Neutral Citation Number: [2021] EWHC 695 (Admin)

Case No: CO/2208/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/3/2021

Before :

Timothy Mould QC (sitting as a Deputy High Court Judge)

- -

Between :

THE BOROUGH COUNCIL OF CALDERDALE	**Claimant**
- and –	
THE SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT	**Defendant**
-and-	
CLEAR CHANNEL UK	
	Interested Party

- -
- -

Sarah Reid (instructed by **Head of Legal and Democratic Services**) for the Claimant
Heather Sargent (instructed by **Government Legal Department**) for the Defendant
The Interested Party did not appear and was not represented.

Hearing date: 12 November 2020

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Approved Judgment

Timothy Mould QC:

The Claim

1. By a decision letter dated 12 May 2020 ["the DL"], an inspector appointed by the Defendant allowed an appeal by the Interested Party and granted consent to upgrade an existing advertisement display at Traveller's Rest, 99 Huddersfield Road, Elland, Calderdale ["the appeal site"].

2. By this claim, the Claimant challenges the validity of the inspector's decision pursuant to section 288 of the Town and Country Planning Act 1990 ["the 1990 Act']. On 31 July 2020 Lang J granted permission on the papers for the claim to proceed.

3. The Claimant raises three grounds of challenge to the inspector's decision –

    (1) The inspector failed to have regard to a material consideration, namely the need to impose highways safety conditions on the grant of advertisement consent.

    (2) The inspector failed to give legally adequate reasons for granting advertisement consent without imposing the necessary highway safety conditions.

    (3) The inspector acted unfairly in failing to allow the Claimant an opportunity to make further representations prior to his decision to grant advertisement consent without imposing highway safety conditions, in circumstances in which the need for such conditions had been asserted by the Claimant on the advice of the local highway authority and accepted by the Interested Party.

The factual background

4. On 11 October 2019, the Interested Party applied to the Claimant for express consent under regulation 9 of the Town and Country Planning (Control of Advertisements) (England) Regulations 2007 ["the 2007 Regulations"] to display an advertisement at the appeal site in the following terms –

    "Upgrade of existing 48 sheet advert to support digital poster".

5. The Interested Party applied for consent for the advertisement for a period of 5 years.

6. On 11 October 2019 the Interested Party's agents also wrote to the Claimant in support of the application for express consent. They described the proposal as being to *"repost"* the existing display at the appeal site with a *"D-poster"* which would display multiple, static advertisements on rotation. The agent suggested the imposition of conditions to control operation of the digital poster, including the following conditions which were proposed as both *"industry standard"* and *"now commonly imposed on applications of this type"* –

    " Static images to be displayed only (no moving or flashing images).

    Changes between adverts to take place instantly with no sequencing, fading, swiping or merging of images.

Maximum level of night time illuminance to be set to 300cd/m2 in accordance with ILP guidelines.

Advertisements to change no more frequently than once every ten seconds".

7. The Interested Party's agents concluded their letter of 11 October 2019 in the following terms –

"The proposal will not change the size, position or orientation of the advert. As such the established acceptability of the advertisement should not change materially. The proposed conditions to control the luminance of the screens and the operation of the digital screens will ensure that there is no additional harm to amenity or road safety".

8. Following receipt of the application for express consent, the Claimant consulted and received the following advice from the local highway authority –

"The proposed digital advertisement is located adjacent to a busy exit from a food store. There is evidence that digital advertisements results [sic] *in an increase in the number and length of glances by passing drivers compared with traditional billboard type advertisements.*

However, it is considered that an objection would be difficult to sustain.

In order to minimise the highway safety risks a number of conditions are required; to control the intensity of illumination, to avoid any moving or apparently moving images, to control the frequency of advertisement changes and to ensure that changes occur quickly".

9. In order to achieve those required controls in the interests of highway safety, the highways officer suggested the terms of conditions to be imposed by the Claimant on a grant of express consent.

10. The Claimant's environmental health officer also recommended the imposition of conditions on a grant of express consent to control both the intensity of illumination of the advertisement display and to prohibit flashing or intermittent lighting.

11. On 13 December 2019, acting under delegated powers the Claimant's planning officer refused express consent. The single reason for refusal stated in the decision notice was that the proposed digital poster display, by reason of internal illumination would form an intrusive feature to the detriment of the residential amenity of neighbouring occupiers, and would accordingly be contrary to paragraph 132 of the National Planning Policy Framework ["the Framework"].

12. In the delegated report, under the heading "Public Safety/Highways", the Claimant's planning officer recorded the absence of objection from the highway authority on highway safety grounds, subject to the imposition of certain conditions.

