Neutral Citation Number: [2016] EWHC 476 (Admin)

Case No: CO/5100/2015

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT
In the matter of s.288 of the Town and Country Planning Act 1990

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Monday 7th March 2016

Before :

THE HONOURABLE MR JUSTICE SUPPERSTONE

Between :

UNIVERSITY OF LEICESTER	**Claimant**
- and -	
(1) SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT	**Defendants**
(2) OADBY & WIGSTON BOROUGH COUNCIL	

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

Timothy Corner QC (instructed by **Gateley plc**) for the **Claimant**
Gwion Lewis (instructed by **Government Legal Department**) for the **First Defendant**
The Second Defendant did not attend and was not represented

Hearing date: 16 February 2016

Judgment
As Approved by the Court

Mr Justice Supperstone :

Introduction

1. In this application under s.288 of the Town and Country Planning Act 1990 ("the TCPA 1990"), the Claimant ("the University") challenges the decision of an Inspector, appointed by the First Defendant, dated 11 September 2015, dismissing its appeal under s.195 of the TCPA 1990 against the refusal of the Second Defendant ("the Council"), to grant its application for a certificate of lawful use ("LDC").

2. The Claimant sought a certificate to the effect that one of its halls of residence, John Foster Hall ("JFH"), could be used lawfully as a hall of residence for students and those attending day and residential conferences.

Factual Background

3. The background to these proceedings as set out below is not in dispute. On 23 November 2012 the University applied to the Council under s.191(1)(a) of the TCPA 1990 for an LDC in respect of JFH for:

> "hall of residence together with day and residential conferences, such conferences falling within the use as applied for and permitted by planning permission ref. 03-407-8M and 04/00189/FUL granted in 2004 and 2005 respectively and/or being ancillary to the use of the subject site as a hall of residence."

4. On 19 August 2014 the Council refused the application because

> "On the evidence submitted by the Applicant, or otherwise available to the Council, the premises has not been used continuously for a mixed halls of residence and conference use for a period of ten or more years nor is it expressly permitted through previous planning permissions relating to the site."

5. The University appealed to the First Defendant against the refusal under s.195 of the TCPA 1990 and an inquiry was held by Mr B.S. Rogers ("the Inspector") on 3 September 2015. By letter dated 11 September 2015 ("DL") the Inspector dismissed the appeal.

6. JFH is a complex of buildings belonging to the University. It is in a mixed use for the purpose of provision of accommodation for students, and for those attending conferences.

7. JFH is a part redevelopment of a previous complex, also owned by the University, known as Villiers Hall. Before the redevelopment Villiers Hall was also in a mixed use for the provision of accommodation for students and those attending conferences. The redevelopment involved the demolition and replacement of the existing halls of residence and an extension to the existing facilities building.

8. JFH was developed pursuant to two planning permissions: (1) Permission reference 03-407-8M dated 5 February 2004 ("the 2004 permission"); and (2) Permission reference 04/00189/FUL dated 29 July 2005 ("the 2005 permission").

9. The application for what became the 2004 permission was received by the Council on 10 July 2003. The proposed development (as amended) was described on the application form as:

> "student accommodation – 569 [this was a typing error; the correct number was 509] rooms – plus addition to existing communal facilities building, new road, paths and landscaping."

10. The application was considered by the Council's Development Control Committee ("the Committee") at its meeting on 8 January 2004. The officers' report, which recommended that planning permission should be granted, specifically referred to the University's intention to use the proposed accommodation not only for students but also for those attending conferences at the University. In particular:

i) Under the heading "DESCRIPTION OF PROPOSAL" it is stated (4th paragraph)

> "the units would be used for the majority of the year to house the students that are attending the University. It is also proposed that the building will also be used during holiday time to provide accommodation for the users of the various conferences which are run by the University within their Manor Road campus."

ii) Under the heading "EXPLANATORY COMMENTS" and under the sub-heading "*Impact through increased vehicular traffic*" it is stated

> "The County Council's Highways Department was consulted over the development…
>
> The use of the units for conference accommodation was brought to their attention. The University in its management plan had indicated that any delegates attending the course would be informed in advance of their parking area and, for the attendees which would not be in spaces adjacent to their accommodation, a bus service would be provided to transport them from parking spaces to their accommodation…
>
> The main comments of the Highways Department were as follows…
>
> You will note that the revised management statement now includes a commitment that the University will ensure that all conference parking is provided within its land holding in advance of the conference date…"

11. Correspondence and meeting notes involving the Highway Authority which were before the Inspector provide further evidence of the knowledge of both the Highway Authority and the Council that the University planned to use JFH for conferences. These documents include the following: (1) meeting note dated 19 August 2003 between the University's transport consultants and Mr Frank Bedford on behalf of the Highway Authority; (2) e-mails dated 8 October 2003 timed 10:56 and 17:03 from Mr Bedford to the University's transport consultants; (3) a letter dated 10 October 2003 from Mr Bedford to Mr Martin Yardley, the Council's Assistant Director Planning; (4) a letter dated 14 October 2003 from Mr Bedford to Mr Yardley; and (5) a letter dated 19 November 2003 from Mr Bedford to Mr Yardley.

12. It is clear from the officers' report that local residents objecting to the development knew that JFH was intended to be used for conferences. At the start of the section "EXPLANATORY COMMENTS" the officer refers to local representations, including objections that the development would

> "increase disruption caused by conference use, delegates have little regard for local residents…"
>
> "cause traffic congestion along Manor Road especially during conference time…"

One of the residents' letters raising such objections dated 23 September 2003 was before the Inspector.

13. The Committee resolved to grant planning permission for the development. The minutes of the meeting refer to the Highway Authority having sought "a payment of £25,000 towards highway works, a cycleway and a green travel plan (for students and delegates)". Further, the Head of Planning explained that the proposed redevelopment of Villiers Hall represented an "intensification, but not a change of use".

