent to which the residential accommodation is separated from the retail use, or whether any part of it is used for retail storage. The use of the garage may be ancillary to a mixed use of the building and might be part of the planning unit and so could be brought into account; it might be solely residential or retail; and it might come into account on that basis since, if the main building became solely residential, the garage would become residential, changing from retail or mixed use, if that was the right way to describe it. All this would require evidence and analysis. There was no evidence

about that; Mr Patel could have provided that to the Inspector, advancing his argument that all counted towards the 150 sq. ms. But he did not.

29. I do not accept that *Dyason v Secretary of State for the Environment* (1998) 75 P&CR 506 CoA, can be prayed in aid to advance the argument that the Inspector, performing an inquisitorial role particularly in a procedure without cross-examination, ought to have examined the measurement issue, and if necessary called for measurements to be taken, and pursued the factual basis for the relevance of those measurements. *Dyason* is essentially a case about the fairness of the procedure adopted by the Inspector at a hearing, when he found against the appellant on an issue on which he knew the appellant wished to call further evidence, and without putting to the appellant the areas of concern on which he found against him. The comments of Pill LJ, in particular, at p512, that the "absence of an accusatorial procedure places an inquisitorial burden upon an Inspector," need to be read in that light. He acknowledged that there plainly were limits on the duty to ask questions. Here, Mr Patel simply failed to raise an issue, which was far from obvious on any basis, failed to provide any evidence on it, and cannot pray in aid the sort of inquisitorial duty which *Dyason* had in mind to make up for that failing.

30. *Tapecrown v First Secretary of State* [2006] EWCA Civ 1744 returned to *Dyason*, in the enforcement context: how far should an Inspector go in considering and suggesting alternatives to the requirements for compliance set out in the enforcement notice, while being under no duty to search around for solutions? Carnwath LJ pointed out that what Pill LJ had said about the extensive duty on an Inspector to lead a discussion could not apply to an appeal by way of written representations, where the scope for an "inquisitorial" approach was reduced. Unduly onerous obligations on the Inspector should be avoided, while appeals by way of written representations should not be regarded as second-class forms of procedure in terms of fairness. The case was essentially one about the fairness of reaching conclusions on issues which the Inspector considers without seeking the views of the parties. It does not advance Mr Fookes' case.

31. Mr Fookes said that discrepancies between the plans should have alerted the Inspector to the need to clarify the areas at the outset. I disagree. There was nothing in the plans or in the papers to alert the Inspector to such an issue, dependant as it was on taking into account the whole building and the garage.

32. Mr Fookes did not really pursue his argument that the correct basis of measurement was the gross external floorspace; Mr Patel's surveyors had put forward the gross internal measurements, recognising that the language of Class M could lead to that view. This is yet a further reason why the Inspector could not have been expected to suppose that an issue arose if no one raised it.

33. There is no justification for complaining that she ought to have acted as a meticulous, anxious, sceptical, inquisitorial auditor and scrutineer of details, which were agreed between the main parties, and not raised at all by the occupier when he had had every chance to do so. It is not for the Inspector to fulfil such a role, whatever lesser obligations the "inquisitorial" role may at times impose. It is for the parties to make their cases, and they cannot normally complain that the Inspector has failed to consider a point which they failed to consider, and could and, if important to them, should have taken, but did not.

34. That does not mean that the Inspector cannot consider a point not raised, or that there may not be points which the public interest requires them to consider, whether raised or not, nor that there may be occasions on which a failure by an Inspector to consider a point not raised, may give rise to a proper challenge on the basis that a material consideration, which he is obliged to consider, has been ignored. In any of those events, the duties of fairness may also require the Inspector to give parties the opportunity to deal with them. The Inspector, cannot just sit back, listen to what is said, and then reach a conclusion on a point of importance without knowing what the parties might say about it.

35. Here, however, the Inspector was under no obligation to raise the question of measurements or of what should be measured, where it was not raised by anyone, and there seemed ample headroom. She might have thought that the occupier would have shown sufficient interest at least to raise the possibility of what would have been, were he correct, a knockout blow.

Ground 2: Natural Justice

36. Mr Fookes raised three points under this head: (i) The Inspectorate did not supply Mr Patel with a copy of the representations made by Mr Johal on 2 October 2015 which drew the Inspector's attention to the Esso petrol station, which she then referred to in her decision. (ii) Mr Patel was not notified of the Inspector's site visit, and so was unable to comment on the Esso petrol station, or on the closure of the Beaumont Road parade. (iii) The Inspector did not take into account Mr Patel's' representations, because through an error in the administration of the Inspectorate, they were not sent to her.