13. The Interested Party exercised its right of appeal to the Defendant. Paragraph 2.1 of the Interested Party's Grounds of Appeal (February 2020) drew attention to the highway authority's consultation response to the application for express consent. A copy of that

consultation response was provided as Appendix 2 of the Interested Party's Grounds of Appeal. Paragraphs 4.3, 4.4 and 4.5 of the Grounds of Appeal stated –

> *"4.3 The advertisement will be digital and will have a maximum luminance that does not exceed 300 cd/sqm at night time. The maximum brightness will always be within the guidelines as set by the Institute of Lighting Professionals (ILP) Technical Note 5 and will be controlled by light sensors to vary the brightness of the screens according to the brightness of the day. During the daytime, the maximum brightness may increase in order to make the screen visible during bright sunlight. This will ensure that the level of luminance of the advertisements is sensitive to the change in daylight from sunrise to sunset and from summer to winter.*
>
> *4.4 Only static images (i.e. no moving images or flashing lights) will be displayed, but the advertisements will be capable of changing to display new adverts every ten seconds depending on how the advertising space is sold. This is in line with industry standard units of advertising space for sale, and in compliance with the outdoor media code. The changeover between adverts will take place instantly in order to minimise the potential for driver distraction. This derives from advice received from road safety specialists in line with industry and planning standards.*
>
> ***Operational Conditions***
>
> *4.5 The applicant accepts the standard conditions for advertising and in addition proposes the following standard operational conditions to control the operation of the digital display:*
>
> - *Static images to be displayed only (no moving or flashing images);*
> - *Changes between adverts to take place instantly with no sequencing fading, swiping or merging of images;*
> - *Maximum level of night time illuminance to be set to 300cd/m2;*
> - *Advertisements to change no more frequently than once every ten seconds".*

14. Given the Claimant's single stated reason for refusing the application for express consent, in section 6 of its Grounds of Appeal headed "Planning Considerations" the Interested Party understandably focused upon the issue of the impact of operation of the proposed digital display poster on the living conditions of neighbouring residential occupiers. Paragraph 6.1 of the Grounds of Appeal stated that the proposed advertisement would not impact on highways safety, a point that was repeated in paragraph 7.1 which concluded –

> *"7.1 In accordance with the NPPF, advertisements should only be controlled where they are harmful to amenity or public safety. These Grounds of Appeal have demonstrated that the Appeal Scheme does not harm amenity or public safety".*

15. Insofar as public safety was concerned, that conclusion was plainly to be read as drawing upon the proposed controls on operation of the digital display to which the Interested Party had referred in paragraphs 4.3 to 4.5 of the Grounds of Appeal.

16. The Claimant submitted its appeal questionnaire on 2 April 2020. The questionnaire indicated, correctly, that "public safety" involving highway or traffic considerations was not one of the Claimant's grounds of refusal of express consent. In response to the question "Do you consider that any condition other than the five standard conditions set out in Schedule 2 to the 2007 Regulations should be imposed in the event that express consent as applied for is granted?", the Claimant answered "Yes". The Claimant did not submit the terms of its proposed additional conditions. Nor did the Claimant respond to that question with an explanation of the need for additional conditions. The Claimant did provide a copy of the Planning Officer's delegated report with the completed appeal questionnaire. The Claimant did not submit a separate statement of case in response to the Interested Party's appeal.

17. There being no objection by either of the parties, the inspector did not carry out a site visit.

18. On 12 May 2020 the inspector issued the DL.

The inspector's decision

19. In DL1, the inspector identified the main issue in the appeal as being the effect of the proposed advertisement on the amenity of neighbouring occupiers. In DL6 he said –

> *"6. The proposal is to replace the existing hoarding with a digital poster, which will display multiple static advertisements on rotation. There would be no change to the size, position or orientation of the advert. The luminance of the advertisement would not exceed 300 candela/sqm at night-time. This would be within the guidelines set by the Institute of Lighting Professionals Technical Note 5. Subject to conditions controlling the luminance there was no objection from the Council's Environmental Health Team".*

20. In fact, DL6 is incorrect, in that the proposed digital poster was to be re-positioned higher and closer to the gable end of the building on the appeal site. This had the effect of bringing the advertisement display closer to the public highway. Ms Sarah Reid, on behalf of the Claimant, did not submit that this factual error was itself material. In my view, she was correct not to do so.

