Neutral Citation Number: [2021] EWHC 2975 (Admin)

Case No: CO/3633/2020

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**PLANNING COURT**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 8 November 2021

**Before** :

**MRS JUSTICE LANG DBE**

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**Between :**

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| **PATRICK GREENWOOD** | **Claimant** |
| **- and -** | |
| **(1) SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT** | |
| **(2) WOKINGHAM BOROUGH COUNCIL** | |
| **(3) SHELDON SEAL** | **Defendants** |

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**Paul Stinchcombe QC** (instructed by **DMH Stallard LLP**) for the **Claimant**
**Nina Pindham** (instructed by the **Government Legal Department**) for the **First Defendant**
**Ned Westaway** (instructed by **Legal Services Wokingham Borough Council**) for the **Second Defendant**
The **Third Defendant** did not appear and was not represented

Hearing date: 19 October 2021

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# Approved Judgment

**Mrs Justice Lang :**

1. The Claimant applies for a statutory review pursuant to section 288 of the Town and Country Planning Act 1990 ("TCPA 1990") of the decision of the First Defendant ("the Secretary of State"), made by an Inspector on his behalf, on 21 July 2020, to allow an appeal brought by the Third Defendant ("Mr Seal") against the decision of the Second Defendant ("the Council") to refuse planning permission for "the preservation, refurbishment and re-roofing" of an existing stable and store at White Horse Farm, White Horse Lane, Finchampstead, Wokingham ("the Site").

2. Mr Seal owns and occupies the Site. The Claimant lives nearby. He is impacted by the development and objected to the grant of planning permission.

3. I granted permission to apply for a statutory review on 15 January 2021.

## Planning history

### The 2017 permission

4. On 22 February 2017, Mr Seal applied for planning permission to convert a range of barns, sheds and stables to a single storey building for residential use. Permission was granted by the Council on 21 June 2017 ("the 2017 permission").

### The 2018 permission

5. On 10 April 2018, Mr Seal made an application for "the proposed erection of detached two storey dwelling … following demolition of existing outbuildings" as he had been advised that the existing outbuildings were in poor condition and not suitable for conversion.

6. The Claimant's Design and Access Statement, in support of the 2018 application, explained the basis of the revised proposal as follows:

> "2.01 The existing 'U' shaped range of stables and barns will be demolished and replaced by a single, detached, two-storey dwelling house. Initially our client wished to retain the existing long stable building fronting White Horse Lane and to re-use it as a garage. From a townscape point of view this had the benefit of maintaining a historic continuity of streetscene.
>
> 2.02 However following an extensive series of meetings with a number of local stakeholders it was clear that the retention of the frontage building was not supported. Objections were raised since local residents consider the existing frontage building to be unattractive and prefer its demolition. The consensus of local opinion is that the demolition of the existing building will remove an existing eyesore whilst beneficially opening up the site frontage and allowing an improved northeast vista from the side windows of the adjoining barn conversion.

> 2.03 The new dwelling lies within the footprint of the rear section of existing stables … and is an almost perfect fit. In addition of the new dwelling reduces by half the existing building footprint thus reducing and *(sic)* possibility of urbanisation. Importantly (from the point of view of neighbouring property) it is no closer to the shared boundary with White Horse Barn. Therefore demolition of the frontage and return buildings will beneficially open up the site frontage and reduce the existing building footprint by half.
>
> ….
>
> 2.08 The replacement building will provide a purpose 5-bedroom, brick-built, hipped and tiled roof detached dwelling house …
>
> 2.09 The Seal family interest in horses will be satisfied by the erection of a small stable block in the southwest corner of the site ….”

7. The “local stakeholders”, referred to above, formed the White Horse Lane Action Group (hereinafter “the Group”), whose members were local residents, and included the Claimant.