14. By notice dated 5 February 2004 permission ("the 2004 permission") was granted for

> "DEMOLITION OF EXISTING HALLS OF RESIDENCE AND THE ERECTION OF 14 BLOCKS COMPRISING OF A TOTAL OF 509 ROOMS PLUS EXTENSION TO EXISTING FACILITIES BUILDING (REV B)…"

15. Condition 15 requires that prior to the occupation of any part of the accommodation a legal agreement should be entered into to ensure that the requirements of the Highway Authority were met. In the "Note(s) to Applicant" at the end of the permission notice it is stated at paragraph 8:

> "This decision is conditional upon the terms of the planning agreement which has been entered into by the developer and the Council under section 106 of the Town and Country Planning Act 1990 (as amended)…"

16. However, no section 106 agreement was entered into between the University and the Council before the issue of the 2004 permission.

17. On 19 April 2004 the Council received the University's application for what became the 2005 permission. The development applied for was described on the application form as

> "student accommodation – construction of an additional 77 no. study bedrooms."

18. By notice dated 29 July 2005 permission was granted for

> "Amended scheme to approved application for redevelopment of students accommodation incorporating the construction of an additional 72 number study bedrooms (Rev B)."

19. Condition 33 of the 2005 permission states:

> "This permission shall only be implemented in conjunction with permission 03/0407/8M dated 5 February 2004."

20. In the Note(s) to Applicant at the end of the 2005 permission it is stated at paragraph 7:

> "This decision is also conditional upon the terms of the planning agreement which has been entered into by the developer and Leicestershire County Council and Oadby and Wigston Borough Council under Section 106 of the Town and Country Planning Act 1990 (as amended) to ensure that the requirements of the highway authority are met…"

21. At the inquiry before the Inspector it was common ground that the section 106 agreement referred to in the 2005 permission was the agreement of 22 July 2005 ("the section 106 agreement"). The section 106 agreement defines the "Development" to which it applies as

> "the construction of 581 Study bedrooms at the site pursuant to the Planning Permission."

22. The section 106 agreement contains provisions which make clear that it was contemplated by the parties that conference use of the accommodation would take place, in particular in the Fourth Schedule, dealing with the "TRAVEL PLAN" (Paragraph 4.4 of the s.106 agreement) provides that the development shall not be occupied or brought into use until a travel plan has been submitted to and approved by the Council to include the elements set out in the Fourth Schedule):

    i) Under "Part 1 – General Requirements" in the Fourth Schedule, the following requirements are listed:

> "Incorporation of the University of Leicester's anti-car policy to promote sustainable travel and discourage staff, students, those attending conferences and other users of the University's facilities from bringing their vehicles to the University's premises in Leicester and Oadby; …

Incorporation, implementation, monitoring and enforcement of a car parking Management Plan… The Management Plan shall include arrangements for parking for conferences and similar events held at the University of Leicester's properties in Oadby and be in accordance with the University of Leicester Management Statement for Conference Parking in Oadby included in part 6 and in the accompanying bwb consulting drawing 'Conference Parking in Oadby' Figure 1 dated 14/11/03, or as altered and approved in writing by the Borough Council."

ii) Under "Part 2 – Monitoring" it is stated that monitoring shall include

"(b) The level of car parking resulting from the Development and the holding of conferences and similar events held at the University of Leicester's properties in Oadby…"

iii) Under "Part 3 – Targets" it is required that the travel plan shall have the following among its targets:

"(b) No on-street car parking resulting from the Development and the holding of conferences and similar events held at the University of Leicester's properties in Oadby…"

iv) "Part 6" is headed "UNIVERSITY OF LEICESTER – MANAGEMENT STATEMENT FOR CONFERENCE PARKING IN OADBY". It is clear from Part 6 that it was contemplated, and known to the Council, that the new accommodation in JFH would be used for conference purposes;

"1.0 Introduction

1.1 The University properties in Oadby are primarily used as student halls of residence. However, for a limited period outside term-time, these premises are used as venues for various conferences. Whilst this is a secondary, diminutive use, the University acknowledges that conferences have different parking characteristics to student halls of residence. Consequently, this management statement has been produced to demonstrate that the additional parking related to these conferences can be accommodated within the University's properties in Oadby.

1.2 It should be recognised that the local authority currently has no control over conference parking in the area. This management statement will enable the University to plan their conference parking more efficiently and therefore improve the current parking situation in the area.

2.0 Delegate numbers

> 2.1 The University has approximately 1700 bed spaces in 1517 rooms in Oadby. However, only 1367 of these beds have been identified as suitable for conference use. The proposed re-development of Villiers Hall would provide an additional 339 bed spaces. Therefore, as an absolute worst case, the University could accommodate residential conferences with a total attendance of 1706 delegates…"

23. At the inquiry before the Inspector, the University relied on evidence from Mr P.E. Bale, the University's Project Manager as well as Mr M. Best MRTPI and, as a written submission, Mrs F. Stone. The Council called Ms Christine Zacharia BTP, MRTPI.

24. Of the witnesses who gave oral evidence before the Inspector, only Mr Bale had been involved in the formulation and submission of the applications, and the subsequent construction of the redeveloped JFH. Mr Bale gave uncontradicted evidence that it had always been the University's intention to use JFH for conferences as well as students, and that the Council and County Council well knew of that intention:

> "4. As a Project Manager I was involved in the project for the redevelopment of Villiers Hall and I can confirm that it was always the University of Leicester's intention that conferencing use should continue at the site…
>
> 5. To my personal knowledge, at no point in time did the University… ever have any intention that conferencing use would cease.
>
> 6. To my personal knowledge conferencing [and] student use have co-existed at Villiers Hall/John Foster Hall since at least 2002.
>
> 7. In my role as project manager, I was involved in the development of the designs for the new John Foster Hall… The designs were always meant to have a conferencing capability.
>
> 8. In particular I can draw attention to a number of factors that were incorporated into the design specifically because the use was intended not merely to be for students but also for conference delegates…
>
> 13. The issue of conference car parking was a matter that was raised by the local planning authority during the development of the scheme and addressed [refers to the letter from the County Council dated 14 October 2003, referred to at paragraph 11 above]."