37. As to the first point, it is correct that the Inspectorate did not supply Mr Patel with Mr Johal's representations of 2 October 2015. These were his representations in response to the submissions of the Council and third Parties such as Mr Patel. This involves no breach of the relevant Rules, the Town and Country Planning (Appeals) (Written Representations Procedure) (England) Regulations 2009 SI No.452, as amended. It involves no breach either of the Guidance issued by the Planning Inspectorate in July 2015 Annex D of which explains its practice for the conduct of appeals by written representations. Paragraphs D6 and D7make it clear that the representations of the Appellant to those of the Council and third parties are not forwarded to others. The Procedure Rules make no provision for that.

38. The concern underlying the submission was that it was only in the reply submissions that Mr Johal's representative referred to the Esso shop, to which the Inspector gave some weight to in her assessment of the adequacy of service provision in the absence of 161 Wimbledon Road. Mr Fookes submitted that the Guidance in D7 said that the Appellant should not introduce "new material or technical evidence" in his reply submissions. Here, he had done so with his reference to the Esso shop, and so a variation in Inspectorial practice was required, in order that the procedure be substantively fair, albeit complying with the Rules. Mr Patel would have wanted to point out all the drawbacks for users from the area served by 161 Wimbledon Road of the Esso shop's location, distance, access problems on foot or by car, and problems for the elderly, and its lesser service.

39. I rather doubt that pointing out the presence of the Esso shop, as one not referred to by the Council in its representations amounts to what the Guidance had in mind as "new material." After all, there is no point in a reply which adds nothing new, and is merely repetitive or emphatic. The response is clearly written as a series of short responses to various issues. The reality is that there was no substantive injustice in this case. The Inspector went to see the Esso shop, aware of the issues over the level of service, and distance for local users to travel in the northwest quadrant of the 400m radius drawn from 161 Wimbledon Road, since that was at the heart of the Council's opposition. She knew of the services provided by Mr Patel, and how they were used and valued by the local community he serves. She went to both shops; she could see the location for herself and appraise the extra distance which those currently using 161 Wimbledon Road would have to travel, the difficulties of getting there including crossing a busy road, the problems of getting into and out of the petrol station site on foot or by car, and the different levels of service offered. I infer from the Decision Letter that she went into the customer areas of both the Esso shop and 161 Wimbledon Road, on her unaccompanied site visit, whether Mr Patel realised who she was or not. There was nothing in the representations which Mr Patel might have made which could have added to her appreciation of the location and service offered by Esso. She would have understood, without being told, that neither the Council nor Mr Patel, nor many others would have regarded that as adequate. The Council's policy and reasoning would have conveyed that. Accordingly, I reject the first point under this head.

40. The second point is that Mr Patel was not notified of the site visit. There was no reason why he should have been; it is not part of the Rules or Guidance. The site visit was unaccompanied by anyone. No access to private areas was required. It would not have been the place either for further representations from Mr Patel about the Esso shop. Mr Fookes also submitted that, had Mr Patel been notified, he would have been able to show the Inspector that the parade of shops in Beaumont Road, some 750 crow fly metres away from 161 Wimbledon Road, had been closed.

41. Ms Tafur submitted that the Inspector in paragraph [10] of the decision letter was to be taken as saying that she had in fact visited Beaumont Road, as it was one of the parades referred to by the Council in its representations and shown on its map. I have been persuaded that I should so read it, because in the end I cannot be satisfied that she meant she had visited something less. I was surprised that, when adding to the information on the map by reference to the Esso shop, and putting weight on it, she did not mention that another parade had closed, also correcting the map, in the other direction, as it were. But as I say I do not think that I can conclude that paragraph 10 should be read any other way. So I reject the second point under this head.

42. The third point is closely related to it. Mr Fookes says, and it is not at issue, that the representations of Mr Patel arrived at the Inspectorate, but administrative failure meant that they were not passed to the Inspector, who reached her decision without taking them into account. On the face of it, that would be a sound basis for successful challenge on a variety of grounds - even more so because Mr Johal's schedule of response to third parties should have alerted the Inspector to the fact that Mr Patel had made representations. However, the problem for Mr Patel is that his short letter really adds nothing, except that he refers in one sentence to the closure of the Beaumont Road parade, (not a point picked up by Mr Johal's representative in response). He

deals with the Landlord and Tenant Act position, the convenience of his shop and the degree to which his services are valued locally, and argues that Mr Johal's parents should look elsewhere for a home. If my conclusion on the second point is correct, that she did visit Beaumont Road, it is the answer to this point as well. In reality there was no unfairness, because the very short point he made about Beaumont Road was appreciated by the Inspector anyway. So this point fails too.