8. The Officer’s Report stated *inter alia* as follows:

> “**Character of the Area**
>
> The subject application involves a new replacement building… It does involve an increase in the scale and form of the building, but only in terms of additional floor area and height (when accounting for all the other outbuildings on the site that are proposed to be removed). It represents a reduction in terms of footprint and volume. … [I]t is viewed as an environmental improvement and would not lead to an excessive increase in built form, as discussed below. It is therefore acceptable.” (Bundle/149)
>
> “Inclusive of all existing structures on the site, including the tractor shed, stable building, secondary shed and main shed/barn, the proposal allows for a consolidation of built form on the site into one footprint and it involves a negligible change in apparent volume and an appropriate overall height. There is also an improved streetscape presentation, with the solid wall of the existing barn built to the front boundary replaced with a new residential building built away from the boundary and landscaping enhancements in its place.” (Bundle/149)
>
> “Furthermore, by siting the building further to the rear than the converted barn to the west, it ensures better amenity from the eastern elevation of the barn, in terms of outlook, privacy and

> access to light. On this basis, the proposal is acceptable" (Bundle/150)
>
> "**Implementation of Two Schemes**
>
> A condition has been imposed to ensure the demolition of the existing buildings prior to construction. This would prevent the implementation of two schemes." (Bundle/156)

9. The Council granted full planning permission for Mr Seal's proposed development on 12 August 2018 ("the 2018 permission"), subject to the condition proposed in the Officer's Report. Condition 6 stated:

> "No development shall take place on the site until all of the existing structure(s) shown to be demolished on the approved plan have been so demolished….
>
> Reason: In the interests of the amenity of the countryside".

10. Condition 6 could only be properly imposed if it satisfied the well-established tests of being "necessary, relevant to planning and to the development to be permitted, enforceable, precise and reasonable in all other respects" (see paragraph 56 of the 2021 National Planning Policy Framework ("the Framework")).

11. Mr Seal commenced work at the Site in October 2018. The construction of the dwelling began in April 2019. It was completed and occupied by the end of 2019. However, in breach of Condition 6, Mr Seal did not demolish the stable and store at the front of the property.

**The non-material amendment decision 2019**

12. On 31 January 2019, Mr Seal applied for a "non-material amendment" to the 2018 permission, *inter alia* seeking the relocation of the building 1.7m to the south, to provide "improve frontage manoeuvering space for agricultural vehicles". The Claimant's Planning Statement stated:

> "The approved front courtyard is sufficiently large to allow cars and light vans to manoeuvre and leave the site in a forward gear. However trials have shown that agricultural vehicles associated with White Horse Farm and the applicants own 4WD and trailer cannot manoeuvre without coming perilously close the front wall of the approved house. In order to provide the necessary manoeuvring space the parking area has been increased in by 1.7m to accommodate the necessary agricultural turning space…"

13. On 8 February 2019, the Council accepted the alterations as non-material amendments ("the NMA decision").

14. The Group objected to the NMA decision, *inter alia* upon the basis that it was only necessary to gain more space by moving the new dwelling back 1.7m if Mr Seal did not

intend to demolish the front stable and store, in breach of Condition 6 of the 2018 permission. The 2018 planning permission already provided for a turning circle at the rear of the dwelling house for large vehicles, and once the stable and store were demolished there would be sufficient space for a turning circle at the front of the dwelling house. The Claimant stated that Mr Seal had informed him, prior to applying for the NMA, that "he needed to move the dwelling back so that he could swing in" to the front stable block (letter of 24 December 2019 from the Claimant to the Council).

15. The Group informed the Council of its intention to seek judicial review of the NMA decision, because of the Council's failure to consult on the application, in breach of its policy, and the failure to take into account that the application was predicated upon an unlawful breach of Condition 6.