The Inspector's Decision ("DL")

25. The Inspector said that the main issue was whether the use was lawful (DL2). He recorded the University's submission that an LDC must be granted because enforcement action cannot be taken for three reasons:

> "(i) the 2004 and 2005 planning permissions grant consent for the use; or (ii) the conferencing use is lawful ancillary to the use of the buildings as student halls of residence; or (iii) the use for conferencing and student halls of residence is lawful under s.75 of the 1990 Act because that is the purpose for which the buildings were designed and intended to be used." (DL4).

26. The Inspector began by dealing with the planning permissions. At DL7-13 he dealt with the 2004 permission. He said that the wording of the permission does not clearly state what the "509 rooms" and "facilities building" permitted by the permission are to be used for, and that the planning conditions do not assist (DL7). He said

> "In my view, most people looking at the permission and detailed plans would interpret this as being permission for a student hall of residence. There is no mention of conference use and, to my mind, no basis on the face of the permission for anyone to interpret the permission as being for such use. However, I agree that the permission is poorly worded, to the extent that there is some lack of clarity. In this case, the planning permission does not expressly incorporate the application. However, following the principles set out in R *v Ashford B.C, ex p Shepway DC* [1999], it is permissible to look at extrinsic material, including the application, to resolve any ambiguity." (DL8)

27. The Inspector then referred to the application form, where under "Full description of the proposal" is found the wording "*student accommodation – 569 [typing error for 509] rooms – plus addition to existing communal facilities building, new road, paths and landscaping*".

28. The Inspector continued

> "… in seeking to resolve ambiguity, there would appear to be no clearer expression of what is sought by an applicant than his own '*full'* description of the proposal which is entirely consistent with detailed plans showing rooms and facilities which appear designed for student use. There is no reference at all to either existing or proposed conference use on the application form. …" (DL9).

29. The Inspector said he did not find the reference by Mr Bale to discussions with Council planning officers about the intended conference use

> "helpful to an objective interpretation of the planning permission. There is no indication that the application was

> formally modified in any way to incorporate conference use." (DL10)

30. The Inspector referred to the reference at condition no.15 of the 2004 permission to a s.106 obligation but commented that the s.106 obligation was not completed until 22 July 2015, and therefore it could not assist with the interpretation of a planning permission granted on 5 February 2004 (DL11).

31. The Inspector then (at DL12) set out part of the reference to conference use in the officers' report to the Committee which states:

> *"It is also proposed that the building will also be used during holiday time to provide accommodation for the users of the various conferences which are run by the University within their Manor Road campus".*

However, he said,

> "there is no indication of the source of this information by way of an amendment to the application. Furthermore, it is not clear whether reference to '*the building*' refers to the 14 pavilions or to the facilities building or to the whole complex. Accordingly, I find the officers' report of little assistance in resolving any ambiguity".

32. The Inspector concluded that therefore

> "the 2004 planning permission can only be properly interpreted as being for student halls of residence with associated facilities building" (DL13).

33. The Inspector next turned to the 2005 permission. He said that what is permitted is clear on its face ("*redevelopment of student accommodation*"). He said that whilst he would agree that "**for** *student accommodation*" would have been clearer than "of", when read as a whole, including the reference to "*study bedrooms*", he considered it quite clear that the permission is for student accommodation (DL14).

34. He continued:

> "Furthermore the permission is described as an amended scheme and condition no.33 requires it to be implemented in conjunction with the 2004 permission, which I have concluded above relates to student halls of residence with associated facilities building." (DL15)

35. He added that even if there was any need to resolve ambiguity, the development description on the application form is "*Student accommodation – construction of an additional 77 no. student bedrooms*" which is perfectly clear, there being no reference to existing or proposed conference use in the application or the permission (DL16).

36. The Inspector concluded that he could see nothing to support the University's view that the Council determined the 2004 and 2005 applications as being for a mixed use

for student halls of residence and conferencing or that either permission grants such a mixed use (DL17).

37. The Inspector then turned to the submission that the conference use was ancillary to the student hall of residence use. He said that that submission is on the face of it rather unconvincing, given the University's primary case that the student accommodation and conferencing is a mixed use planning unit (DL18).

38. The Inspector said that it is not in dispute that a student hall of residence is a *sui generis* use, "characterised by a functional link to the University". He said

> "The conference use as described by the appellants appears quite different. It entails outside bodies running events at the premises and accommodating their delegates in the halls of residence. It may have University employed staff providing administrative and operational support, but there appears to be no functional link with the University's primary educational and research purposes. Whilst there are some similarities in terms of use of the living accommodation, dining and bar facilities, there are material differences in the nature of the use in terms of the length of stay, traffic generation and car parking." (DL19).

39. He continued

> "Whilst it is clear that conference use is a common use of halls of residence, and appears to make efficient use of otherwise vacant premises when students are away, it does not appear to me to be ancillary to the primary use." (DL20)

He added that the conference use was not "diminutive" (as the University had claimed), but a substantial use in its own right" (DL21).

40. Lastly the Inspector dealt with s.75 of the TCPA 1990. He concluded that s.75(3) did not assist the University because "the 2004 and 2005 permissions are clearly for student halls of residence and do not include any reference to conference use" (DL23).

41. The Inspector said

> "It is not in dispute that a conference use existed at the former Villiers Hall and continues to do so at the redeveloped John Foster Hall. It appears that was the University's intention all along and Mr Bale gave evidence that the designs and specifications of the buildings were tailored to such a mixed use."