21. In DL7, the inspector acknowledged that the proposed hoarding would be 12.5m away from two dormer windows. However, unlike the adjacent streetlight, the hoarding would not be in a direct line of sight from those windows, but rather angled away from them. In DL8 he said that there was no evidence before him to show how compliance with the requisite standards would have an unacceptable effect on the living conditions of neighbouring occupiers, who had themselves raised no objection. DL9 to DL11 are as follows –

> *"9. Based on the Council's own professional advice, the site's urban context, existing levels of illumination, lack of objection from third parties, compliance with national standards and lack of credible evidence to support the Council's reason*

for refusal, it is difficult to understand how the Council came to the conclusion they did.

10. In these circumstances, I am satisfied that the amenity of neighbouring occupiers would not be unacceptably harmed. Accordingly, there would be no conflict with paragraph 132 of the National Planning Policy Framework which seeks to ensure advertisements do not give rise to unacceptable amenity and public safety effects.

Conclusion

11. For the reasons set out above, I conclude that the appeal is allowed".

22. The inspector stated his formal decision on the appeal and application for express consent in DL1, in the following terms –

*"**Decision***

1. *The appeal is allowed and express consent is granted for the display of the advertisement as applied for. The consent is for five years from the date of this decision and is subject to the five standard conditions set out in the Regulations and the following additional conditions:*

    1) *The intensity of the luminance of the advertisements hereby granted consent shall be no greater than 600 candela per square metre during daylight hours and shall be no greater than 300 candela per square metre during evening/night-time hours.*

    2) *The advertisement hereby granted consent shall not be illuminated by flashing or intermittent lighting".*

Relevant legislation, policy and legal principles

23. Regulation 3 of the 2007 Regulations includes the following provisions –

"3(1) A local planning authority shall exercise its powers under these Regulations in the interests of amenity and public safety, taking into account –

(a) the provisions of the development plan, so far as they are material; and

(b) any other relevant factors.

(2) Without prejudice to the generality of paragraph (1)(b) –

…

(b) factors relevant to public safety include –

(i) the safety of persons using any highway…

…

(4) Unless it appears to the local planning authority to be required in the interests of amenity or public safety, an express consent for the display of advertisements shall not contain any limitation or restriction relating to the subject matter, content or design of what is to be displayed".

24. Regulation 14(1) of the 2007 Regulations provides (insofar as is relevant for present purposes) –

"14(1) Where an application for express consent is made to the local planning authority, the authority may -

(a) grant consent, in whole or in part, subject to the standard conditions and, subject to paragraphs (6) and (7), to such additional conditions as it thinks fit;

(b) refuse consent;

…".

25. Schedule 2 to the 2007 Regulations specifies the standard conditions. Of relevance for present purposes is the second standard condition which is in the following terms –

"2 No advertisement shall be sited or displayed so as to —

(a) endanger persons using any highway, railway, waterway, dock, harbour or aerodrome (civil or military);

(b) obscure, or hinder the ready interpretation of, any traffic sign, railway signal or aid to navigation by water or air; or

(c) hinder the operation of any device used for the purpose of security or surveillance or for measuring the speed of any vehicle".

26. On an appeal against a refusal of express consent made pursuant to regulation 17 of the 2007 Regulations, the Defendant may allow or dismiss the appeal, reverse or vary any part of the decision of the local planning authority and may deal with the application as if it had been made to him in the first instance: section 79(1) of the Town and Country Planning Act 1990.

27. Paragraph 132 of the Framework states –

"132. The quality and character of places can suffer when advertisements are poorly sited and designed. A separate consent process within the planning system controls the display of advertisements, which should be operated in a way which is simple, efficient and effective. Advertisements should be subject to control only in the interests of amenity and public safety, taking account of cumulative impacts".

28. A modern statement of the well-established principles upon which the Court determines a challenge to the validity of a planning appeal decision under section 288 of the 1990 Act is to be found at [6] in the judgment of Lindblom LJ in *St Modwen Developments Ltd v Secretary of State for Communities and Local Government* [2018] PTSR 746, [2017] EWCA Civ 1643 –

"(1) Decisions of the Secretary of State and his inspectors in appeals against the refusal of planning permission are to be construed in a reasonably flexible way. Decision letters are written principally for parties who know what the issues between them are and what evidence and argument has been deployed on those issues. An inspector does not need to "rehearse every argument relating to each matter in every paragraph" (see the judgment of Forbes J. in Seddon Properties v Secretary of State for the Environment (1981) 42 P. & C.R. 26, at p.28).