16. In response, Mr Seal and his father sent a signed letter to the Council and to the Group, dated 20 February 2019, disputing the Group's allegation that the application to move the dwelling house was predicated upon retaining the front stables and store in breach of Condition 6. However, Mr Seal and his father gave a series of undertakings to the Group and the Council, as follows:

> "However to show goodwill to our neighbours, we have agreed to write this letter to confirm our intentions.
>
> As soon as the new stables are completed, we confirm that we will demolish the old stable block in conformity with planning condition 6.
>
> We further confirm that we will not:
>
> (a) undertake any further development or erection of structures on land between the front of the new dwelling and White Horse Lane, without making a full planning application;
>
> (b) breach any of the planning conditions in planning consent 180983; and
>
> (c) apply for any other amendments other than those in non-material amendment no 190290;
>
> without first consulting and getting agreement of all neighbourhood stakeholders to our proposals."

17. In the light of these undertakings, the Group withdrew their complaint and agreed not to pursue a judicial review.

**The 2019 application for permission**

18. Contrary to the undertaking in the letter of 20 February 2019, the front stables and store were not demolished. Instead, on 23 October 2019, Mr Seal made a further application for planning permission to retain and develop them. He applied for planning permission for "the proposed preservation, refurbishment and re-roofing of existing frontage stable

and store to form double garage and store". It is apparent from the photographs that part of the outbuilding at the front of the Site had been removed.

19. The Claimant and other members of the Group objected to the application, in part because of the planning history, but also because they considered that the massing and scale of the building was inappropriate and impacted upon neighbours. It is 4.8m high, as it was designed to allow for a horse to rear. However, a typical garage is considerably lower in height (the owners of White Horse Barn said their garage was 3.5m high and provided ample space for large cars).

20. The Officer's Report observed that:

> "The application is a separate full application but should have been submitted as a variation of 180983 so as to amend Condition 6. However, the application does not turn on this aspect." (Bundle/199)

21. The Officer's Report recommended refusal of the application, and also that enforcement action be taken against the breach of planning control. It reiterated the advice set out in the report for the 2018 permission, which recognised the benefits of the removal of the front stable building and store, and stated:

> "The proposal seeks to retain an existing stables building at the frontage with White Farm Lane that was previously proposed for and required to be demolished as part of the establishment of a replacement dwelling on the site. The consideration of the planning application for the dwelling house took account of this fact….
>
> The retention of the new building for an ancillary residential purpose would be perceived as a residential extension that has an inappropriate increase in built form in an inappropriate location. As such, there is a departure from Policy CP11, cumulative harm to the character of the area and the principle of development fails in this case. This is illustrated further in 'Character of the Area'." (Bundle/200)

22. On 3 January 2020, the Council refused permission for the proposed retention of the stable and store for the following reasons:

> "1. Harm to the character of the area
>
> The retention of the stables building will lead to an expansion away from the main dwelling, reduce the amount of approved landscaping to the frontage and result in a garage building forward of the main dwelling. The net impact is an expanse of blank façade, excessive building height and an inconsistent building line that is out of place in the character and landscape setting of the site and which detracts from the countryside lanescape of White Horse Farm Lane.

> …
>
> 2. Impact upon neighbour amenity
>
> The retention of the stables building will result in a cumulatively adverse impact upon the amenity afforded to the occupants of White Horse Barn on the adjoining property to the west, in the form of a loss of outlook, loss of light and increased sense of enclosure and building dominance…."

23. Following the refusal of permission for the retention of the stable and store, the Council issued a "breach letter" to Mr Seal on 18 February 2020, requiring removal of the building within 28 days or enforcement action would be commenced. However, all enforcement action was held in abeyance when Mr Seal's agent submitted an appeal against the refusal of planning permission for the retention of the stable and store.

**The Inspector's decision**

24. The Inspector allowed the appeal. In his decision letter ("DL") dated 27 August 2020, at DL2, he said:

> "2. Planning permission [Application reference 180963 approved 12 August 2018] was granted for the demolition of the existing buildings on the appeal site, to be replaced with a new two storey pitched roof dwelling comprising five bedrooms. The decision notice included a condition which required the demolition and removal of all the buildings on the site, which included the frontage stable which is the subject of this appeal. From my site visit it was apparent that the two storey dwelling has been constructed, however the frontage stable had not yet been demolished. I have considered the appeal on this basis and the plans provided as part of the appeal."