However, he said,

> "A local planning authority can only determine the formal application before it; it can't proceed on the basis of an

applicant's intentions unless they are formally incorporated into the application." (DL24)

Legal Framework

Interpretation of a planning permission

42. The construction of a planning permission is a question of law for the court (*Barnett v Secretary of State for Communities and Local Government* [2009] EWCA Civ 476 at para 28). The general principles of construction, re-stated by Keene J in *R v Ashford Borough Council v Shepway District Council* [1999] PLCR 12 at para 19, are as follows:

> "(1) The general rule is that in construing a planning permission which is clear, unambiguous and valid on its face, regard may only be had to the planning permission itself, including the conditions (if any) on it and the express reasons for those conditions: see *Slough Borough Council v Secretary of State for the Environment* (1995) JPL 1128, and *Miller-Mead v Minister of Housing and Local Government* [1963] 2 QB 196.
>
> (2) This rule excludes reference to the planning application as well as to other extrinsic evidence, unless the planning permission incorporates the application by reference. In that situation the application is treated as having become part of the permission. The reason for normally not having regard to the application is that the public should be able to rely on a document which is plain on its face without having to consider whether there is any discrepancy between the permission and the application: see *Slough Borough Council v Secretary of State (ante); Wilson v West Sussex County Council* [1963] 2 QB 764; and *Slough Estates Limited v Slough Borough Council* [1971] AC 958.
>
> (3) For incorporation of the application in the permission to be achieved, more is required than a mere reference to the application on the face of the permission. While there is no magic formula, some words sufficient to inform a reasonable reader that the application forms part of the permission are needed, such as '… in accordance with the plans and application…' or '… on the terms of the application…', and in either case those words appearing in the operative part of the permission dealing with the development and the terms in which permission is granted. These words need to govern the description of the development permitted: see *Wilson (ante); Slough Borough Council v Secretary of State for the Environment (ante).*
>
> (4) If there is an ambiguity in the wording of the permission, it is permissible to look at extrinsic material, including the application, to resolve that ambiguity: see *Staffordshire*

> *Moorlands District Council v Cartwright* (1992) JPL 138 at 139; *Slough Estates Limited v Slough Borough Council (ante); Creighton Estates Limited v London County Council, The Times,* March 20, 1958.
>
> (5) If a planning permission is challenged on the ground of absence of authority or mistake, it is permissible to look at extrinsic evidence to resolve that issue: see *Slough Borough Council v Secretary of State (ante); Co-operative Retail Services v Taff-Ely Borough Council* (1979) 39 P&CR 223 affirmed (1981) 42 P&CR 1."

43. In *Barnett v Secretary of State for Communities and Local Government* the Court of Appeal approved a qualification of proposition (2) by Sullivan J in the court below. Sullivan J held that in the case of a full, as distinct from an outline, grant of planning permission, reference to plans is permissible when interpreting the permission even if those plans are not expressly incorporated by the decision notice. Keene LJ confirmed that his judgment in *Ashford* "was not intended to apply to the interpretation of a full detailed planning permission" as he agreed with Sullivan J that a full permission "does not purport to be a complete and self-contained description of the permitted development" (para 21). Keene LJ approved these paragraphs in Sullivan J's judgment:

> "23. … In the *Ashford* case Keene J was considering the proper interpretation of an outline planning permission. The issue was whether, in construing that planning permission, regard could have had to a letter which had been included in an environmental statement that had accompanied the application for planning permission, The reason given for normally not having regard to the application is that 'the public should be able to rely on a document which is plain on its face without having to consider whether there is any discrepancy between the permission and the application' (see principle (2)).
>
> 24. If it is plain on the face of the permission that it is a full permission for the construction, erection or alteration of the building, the public will know that, in addition to the plan which identifies the site, there will be plans and drawings which will describe the building works which have been permitted precisely because the permission is not, on its face, an outline planning permission. In such a case those plans and drawings describing the building works were as much a part of the description of what has been permitted as the permission notice itself. It is not a question of resolving an 'ambiguity'. On its face, a grant of full planning permission for building operations is incomplete without the approved plans and drawings showing the detail of what has been permitted. …"

44. The *Ashford* principles were recently approved by the Supreme Court in *Trump International Golf Club Scotland Ltd v The Scottish Ministers* [2015] UKSC 74, where Lord Hodge stated at para 33:

> "… Differences in the nature of documents will influence the extent to which the court may look at the factual background to assist interpretation. Thus third parties may have an interest in a public document, such as a planning permission or a consent under section 36 of the 1989 Act, in contrast with many contracts. As a result, the shared knowledge of the applicant for permission and the drafter of the condition does not have the relevance to the process of interpretation that the shared knowledge of parties to a contract, in which there may be no third party interest, has. There is only limited scope for the use of extrinsic material in the interpretation of a public document, such as a planning permission or a section 36 consent: *R v Ashford Borough Council*…"

45. Lord Hodge added (at para 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 the 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 meaning 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 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 it is interpreting. Other documents may be relevant if they are incorporated into the consent by reference… or there is an ambiguity in the consent, which can be resolved, for example, by considering the application for consent."

46. In his concurring judgment Lord Carnwath observed (at para 66) that the "context" is that "a planning permission is a public document which may be relied on by parties unrelated to those originally involved". This, he said, is a good reason for "a relatively cautious approach for example in the well established rules limiting the categories of documents which may be used in interpreting a planning permission", as summarised in *Ashford*.

47. In *R (Campbell Court Property) v Secretary of State for the Environment, Transport and the Regions* [2001] EWHC Admin 102, Sullivan J said at para 53:

> "The first port of call in any examination of extrinsic evidence will usually be the application for permission."

48. In the recent case of *Wood v Secretary of State for Communities and Local Government* [2015] EWHC 2368 (Admin) Lindblom J, as he then was, said at para 43:

> "When it is necessary to do so, it is permissible to consider extrinsic evidence beyond the available relevant documents as an aid to the interpretation of a planning permission. Such evidence may relate to the way in which the permission was actually implemented. In *R (on the application of Campbell Court Property) v Secretary of State for the Environment, Transport and the Regions* [2001] EWHC Admin 102 Sullivan J, faced with the need to construe a planning permission whose full meaning was not apparent from the decision notice itself was prepared to consider the application for permission, the site plan and the relevant planning officer's report. But having done that, he said (in paragraph 58 of his judgment) that he did not see why the consideration of extrinsic evidence should be confined to documentary evidence, and (in paragraph 59) that, in the circumstances of the case before him, he did not see why it should not be possible to have regard to what had taken place on the ground. He went on to say (in paragraph 60);
>
> > 'I realise that what takes place on the ground cannot be conclusive and agree with [the] submission that caution has to be exercised because land owners may choose not to implement the whole of a planning permission, and may carry out development in breach of planning control. But if the documentary evidence is sparse, I do not see why the purported implementation of a planning permission on the ground, if done without any complaint over many years, should be altogether ignored.' "