Ground 3: the role of the development plan

43. I set out first the relevant provisions of the Order. Paragraph W has been referred to already but for these purposes it continues:

> "W(4) Sub-paragraphs (5) to (8) and (10) do not apply where a local planning authority refuses an application under sub-paragraph (3) and for the purposes of section 78 (appeals) of the [1990] Act such a refusal is to be treated as a refusal of an application for approval.
>
> (10) The local planning authority must, when determining an application—
>
> (b) have regard to the National Planning Policy Framework issued by the Department for Communities and Local Government in March 2012, so far as relevant to the subject matter of the prior approval, as if the application were a planning application; …"

44. I mention W(4) because it seems relevant somehow, but no one was able to offer any coherent explanation of how it was intended to work or if it was intended to apply to an appeal. I now ignore it.

45. S70 of the 1990 Act deals with applications to a local planning authority for planning permission, and subsection (2) requires it to have regard to the development plan, so far as material to the application, and to any other material considerations. It applies to an appeal against the refusal of planning permission. An application for prior approval is not an application for planning permission. S38(6) of the Planning and Compulsory Purchase Act 2004 provides: "If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts, the determination must be made in accordance with the plan unless material considerations indicate otherwise." "The planning Acts" are all Acts, s117.

46. The National Planning Policy Framework, NPPF, contains in [70] a policy for guarding "against the loss of valued facilities and services, particularly where this would reduce the community's ability to meet its day to day needs." The Inspector dealt with that. It is two other paragraphs upon which Mr Fookes relied. Paragraph 12, under the heading "The presumption in favour of sustainable development" points out that the NPPF does not change the status of the development plan, using the language of s38(6). Proposals that conflict with an up to date local plan should be refused, unless material considerations indicate otherwise. This leads into the policies for

giving effect to up to date plans, and dealing with the consequences of out of date plans. But that needs to be read as following on from paragraph 11 which restates s38(6).

47. [150] comes in the section headed "Plan-making - Local Plans". It reads**:**

> "150. Local Plans are the key to delivering sustainable development that reflects the vision and aspirations of local communities. Planning decisions must be taken in accordance with the Development Plan unless material considerations indicate otherwise."

48. The Planning Practice Guidance, a Government document of lower status then the NPPF states, for what it is worth, that, when considering prior approval, a local planning authority "cannot consider any other matters [than those set out in full in the relevant parts of Schedule 2]". An application for prior approval is described as having "much less prescriptive" requirements than an application for planning permission; it is a "light-touch process which applies where the principle of the development has already been established."

49. I am not clear how far that last sentence can apply where the Class itself requires the evaluation of an issue on which the NPPF has a policy, which goes to the very question of whether the development is acceptable. It is difficult to say that the principle has been established, other than conditionally and the condition here is no mere technical issue.

50. The development plan, the Development Management Policy Document, contains the policy accurately summarised by the Inspector in [9] of the decision letter, set out above.

51. Mr Fookes submitted that she erred in law in saying that compliance with it did not need to be considered. Without such an error her decision might well have been different. I accept that if her approach was wrong, her decision might have been different. Although Mr Fookes referred to the need to take representations in to account, his argument was confined to the need to approach the decision on the basis that it had to be made in accordance with the development plan unless material considerations indicated otherwise. It was not an argument that the development plan was a material consideration, regardless of any notion of compliance, but had been ignored.

52. I am satisfied that Mr Fookes' argument is wrong. There is no statutory obligation to decide the application on the basis of the approach in s38(6) of the 2004 Act. S70 of the 1990 Act does not apply to an application for prior approval, and there is no other provision to like effect for applications for prior approval. So there is no means whereby s38(6) can supply the hook for the application of its decision-making duty. It only applies "If regard is to be had to the development plan…". There is no such statutory requirement in relation to prior approvals.