25. The Inspector went on to identify the main issues at DL3:

> "3. The main issues are the effect of the proposal on the:
>
> • Character and appearance of the area; and
>
> • Living conditions of neighbouring occupiers of White Horse Barn, with particular regard to outlook."

26. On the issue of character and appearance, the Inspector described the proposed development at DL5:

> "5. The appeal proposal would retain the existing stable building, and proposes no increase to either the height or footprint of the building. It would retain the existing concrete slab and exterior walls. The roof would be replaced with a new hip roof finished in tiles matching the residential dwelling on the site. The proposal would introduce new timber cladding on the exterior

> walls, which would be stained black to match … White Horse Barn."

27. The Inspector did not agree with the Council's concerns that the proposal in its prominent location was harmful to the streetscape and created an inconsistent building line. At DL6 and DL7, he found that there was no consistent building line and the variety provided a more informal streetscape which complemented the rural character of the area.

28. At DL8, he found that the proposed changes were relatively minor, and the building would retain the same footprint and height as the existing building.

29. The Inspector said at DL10 and DL11:

> "10. Whilst I appreciate that the frontage stables were due to be demolished in the previously approved scheme, they already exist and thus have an established presence within the streetscape. In this respect, the proposal would not be introducing any new built form onto White Horse Lane, merely changing the exterior appearance. In addition, whilst the Council have raised concerns that retaining the stables would reduce the amount of landscaping on site, I do not share these concerns and landscaping can be addressed through a suitable planning condition.
>
> 11. Furthermore, I do not find that the proposal would harm the character and appearance of the area, as the building would retain a rural appearance which would sit well within the character of the streetscape…"

30. On the issue of living conditions, the Inspector said at DL14:

> "14. The Council have raised concerns that the height of the proposal would harm the living conditions of the neighbouring occupiers at White Horse Barn, with the proposal creating a sense of enclosure. The proposal is not adding any additional height to the structure, but would change the roof style from a gable to hip roof, which would be visible from this neighbouring property. This change in itself would not result in any harm to the neighbouring occupiers' outlook."

31. At DL15 and DL16, he found that the proposal building would not be overbearing for the occupiers of White Horse Barn because of the distance between the properties and the high boundary fence, which meant there would be limited visibility of the stable.

32. At DL17 the Inspector said:

> "The Council have indicated that, as part of their consideration of the wider planning permission on this site, the removal of the stables was a positive factor for the outlook and living conditions of neighbouring occupiers, and there is an expectation that their

> outlook would be improved. Be that as it may, the proposal before me does not result in harm to the living conditions experienced by the neighbouring occupiers."

33. Under the sub-heading "Other Matters", the Inspector then went on to say as follows:

> "19. I note the concerns raised by interested parties in respect of the proposal, and the planning history of the site. This includes concerns with a non-material amendment application, and potential breach of planning conditions. Matters relating to the original planning application for the erection of the two storey dwelling, and any alleged breach of planning conditions are a matter for the Council and are not within the remit of this appeal."
>
> "20. I note that reference has been made to an agreement between interested parties and the appellant to ensure the existing building which is the subject of this appeal is demolished. Such private agreements are not a planning matter, and do not fall within the scope of this appeal. Each application and appeal must be determined on its own planning merits, which is what I have done in this case."

## Legal framework

34. Section 70(2) TCPA 1990 provides that, when considering an application for planning permission, the decision-maker shall have regard to the provisions of the development plan, so far as material to the application. Section 38(6) of the Planning and Compulsory Purchase Act 2004 ("PCPA 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."

35. Under section 288 TCPA 1990, a person aggrieved may apply to quash a decision on the grounds that (a) it is not within the powers of the Act; or (b) any of the relevant requirements have not been complied with, and in consequence, the interests of the applicant have been substantially prejudiced.

36. The general principles of judicial review are applicable to a challenge under section 288 TCPA 1990. Thus, the Claimant must establish that the Secretary of State misdirected himself in law or acted irrationally or failed to have regard to relevant considerations or that there was some procedural impropriety.