49. At paragraph 44 Lindblom J added:

> "Nothing in the Inspector's approach to the interpretation of the planning permission in question here seems in any way inconsistent with the well established principles in the cases to which I have referred. He adopted the pragmatic approach endorsed by the court in *Barnett* and *Campbell Court Property*…"

Ancillary Uses

50. The question whether a building is used as a single dwelling or whether its use is ancillary to the use of another building is in principle a question of fact and degree for the fact finding body. However, if the fact finding body, here the Inspector, applies the wrong test, the court can interfere; see *Eagles v Minister for the Environment, Sustainability and Housing, Welsh Government* [2009] EWHC 1028 (Admin).

51. In deciding whether a use is ancillary to a main use, it is appropriate to ask what main uses of that kind in general have as reasonably incidental activities; see *Harrods Limited v Secretary of State* [2002] JPL 1258 at paragraph 22.

52. The test for an ancillary use is one of functional relationship rather than extent; see *Main v Secretary of State for the Environment* (1998) 77 P&CR 300.

Section 75 of the TCPA 1990

53. Section 75 of the TCPA 1990 provides in part:

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

54. "Designed" in the context of section 75(3) means 'intended' rather than "architecturally designed"; see *Wilson v West Sussex County Council* [1963] 2 QB 764 at 780 and 783.

General approach to decision letters

55. As summarised by Hickinbottom J in *Oadby and Wigston BC v Secretary of State* [2015] EWHC 1879 (Admin) at paragraph 6(vi),

> "An inspector's decision cannot be subjected to the same exegesis that might be appropriate for a statute or deed. It must be read as a whole, and in a practical, flexible and common sense way, in the knowledge that it is addressed to the parties who will be well aware of the issues and arguments deployed at the inspector's inquiry, so that it is not necessary to rehearse every argument but only principal important controversial issues. The reasons for an inspector's decision must be intelligible and adequate to enable an informed observer to understand why he decided the appeal as he did, including his conclusions on those issues. They must not give rise to any substantial doubt that he proceeded in accordance with the law, e.g. in his understanding the relevant policies (see *Seddon Properties v Secretary of State for the Environment* (1981) 42 P&CR at page 28 per Forbes J: *Bolton Metropolitan Borough Council v Secretary of State for the Environment* [1995] 71 P&CR 309 at page 314; *South Somerset District Council v Secretary of State for the Environment* [1993] 1 PLR 80 at pages 82H, 83F-G per Hoffman LJ; and *South Bucks District Council v Porter (No.2)* [2004] UKHL 33 at [36] per Lord Brown…"

Grounds of Challenge

56. Mr Timothy Corner QC, for the Claimant, advances three grounds of challenge. First, the Inspector erred in law in refusing the LDC, and should have found that the University was entitled to the LDC on the ground either

i) that the use in respect of which the LDC was sought was permitted by the 2004 planning permission and/or the 2005 planning permission (**Ground 1**); or

ii) by reason of the application of s.75(3) of the TCPA 1990 (**Ground 2**).

Alternatively, the Inspector erred in law in dealing with the University's submissions in relation to ancillary use (**Ground 3**).

The Parties' Submissions and Discussion

Ground 1: the nature of the use was permitted by the 2004 and 2005 permissions

57. Mr Corner submits that the Inspector correctly found the 2004 permission ambiguous. Having so found he correctly decided that in those circumstances it was appropriate, following the *Ashford* case, to look at extrinsic material.

58. There was clear evidence, Mr Corner submits, before the Inspector on the basis of which he should have concluded that the 2004 permission permitted conference use. It was contemplated and intended by the University and the Council (as well as the County Council) that JFH was to be used for conferences as well as for students. (See the officer's report, the minutes of the committee meeting, Mr Bale's evidence and the correspondence referred to at para 11 above). The Inspector accepted that "conference use is a common use of halls of residence" (DL20); that being so, it cannot be inferred, Mr Corner submits, from the description of the proposed developments in the application forms as "student accommodation" that it was only for student accommodation.

59. In relation to the 2005 permission Mr Corner submits the fact that, as the Inspector recognised, that permission was intended to be an amended version of the 2004 permission, means it should be interpreted as permitting the same uses as the 2004 permission (see paras 19 and 34 above). If it is right that the 2004 permission permitted conference use, then so also must the 2005 permission. Such a conclusion can be reached on the basis of the 2005 permission itself, and without reference to extrinsic material. If there was any ambiguity in the 2005 permission, the decision was conditional on the terms of the s.106 agreement (see para 20 above). Mr Corner submits that the s.106 agreement contains extensive references (see para 22 above) which make clear that conference use of the JFH development was contemplated by both the Council and the University.

60. Mr Gwion Lewis, for the First Defendant, did not challenge Mr Corner's contention that there was clear evidence before the Inspector that it was contemplated and intended by the University and the Council (and by the County Council) that JFH was to be used for conferences as well as for students. If all the extrinsic material relied upon by Mr Corner could properly be referred to for the purposes of construing the 2004 and 2005 permissions I consider that to be plainly so.

61. The point taken by Mr Lewis is that it is not permissible on the facts of this case to have regard to all that extrinsic material. The critical issue, Mr Lewis submits, on this first ground of challenge is whether the Inspector should have had regard to the extrinsic material before him beyond the application for planning permission. Mr

Lewis did not suggest that the Inspector was wrong to find that there was an ambiguity in the 2004 permission and that therefore reference could be made to extrinsic material in an attempt to resolve it. However the starting point, Mr Lewis suggested, for considering what extrinsic material could be referred to, was that the Inspector found there was only what Mr Lewis described as a "slight" ambiguity (see DL8 at para 26).