53. Hence Mr Fookes has to argue that the hook is supplied, despite that, by the language of the NPPF itself in the two paragraphs I have referred to. I disagree. First, it would be surprising if, Parliament having provided no such constraining framework, it is

brought in by the side wind of the NPPF in relation to provisions which are plainly intended to make it easier to achieve changes of use. The duty to have regard to the NPPF would have become a duty in effect to apply s38(6), without Parliament saying so. This would involve inserting the words "and the development plan" between "March 2012" and "so far as relevant to the subject matter", in order to bring in the s38(6) duty. The words are not there expressly nor by necessary implication either. If Parliament or the Minister left them out, I would be very reluctant to interpret the NPPF as supplying such an omission.

54. Second the context in which the paragraphs are set provides the most powerful reason why he is wrong. Paragraph 12 of the NPPF, read with paragraph 11 is simply stating first what s38(6) says, and that it applies to applications for planning permission. [12] simply follows that up by saying that the NPPF does not alter the status of the development plan. It does not purport to give effect to some application of s38(6) and s70 outside their statutory language. Paragraph 150 deals with plan-making, and starts by explaining, in the language of s38(6) what the effect of the development plan is on planning decisions, but clearly means those to which that provision applies, which do not include prior approvals. Again it would be quite wrong to treat that as enlarging the practical application of those provisions to this sort of approval. This submission is wrong.

Ground 4: Asset of Community Value (ACV)

55. The Localism Act 2011 s87 requires local authorities to maintain a list of assets of community value. Land is entered on the list for a period of five years. Land qualifies under s88(1)(a) for entry on the list if in the opinion of the authority "an actual current use of the building…furthers the well-being or social interest of the local community…, and (b) it is realistic to think" that that such a use can continue there. There is a procedure for "the community" to nominate such assets. The effect of entry on the list, by way of a considerable simplification, is to create a 6-month period during which a community interest group may bid for the land, if the owner wishes to sell it.

56. The application for prior approval is dated 3 May 2015, and refused on 23 June 2015. This building was accepted as nominated as an ACV on 29 May 2015 and on 4 June was added to the Council's list of ACVs. This timing was no coincidence. The building was added "because the current use of the Premises currently furthers the social wellbeing of the local community." The justification for that was the services it provided, particularly for the elderly, and that it was the focal point for the community.

57. The Inspector treated this listing, [18], as a matter which she could not take into account because being an ACV was not one of the exceptions to the application of Class M in M1(g), which included listed buildings, for example. That is a misunderstanding of Class M. M1(g) provides for the exclusion of certain areas or types of building from the operation of the Order. That does not mean that some other non-exclusionary status is made legally irrelevant to any issue which does arise. The only issues which can be considered on this application for prior approval are set out in Class M; the PPG only states that the issues to be considered are those set out in the Order, which is correct in law. The Order in M2(d)(i) requires a planning judgment about the undesirability of permitting the change because of its impact on the

provision of services. That was the only real issue here. There is no provision stating that it is only the NPPF that is relevant; a duty to have regard to the NPPF is not a duty to ignore other planning considerations relevant to the defined issue. One would expect that to be expressly stated if that were how the Class were to be construed. Indeed, the Inspector appears to have had regard to the development plan in [9], though not for the purposes of judging compliance with it, and Ms Tafur relied on that paragraph in relation to ground 5. The Inspector therefore erred in treating the absence of ACV status from M 1(g) as making ACV status irrelevant to the defined issue, if it was otherwise relevant, as it could well be.

58. However, it is perfectly clear that had she considered it to be of relevance to the real issue, it would have made no difference to her decision. She could properly have concluded that of itself it added nothing to the arguments. The ACV status of this corner shop reflects the local value put on its services as a shop. That was perfectly evident from the representations made to her, and the Council's case. Local value was at the heart of the question of the impact of its loss on the provision of services. The status in fact added nothing or nothing much to the arguments. It is another guise in which the same points would be made, except if an issue had arisen as to whether, absent the change of use, the shop would in fact continue in shop use, where the possibility of community purchase could be relevant. That is relevant to Class M but did not arise as an issue in this case. There is nothing in reality in this point.

Ground 5: the public sector equality duty and s149 Equality Act 2010

59. S149 so far as material provides:

> "(1) A public authority must, in the exercise of its functions, have due regard to the need to—
>
> (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
>
> (3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—
>
> (a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
>
> (b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;…."

60. The relevant protected characteristics here are age and disability.

61. Mr Fookes submitted that, although express reference to the duty was not necessary in order for an Inspector to have had "due regard" to the statutory needs, it was good practice and would help avoid arguments that it had been ignored. Here, the Inspector had made no reference to the duty. Nor had she in fact had due regard since she had

not considered the extent to which the children, elderly and disabled would be less able than others to reach other shops for groceries and newspapers and other services of the sort provided by this corner shop, were this shop to close.