37. The relevant principles were summarised by Lindblom J. in *Bloor Homes East Midlands Ltd* v *Secretary of State for Communities and Local Government* [2014] EWHC 754 (Admin), at [19].

38. The exercise of planning judgment and the weighing of the various issues are matters for the decision-maker and not for the Court: *Seddon Properties Ltd v Secretary of State for the Environment* (1981) 42 P & CR 26. As Sullivan J. said in *Newsmith v Secretary of State for the Environment, Transport and the Regions* [2001] EWHC Admin 74, at [6]:

> "An application under section 288 is not an opportunity for a review of the planning merits….."

39. A decision letter must be read (1) fairly and in good faith, and as a whole; (2) in a straightforward down-to-earth manner, without excessive legalism or criticism; (3) as if by a well-informed reader who understands the principal controversial issues in the case: see Lord Bridge in *South Lakeland v Secretary of State for the Environment* [1992] 2 AC 141, at 148G-H; Sir Thomas Bingham MR in *Clarke Homes v Secretary of State for the Environment* (1993) 66 P & CR 263, at 271; *Seddon Properties Ltd v Secretary of State for the Environment* (1981) 42 P & CR 26, at 28; *and South Somerset District Council v Secretary of State for the Environment* (1993) 66 P & CR 83.

## Ground 1

40. The Claimant submitted that the Inspector failed to comply with the duty identified by Lord Diplock in *Secretary of State for Education and Science v Tameside MBC* [1977] AC 1014, at 1065:

> "It is not for any court of law to substitute its own opinion for [the Secretary of State]; but it is for a court of law to determine whether it has been established that in reaching his decision unfavourable to the council he had directed himself properly in law and had in consequence taken into consideration the matters which upon the true construction of the Act he ought to have considered and excluded from his consideration matters that were irrelevant to what he had to consider: see *Associated Provincial Picture Houses Ltd. V. Wednesbury Corporation* [1948] 1 K.B. 223 , per Lord Greene M.R., at p. 229. Or, put more compendiously, the question for the court is, did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?"

41. The Claimant submitted that, in this appeal, the approach which the Inspector should have taken was to capture all the impacts of the proposed development (including the breach of planning control), and assess those impacts against the baseline or benchmark of the 2018 permission, including Condition 6, which required demolition of the stable and store block.

42. On the Claimant's reading of the appeal decision, the Inspector did not compare the proposed development against the appropriate baseline or benchmark, but instead erroneously compared and assessed all aspects of the proposed development against the position as it currently existed, with the stable and store block in place.

43. Mr Stinchcombe QC initially referred to the 2018 permission as "the fall-back". However, the term fall-back has acquired a specific meaning in planning law. The *Encyclopedia of Planning Law and Practice* states at paragraph 1.002.29:

> "Sometimes an applicant can demonstrate that the grant of a permission will be less harmful than a use or development which has previously been permitted; this is known, unsurprisingly, as fall-back"

In *R (Mansell) v Tonbridge & Malling BC* [2017] EWCA Civ 1314, Lindblom LJ considered the status of a fall-back development as a material consideration at [27], confirming that there must be a "real prospect" that it would be reverted to.

44. Mr Stinchcombe QC accepted that he was not using the term "fall-back" in the sense referred to in the Encyclopedia and the case of *Mansell.* To avoid confusion, he adopted the terms baseline or benchmark, which he used interchangeably.

45. The Secretary of State submitted, on Ground 1, that the Claimant's analysis of the Inspector's decision was overly legalistic and had no proper legal basis. The Inspector was not obliged, as a matter of law, to frame his decision in the manner contended for by the Claimant. The question for the Inspector was whether the development was acceptable in planning terms, having regard to the development plan and any material considerations. Within that framework, the approach he took was a matter for him to decide. The Secretary of State submitted that it would have been odd for the Inspector to put the existence of the stable and store block out of his mind, as he had the advantage of seeing its impact on the character of the area and the neighbours at White Horse Barn.