62. That being so, following the principles set out in *Ashford*, it was permissible for the Inspector to look at the application to resolve any ambiguity. In the application form under "*Full description of the proposal*" is found the wording "*Student accommodation – 569 rooms – plus addition to existing communal facilities building, new road, paths and landscaping*". The Inspector said:

> "In seeking to resolve ambiguity, there would appear to be no clearer expression of what is sought by an applicant than his own '*full*' description of the proposal which is entirely consistent with detailed plans showing rooms and facilities which appear designed for student use. There is no reference at all to either existing or proposed conference use on the application form. The existing use is stated to be '*student accommodation (250 rooms), facilities building and garden*'." (DL9)

63. By reference to the authorities, Mr Lewis submits, that there is a two-stage test of necessity. In support of this submission he refers to the judgment of Lindblom J, as he then was, in *Wood* and, in particular, to his statement at para 43 that "When it is necessary to do so, it is permissible to consider extrinsic evidence beyond the available relevant documents as an aid to the interpretation of a planning permission" (see para 48 above). Further Mr Lewis relies in particular on two passages in the judgment of Lord Hodge in *Trump*: first, at para 33: "There is only limited scope for the use of extrinsic material in the interpretation of a public document, such as a planning permission or a section 36 consent". Second, at para 34: "Whether the court may also look at other documents that are connected with the application for the consent or referred to in the consent will depend on the circumstances of the case, in particular the wording of the document that it is interpreting" (see paras 44 and 45 above).

64. In relation to the use of extrinsic evidence, Mr Lewis submits that the decision maker should go so far as is necessary to resolve the ambiguity and no further. He accepts that there is no express reference to the test of necessity in *Trump*. However it follows, he submits, from the passages he relies upon (see para 63 above) that this is a hard-edged question that gives rise to the application of the test of necessity. Absent the test of necessity, he suggests that the "floodgates" would open if it is permissible to look at all extrinsic evidence whenever an ambiguity in the wording of the permission exists. It follows, submits Mr Lewis, that extrinsic evidence may only be referred to when it is necessary to do so to resolve an ambiguity (stage 1); and if it is necessary to refer to extrinsic evidence, the evidence that may be referred to is limited to that which is required by necessity (stage 2). In the present case, Mr Lewis submits, it was only necessary to refer to the application form because, as the Inspector correctly found, the contents of that form resolved the limited ambiguity that existed (DL9 at para 28 above).

65. Mr Lewis does not suggest that there is any hierarchy that exists when reference is to be made to extrinsic material, but there is, he says, something of a hierarchy implicit in the analysis of such material in the authorities. For example, in *Campbell* the application for permission was of no assistance in resolving the ambiguity, therefore the judge moved on to consider the report on the application and only thereafter to what actually took place on the ground (see paras 53-60).

66. Mr Lewis also emphasised the public importance in third parties being able to rely on a planning permission as a public document. Having regard to that, he submits, it would be wrong to require an extensive trawl through the extrinsic evidence in each case whatever the nature and extent of the ambiguity. The authorities indicate the extent of the reference to extrinsic evidence that is permissible, but not what is required in each case, which must depend on the context of the individual case and the nature and extent of the ambiguity. Mr Lewis submits that in the present case where there was a slight ambiguity all that was required to resolve the ambiguity was to look at the application form. Whilst it was permissible in an appropriate case to have regard to the officers' report, it was not necessary in the present case because the application resolved the ambiguity.

67. Mr Lewis suggests that the Inspector's acceptance that "conference use is a common use of halls of residence" (DL20) does not assist the Claimant. It will commonly be the case, for example, that houses will be sub-divided but it does not follow that permission for such sub-division has been obtained. All the Inspector was doing was acknowledging the fact that halls of residence are commonly used for conferences.

68. Mr Lewis submits that having so found, as he did, that the application form resolved the "lack of clarity" in the 2004 permission, the Inspector was correct not to have regard to any further extrinsic material for the purposes of construing the permission. The limited references to other extrinsic material in DL10-12 (see paras 29-31 above) were, Mr Lewis submits, only in response to points made on behalf of the Council so that it could not be said that the Council's contentions in relation to such material had been ignored. Those references were not, he submits, because there was any requirement to refer to such extrinsic material when construing the 2004 permission, because there was not.

69. Mr Corner does not accept that the Inspector did adopt the approach contended for by Mr Lewis. I agree it is not entirely clear that he did so. The Inspector's starting point, by reference to the principles set out in *Ashford*, was that in the event of ambiguity "it is permissible to look at extrinsic evidence, including the application, to resolve any ambiguity" (DL8). He then referred to the application, and observed that "in seeking to resolve ambiguity, there would appear to be no clearer expression of what is sought by an applicant than his own *'full'* description of the proposal" (DL9). Nevertheless the Inspector went on to consider the evidence of Mr Bale (DL10), the s.106 obligation required by condition 15 of the 2004 permission (DL11), and the officers' report to the planning committee (DL12). For the reasons he gave he did not find Mr Bale's evidence or the s.106 obligation or the officers' report of any real assistance in resolving any ambiguity. However, having had regard to the application form (DL9), Mr Bale's evidence (DL10), the s.106 obligation (DL11) and the officers' report (DL12), the Inspector concluded at DL13: "I <u>therefore</u> [emphasis added] form the view that the 2004 planning permission can only be properly interpreted as being for student halls of residence with associated facilities building".

70. Mr Corner, as I understand it, does not take issue with Mr Lewis's formulation of stage 1 of the test. In any event there is no issue as to whether the Inspector was entitled to refer to extrinsic material. Mr Lewis accepts that he was and he did so. The issue that arises concerns Mr Lewis's formulation of stage 2 of the test. Mr Corner does not accept that there is a necessity test at this stage. He contends that in circumstances, such as the present case, when it is permissible to look at extrinsic material, regard may be had to all such material that may be relevant to resolving the ambiguity. In any event, in the circumstances of the present case, it was necessary to look at all the available extrinsic material which included the officer's report, the minutes of the committee meeting, Mr Bale's evidence, the correspondence referred to at para 11 above, and the s.106 agreement.