(2) The reasons for an appeal decision must be intelligible and adequate, enabling one to understand why the appeal was decided as it was and what conclusions were reached on the "principal important controversial issues". An inspector's reasoning must not give rise to a substantial doubt as to whether he went wrong in law, for example by misunderstanding a relevant policy or by failing to reach a rational decision on relevant grounds. But the reasons need refer only to the main issues in the dispute, not to every material consideration (see the speech of Lord Brown of Eaton-under-Heywood in South Bucks District Council and another v Porter (No. 2) [2004]1 WLR 1953, at p.1964B-G).

(3) The weight to be attached to any material consideration and all matters of planning judgment are within the exclusive jurisdiction of the decision-maker. They are not for the court. A local planning authority determining an application for planning permission is free, "provided that it does not lapse into Wednesbury irrationality" to give material considerations "whatever weight [it] thinks fit or no weight at all" (see the speech of Lord Hoffmann in Tesco Stores Limited v Secretary of State for the Environment [1995] 1 WLR 759, at p.780F-H). And, essentially for that reason, an application under section 288 of the 1990 Act does not afford an opportunity for a review of the planning merits of an inspector's decision (see the judgment of Sullivan J., as he then was, in Newsmith v Secretary of State for Environment, Transport and the Regions [2001] EWHC Admin 74, at paragraph 6).

(4) Planning policies are not statutory or contractual provisions and should not be construed as if they were. The proper interpretation of planning policy is ultimately a matter of law for the court. The application of relevant policy is for the decision-maker. But statements of policy are to be interpreted objectively by the court in accordance with the language used and in its proper context. A failure properly to understand and apply relevant policy will constitute a failure to have regard to a material consideration, or will amount to having regard to an immaterial consideration (see the judgment of Lord Reed in Tesco Stores v Dundee City Council [2012] PTSR 983, at paragraphs 17 to 22).

(5) When it is suggested that an inspector has failed to grasp a relevant policy one must look at what he thought the important planning issues were and decide whether it appears from the way he dealt with them that he must have misunderstood the policy in question (see the judgment of Hoffmann L.J., as he then was, South Somerset District Council v The Secretary of State for the Environment (1993) 66 P. & C.R. 80, at p.83E-H).

(6) Because it is reasonable to assume that national planning policy is familiar to the Secretary of State and his inspectors, the fact that a particular policy is not mentioned in the decision letter does not necessarily mean that it has been ignored

(see, for example, the judgment of Lang J. in Sea Land Power & Energy Limited v Secretary of State for Communities and Local Government [2012]EWHC 1419 (QB), at paragraph 58).

(7) Consistency in decision-making is important both to developers and local planning authorities, because it serves to maintain public confidence in the operation of the development control system. But it is not a principle of law that like cases must always be decided alike. An inspector must exercise his own judgment on this question, if it arises (see, for example, the judgment of Pill L.J. in Fox Strategic Land and Property Ltd. v Secretary of State for Communities and Local Government [2013] 1 P. & C.R. 6, [2012] EWCA Civ 1198, at paragraphs 12 to 14, citing the judgment of Mann L.J. in North Wiltshire District Council v Secretary of State for the Environment [1992] 65 P. & C.R. 137, at p.145)."

29. The principles upon which the court approaches the contention that the decision maker in a planning appeal has acted unlawfully in failing to take account of a relevant or "material" consideration were summarised by Lord Carnwath JSC at [30] – [31] in *R (Samuel Smith Old Brewery (Tadcaster)) v North Yorkshire County Council* [2020] PTSR 221, [2020] UKSC 3 –

"30. The approach of the court in response to such an allegation has been discussed in a number of authorities. I sought to summarise the principles in Derbyshire Dales District Council v Secretary of State for Communities and Local Government [2009] EWHC 1729 (Admin); [2010] 1 P & CR 19. The issue in that case was whether the authority had been obliged to treat the possibility of alternative sites as a material consideration. I said:

> *"17. It is one thing to say that consideration of a possible alternative site is a potentially relevant issue, so that a decision-maker does not err in law if he has regard to it. It is quite another to say that it is necessarily relevant, so that he errs in law if he fails to have regard to it …*
>
> *18. For the former category the underlying principles are obvious. It is trite and long-established law that the range of potentially relevant planning issues is very wide (Stringer v Minister of Housing and Local Government [1970] 1 WLR 1281); and that, absent irrationality or illegality, the weight to be given to such issues in any case is a matter for the decision-maker (Tesco Stores Ltd v Secretary of State for the Environment and West Oxfordshire District Council [1995] 1 WLR 759, 780). On the other hand, to hold that a decision-maker has erred in law by failing to have regard to alternative sites, it is necessary to find some legal principle which compelled him (not merely empowered) him to do so."*