46. In any event, the Secretary of State submitted that the Inspector did carry out the exercise the Claimant accused him of sidestepping. At DL14 – 18, he considered the impacts of retaining the stable and store block, concluding that they were acceptable in planning terms. The Council made similar submissions in support of the Inspector's decision.

47. I agree with the Claimant's submission that, in the circumstances of this application where Mr Seal was, in effect, seeking to vary a condition precedent to the planning permission which he was in the course of implementing, it was axiomatic that the decision-maker would consider the impacts of the proposed variation (including the breach of Condition 6), and assess them against the impacts of the existing permission (including compliance with Condition 6). That is the exercise which the Council carried out when it decided to refuse planning permission for the proposed development. In my view, that is also the exercise which the Inspector carried out on appeal, but which led him to the opposite conclusion.

48. It is clear from DL2 that, in deciding the appeal, the Inspector had regard to the terms of the 2018 permission and the extent to which it had been implemented. Understandably, the focus of the appeal was the Council's reasons for refusal of permission. Under the heading 'Character and appearance', the Inspector considered in turn the reasons which the Council gave for refusing the application. In doing so, he was assessing the impacts of retaining the stable and store block against the alternative,

namely, demolition pursuant to Condition 6 of the 2018 permission. He carried out a similar exercise under the heading 'Living conditions'.

49. The Inspector also considered the impacts of the proposed alterations to the stable and store block, in comparison with the existing building. In my view, the Claimant's criticisms of these paragraphs was misplaced as these matters were also within the scope of the appeal. Mr Seal was applying for planning permission both to retain and to alter the stable and store block. When the Inspector was considering the application to alter the stable and store block, it was appropriate for him to compare the impacts of the proposed alterations with the existing building.

50. I well understand the Claimant's concern about DL19, as it appeared to be dismissive of aspects of the planning history which were of justifiable concern to the Claimant and other members of the Group, because Mr Seal misled them. I consider it would have been helpful if the Inspector had set out more fully the scope of this appeal, explaining the tests which he had to apply, and that Mr Seal's conduct was not a basis upon which the Inspector could refuse the appeal. If he had done so, this challenge might not have been brought. But I am not persuaded that DL19 discloses any error of law. In the first two sentences the Inspector is noting the concerns raised in respect of the planning history of the Site. In the final sentence he correctly states that enforcement is a matter for the Council and is not within the remit of the appeal.

## Ground 2

51. The Claimant submitted that the *Whitley* principle, namely, that works which contravene conditions precedent cannot be taken as lawfully commencing development, applied in this case. The principle is derived from the case of *Whitley and Sons v Secretary of State for Wales and Clwyd CC* (1992) 64 P & CR 296, and later developed in *R (Hart Aggregates Ltd) v Hartlepool BC* [2005] EWHC 840 (Admin). He submitted that Condition 6, which provided that "No development shall take place on the site until all of the existing structure(s) shown to be demolished on the approved plan have been so demolished" was clearly a condition precedent. Therefore the construction of the dwelling house without first complying with the condition precedent was unlawful.

52. The Council conceded in its Summary Grounds that Condition 6 went to the heart of the 2018 permission and that it had been breached. Accordingly the *Whitley* principle was engaged and there was no valid planning permission for the dwelling which had been built at the Site.

53. In my judgment, the *Whitley* principle does apply on the facts of this case, and the Council was right to concede this point.

54. However, I agree with the Secretary of State and the Council that it would be inappropriate for me to grant a declaration that the dwelling is unlawful and is susceptible to enforcement, as that is a matter for the Council to determine. I am only concerned with the lawfulness of the Inspector's decision on Mr Seal's appeal.

55. According to the Council, it will consider whether the dwelling should be enforced against after this statutory review is concluded. It will also consider the Claimant's

application under section 73A TCPA 1990 to vary Condition 6 of the 2018 permission to allow for retention of the stable and store block.

## Conclusion

56. For the reasons set out above, the application for statutory review is dismissed.