71. Mr Corner says there was not just a slight ambiguity, as Mr Lewis suggests; there was sufficient ambiguity in the Inspector's view for extrinsic evidence to be taken into account. Neither *Trump* nor *Wood* place any limit on the material that can be referred to when an ambiguity exists; and there is no prescriptive hierarchy, as Mr Lewis accepts. Mr Corner submits that if an ambiguity exists it is necessary to look at the extrinsic evidence as a whole. However, even if there is a necessity test as proposed by Mr Lewis, I agree with Mr Corner that it was necessary in the circumstances of the present case to go further than the application form and to look at the extrinsic evidence that was available as a whole because the application form did not resolve the ambiguity for the reasons advanced on the Claimant's behalf (see para 58 above).

72. I am not in fact persuaded that the authorities, in particular *Trump* and *Wood*, on which Mr Lewis relies, support his formulation of the second stage of the test for resolving an ambiguity in the planning permission (see paras 44-46 and 48-49 respectively above). The authorities suggest that when there is an ambiguity, it is permissible to look at the extrinsic evidence, including but not limited to the application form, and indeed including but not limited to documentary evidence. All relevant extrinsic material may be referred to, depending on the circumstances of the individual case. Mr Corner accepts that the application for permission may well be "the first port of call" in any examination of extrinsic evidence (*Campbell Court Property* at para 53, see para 47 above). However I agree with Mr Corner that it does not follow from the fact that the application form can be described as the first port of call that the decision maker has to ignore all other extrinsic material, in particular when it appears to "point all one way". Not to go further than the application form, Mr Corner observes, "flies in the face of reality". In some cases it will resolve the ambiguity; in others, it will not. When it does not, other extrinsic material may be referred to, and such evidence may include the way in which the permission was actually implemented (see *Campbell Court Property* at paras 58-60, and *Wood* at para 43).

73. I agree with Mr Corner that if reference can be made to extrinsic material beyond the application form then plainly the uncontradicted evidence of Mr Bale, the officer's report, the minutes of the committee meeting, the correspondence and the s.106 agreement are relevant extrinsic material for the purposes of resolving the ambiguity in the planning permission. I do not understand Mr Lewis to argue to the contrary.

74. If, as I conclude, in the circumstances of this case the Inspector could, as Mr Corner submits, have regard to extrinsic material beyond the application form, then the ambiguity should have been resolved in favour of the University's contention that the

permission was for mixed use. In that event there would have been no need to amend the application in the way the Inspector said he would have expected given the background to the application (DL10 and 24 at paras 29 and 41 above).

75. I can take the 2005 permission shortly. The Inspector said that the permission was clear on its face, and that it was "quite clear that the permission is for student accommodation" (DL14). If that were so it was not necessary to refer to any extrinsic material, there being no ambiguity. However as the Inspector recognised, the 2005 permission was intended to be an amended version of the 2004 permission, so it should be interpreted as permitting the same use as the 2004 permission (DL15).

76. If there was need to resolve ambiguity then for the reasons I have stated, in the circumstances of this case, reference should have been made to the extrinsic material before the Inspector on which the University relies. I agree with Mr Corner that there is a further aid to the interpretation of the 2005 permission which the Inspector ignored, namely that the decision was conditional on the terms of the s.106 agreement (see para 20 above), and the s.106 agreement contains extensive references which make clear that conference use of the JFH development was contemplated by both the Council and the University (see para 22 above).

77. It is no answer to the University's reliance on the s.106 agreement to say, as does Mr Lewis, that the s.106 obligation does not in substance form part of the planning permission and that it is a restriction on the development or use of land. The significant fact in the present case is that the planning permission specifically states that the grant of permission is conditional on the terms of the planning agreement. The s.106 agreement was part of the planning permission; the planning permission being conditional on the terms of the s.106 agreement. That being so, Mr Corner submits, that the University can rely on the s.106 agreement whether or not there is ambiguity in the planning permission. It follows that the s.106 agreement sheds light on the 2004 permission, there being no suggestion that the 2004 and 2005 permissions were to be for different uses. I agree with Mr Corner that the s.106 agreement therefore assists with the interpretation of the 2004 as well as the 2005 planning permission.

78. In summary, I conclude that the Inspector was wrong to decide that the 2004 and 2005 permissions permitted use for the accommodation of students alone. The 2004 permission was ambiguous, as the Inspector found, but he erred, in the circumstances of the case, in limiting, if he did (see para 69 above), his consideration of extrinsic material to the application for permission. If he had considered the other relevant material on which the University relied he would have inevitably concluded that the use permitted by the 2004 permission was not just for accommodation of students, but for a mixed use including conference use. The 2005 permission amended the 2004 permission and as such is to be interpreted as permitting the same uses as the 2004 permission. In the event of any ambiguity in the 2005 permission the terms of the s.106 agreement (in addition to the other extrinsic evidence) lead to the same conclusion, that mixed use was permitted including conference use.

Ground 2: the application of s.75(3) of the TCPA 1990

79. The Inspector concluded that the 2004 and 2005 permissions are clearly for student halls of residence and do not include any reference to conference use (DL23). That

being so, he concluded that the provisions of s.75(3) of the TCPA 1990 do not assist the University's case (DL26).

80. The University's primary contention is that the 2004 and 2005 permissions, properly interpreted, did permit a mixed student and conference use (see Ground 1 above). Mr Corner submits that s.75 provides another route to the same conclusion.

81. If a planning permission does not specify the purpose for which the building may be used s.75(3) applies and the use of the building is that which was intended (see paras 53 and 54 above).

82. If s.75(3) applies, as the Inspector acknowledged it was the University's intention all along that JFH be for a mixed student and conference use (DL24), and it is clear from the evidence that conference use was contemplated by both the Council and the University (see para 58 above). That being so if s.75(3) applies I construe the 2004 and 2005 permissions as being for mixed student and conference use. I do not understand Mr Lewis to argue to the contrary in the event that s.75(3) does apply.

83. The issue between the parties is whether s.75(3) is engaged which turns on whether the 2004 and 2005 permissions do specify the purposes for which JFH may be used (s.75(2)). Mr Corner submits that they do not.