62. The Defendants submitted, correctly, that what was required was an examination of whether the decision-maker has in substance had due regard to the statutory needs, which depends on the decision and its reasoning; *R (Coleman) v Barnet LBC* [2012] EWHC 3725(Admin), [66]. They submitted that the Inspector had done so in her consideration of the adequacy of provision in [9-12] of the decision letter, and particularly in [11] where the needs of children, the elderly and disabled were considered.

63. Their needs had been a concern raised by the Council. Indeed, the minutes of the Council meeting show that their needs were part of the thinking behind why Councillors, with specific reference to disadvantages for the disabled and elderly, rejected the Officer recommendation that prior approval be granted. The Minutes were before the Inspector as part of the Council's representations, but there was no more specific reference in the representations to the elderly or disabled. Mr Patel made no reference to them in his representations nor did Mr Johal's representatives, until in response to some third party representations, they said that the needs of the elderly and disabled were adequately met by alternative provision.

64. I have considered the principles summarised in *Bracking v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345, at [26], notably [26 (8)], McCombe LJ. I set out 26(8) (i), in fact a citation from Elias LJ in R *(Hurley & Moore) v Secretary of State for Business, Innovation and Skills* [2012] EWHC 201 (Admin) at [77-78] :

> "(i) at paragraphs [77-78]
>
> "[77] Contrary to a submission advanced by Ms Mountfield, I do not accept that this means that it is for the court to determine whether appropriate weight has been given to the duty. Provided the court is satisfied that there has been a rigorous consideration of the duty, so that there is a proper appreciation of the potential impact of the decision on equality objectives and the desirability of promoting them, then as Dyson LJ in Baker (para [34]) made clear, it is for the decision maker to decide how much weight should be given to the various factors informing the decision.
>
> [78] The concept of 'due regard' requires the court to ensure that there has been a proper and conscientious focus on the statutory criteria, but if that is done, the court cannot interfere with the decision simply because it would have given greater weight to the equality implications of the decision than did the decision maker. In short, the decision maker must be clear precisely what the equality implications are when he puts them in the balance, and he must recognise the desirability of achieving them, but ultimately it is for him to decide what weight they should be given in the light of all relevant factors. If Ms Mountfield's submissions on this point were correct, it

> would allow unelected judges to review on substantive merits grounds almost all aspects of public decision making."

65. There is no duty to give particular weight to the needs of the elderly or disabled, and no duty to achieve the outcome which advantages them the most or disadvantages them the least. The decision-maker needs to be properly informed about the issues, but that is clear here; *Bracking* [26 (8)(ii)]. The question is whether the Inspector applied her mind to the issue in the manner required by *Bracking*, even though she did not specifically refer to the s149 duty.

66. Not without some hesitation, I have come to the conclusion that the duty was fulfilled. The Inspector was specifically looking at the disadvantages for residents having to travel further for alternative provision. She had the issue of the elderly and disabled specifically drawn to her attention, though there was no suggestion that this was an area in which there was any greater concentration than anywhere else. So she would have been well aware that children, the elderly and disabled were part of the general population which would be affected. Although most who wrote in made very little of this point, she would have been aware that it was one of the factors which caused the officer recommendation not to be followed. So I accept that she would have been alive to the problems faced by those groups in reaching her decision. She then specifically considers them as a group who would find the greater distances more problematic than others, and who would be more disadvantaged. She does not use those words, but it is clear that point is what she was considering in [11]. She then appraises that, also in [11]. She considers that the limited extra distance that some would have to travel not to mean that closure of the shop would create an undesirable inadequacy of provision. She clearly includes her judgment about children, the elderly and disabled in that judgment.

67. In [12], she specifically considers the extra services which Mr Patel provides. These are of particular benefit to the elderly, but are not the sort of services which any corner shop could reasonably be expected to provide; they are more Mr Patel's personal contribution to the community. She again sets her judgment in the framework of the decision she is required to reach on the adequacy of provision.

68. She is not obliged by s149 to find some countervailing public benefit to set against the greater disadvantage of the longer journey or the loss of those services before she could reach a lawful decision on the prior approval. The question she has to decide under the Order is still the same. Otherwise, s149 would alter the decision which had to be made.

69. Accordingly, I do not accept this fifth ground.

Conclusion

70. This application is dismissed.