84. The 2004 permission was granted for

> "DEMOLITION OF EXISTING HALLS OF RESIDENCE AND ERECTION OF 14 BLOCKS COMPRISING OF A TOTAL OF 509 ROOMS PLUS EXTENSION TO EXISTING FACILITIES BUILDING (REV B)"

The Inspector agrees with the University that the wording of this permission does not clearly state what the "509 rooms" and "facilities building" are to be used for (DL7). Neither the planning conditions, nor the detailed plans specify the purpose for which the building may be used.

85. The 2005 permission was granted for

> "Amended scheme to approved application for redevelopment of students' accommodation incorporating the construction of an additional 72 study bedrooms (Rev B)."

86. Mr Corner submits that the 2005 permission cannot really be said to specify the purpose for which the buildings can be used. The mere fact that it refers to the redevelopment of student accommodation does not inform what the University is developing it for. It is not, he submits, reasonable to take the reference to "students' accommodation" and "study bedrooms" as excluding conference use because it is accepted that student halls of residence are commonly used for conferences. Further, even if the Inspector is correct that it was "**for** student accommodation" (DL14), Mr Corner submits that it does not answer the question whether it is for conference use as well.

87. Mr Lewis makes two points. First, this ground stands or falls with Ground 1. If he is correct in his submission on Ground 1 then s.75 cannot assist the University because

the purpose can be identified. Second, Mr Lewis submits the Inspector made a clear and correct finding that the 2004 and 2005 permissions did specify that the buildings were to be used as a hall of residence, and concluded correctly that s.75(3) did "not assist the appellant's case" (DL26).

88. Whilst agreeing that "**for** student accommodation" would have been clearer than "of", the Inspector considered (and Mr Lewis agrees) that, when read as a whole, including the reference to "study bedrooms", it is quite clear that the 2005 permission is for student accommodation (DL14 at para 33 above). As the Inspector noted, the 2005 permission is described as an amended scheme and condition No.33 requires it to be implemented in conjunction with the 2004 permission.

89. I agree with Mr Lewis that Section 75(2) is concerned with a narrower question than arises on the application of the *Ashford* principles: it is whether the purpose for which the building may be used is "specified" in the planning permission. The mischief with which s.75 is concerned is wholesale failure in the planning permission to state why it was granted in the first place. That is not the position in the present case. Mr Corner agrees with Mr Lewis that the question to be asked when considering s.75 is different from the question to be asked when considering the application of *Ashford* to extrinsic material. In relation to s.75(2) the focus is exclusively on the grant of permission.

90. I do not consider that, as a matter of construction of the words of the permission, the Inspector was wrong in concluding that the 2005 permission is for student accommodation. The 2004 permission must be for the same use.

91. I consider, that applying the statutory test in s.75(2) the purpose specified in the 2004 and 2005 grants of permission is student use. Accordingly s.75(3) has no application.

Ground 3: ancillary use

92. The Inspector was not persuaded that "the nature and scale of the conference use" as carried out and applied for in the LDC application renders it an ancillary use to the authorised use as student halls of residence (DL22). It appeared to the Inspector that the conference use had "no functional link with the University's primary educational and research purposes" (DL19). Further, he considered that in addition to the nature of the use, the evidence of the size and frequency of the conference use indicates it to be "a substantial use" in its own right, rather than ancillary to the main use. It is clearly, he said, not "diminutive", as the university had contended (see para 39 above).

93. Mr Corner submits that the Inspector made two errors of law. First, he erred in deciding that there was no functional link between the student accommodation and conferencing uses. He erred in asking whether there was a functional link with the University's primary educational and research purposes (DL19 at para 38 above). The true question, Mr Corner submits, is whether there was a functional link between the student accommodation at JFH and the conferencing use. Plainly, he submits, there is. The same accommodation as is used for students in term time is used during vacations, with the same staff providing administrative and operational support. There is, Mr Corner submits, a functional link because there is a common use of the halls of residence (both are used for accommodation and communal activities). The

conference use is ancillary to the student use of the premises. Second, the Inspector was wrong to conclude that the conference use could not be ancillary because it was not small in extent. The test for an ancillary use is one of functional relationship rather than extent (see *Main v Secretary of State for Environment* (1999) 77 P&CR 300 at 309).

94. Mr Lewis agrees that the test is essentially one of functional relationship rather than extent, but submits that in answering the question of fact and degree, the extent of the use can be relevant when deciding whether it is subsumed in a larger use.

95. I do not accept that the Inspector made the errors suggested by Mr Corner. First, DL19 and 20 need to be read together (see paras 38 and 39 above). It seems to me that the Inspector did answer the question as to whether there was a functional link between the student accommodation at JFH and the conferencing use. I agree with Mr Lewis that the observation of the Inspector that the conferencing use had no apparent functional link with the University's primary educational and research purposes (DL19) was a factor that led to his conclusion that it did not appear to him that the conference use had a functional connection with the students' use of JFH as somewhere facilitating their pursuit of those educational goals (DL20). This conclusion that the conference use is not ancillary to the primary use was arrived at by the Inspector exercising his planning judgment of what is ancillary use in the material circumstances. Mr Corner's submission, which I reject, appears to be that there is a functional link between student accommodation and conferencing use if a conference is using the accommodation (however removed the subject matter of the conference may be from the pursuit of education).

96. I further agree with Mr Lewis that the second error contended for relies on a misreading of DL21 (see para 39 above). The Inspector did not say that only "small" uses could be considered "ancillary". He referred to the University's evidence of the size and frequency of the conference use as indicating it to be a substantial use in its own right, rather than ancillary to the main use. I consider the Inspector had proper regard to the extent of the use when answering the question of fact and degree.

Conclusion

97. For the reasons I have given Ground 1 is made out, but not Grounds 2 and 3.

98. Accordingly the Inspector was wrong to refuse the LDC. The University's appeal should have been allowed, and the LDC granted because that is what the 2004 and 2005 permissions on their correct construction permit.