31. I referred to the discussion of this issue in a different context by Cooke J in the New Zealand Court of Appeal, in CreedNZ Inc v Governor General [1981] 1 NZLR 172, 182 (adopted by Lord Scarman in the House of Lords in In re Findlay [1985] AC 318, 333-334, and in the planning context by Glidewell LJ in Bolton Metropolitan Borough Council v Secretary of State for the Environment and Greater Manchester Waste Disposal Authority (1991) 61 P & CR 343, 352):

"26. Cooke J took as a starting point the words of Lord Greene MR in the Wednesbury case [1948] 1 KB 223, 228:

> *'If, in the statute conferring the discretion there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters.'*

He continued:

> *'What has to be emphasised is that it is only when the statute expressly or impliedly identifies considerations required to be taken into account by the authority as a matter of legal obligation that the court holds a decision invalid on the ground now invoked. It is not enough that it is one that may properly be taken into account, nor even that it is one which many people, including the court itself, would have taken into account if they had to make the decision ...' (Emphasis added)*

27. In approving this passage, Lord Scarman noted that Cooke J had also recognised, that -

> *'... in certain circumstances there will be some matters so obviously material to a decision on a particular project that anything short of direct consideration of them by the ministers ... would not be in accordance with the intention of the Act.' (In re Findlay at p 334)*

28. It seems, therefore, that it is not enough that, in the judge's view, consideration of a particular matter might realistically have made a difference. Short of irrationality, the question is one of statutory construction. It is necessary to show that the matter was one which the statute expressly or impliedly (because 'obviously material') requires to be taken into account 'as a matter of legal obligation'."

30. At [36] of *South Bucks DC v Porter (No 2)* [2004] 1 WLR 1953, Lord Brown summarised the required legal standard for reasons in planning appeal decisions-

> *"36. The reasons must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need only refer to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they*

are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision".

31. On the question of what fairness demands in the context of planning appeal proceedings, Counsel drew attention to the principles summarised by Ouseley J in *Castleford Homes Limited v Secretary of State for the Environment Transport and the Regions* [2001] EWHC 77 (Admin) –

> *"52. The relevant law, though not cited to me, is to be found in cases such as Fairmount Investment Ltd. -v- The Secretary of State for the Environment [1976] 1 WLR 1255 at p.1266; and H. Sabey & Co. Ltd. -v- The Secretary of State for the Environment [1978] 1 All E.R. 586. Did the Claimant have a "fair crack of the whip?" Was the Claimant deprived of an opportunity to present material by an approach on the part of the Inspector which he did not and could not reasonably have anticipated? Or is he trying to improve his case subsequently, having been substantially aware of, or alerted to, the key issues at the Inquiry? Did he simply fail to realise that he might lose on an aspect which was fairly and squarely at issue and hence fail to put forward his fall-back case? Those are the sort of questions which can be used to guide a conclusion as to whether the manner in which a particular issue was dealt with at an Inquiry involved a breach of natural justice and was unfair".*

32. On behalf of the Defendant, Ms Heather Sargent also relied upon the observations of Sullivan J at [26] in *Jory v Secretary of State for the Environment Transport and the Regions* [2003] JPL 549; [2002] EWHC 2724 (Admin) –

> *"26. …What fairness requires is bound to depend upon the circumstances of each particular case. I would further accept that in the great majority of cases it will not be in the least unfair if the Inspector decides that it is unnecessary to invite further representations dealing with the precise terms of the conditions which he proposes to impose after the close of an inquiry, a formal hearing or an exchange of written representations".*

Submissions

33. For the Claimant, Ms Reid submitted that the basis for the challenge to the validity of the inspector's decision was straightforward. In determining the Interested Party's appeal, the inspector was under a statutory duty to exercise his powers in the interests both of amenity and of public safety. In particular, he was under a legal obligation to take into account the safety of persons using the highway.

34. The local highway authority had advised the Claimant that, in the interests of highway safety, this was a case in which specific conditions should be imposed on a grant of express consent in order to control day-time and night-time levels of luminance, to prohibit the display of moving images, to control the frequency of changes to the

advertisement display and to ensure that such changes took place quickly. That advice was before the inspector. The Interested Party had not taken issue with the need for specific conditions to control each of those matters in the interests of highway safety. On the contrary, in its Grounds of Appeal the Interested Party had itself advised that such specific conditional controls were necessary in addition to the imposition of the standard conditions, in order to minimise the potential for driver distraction and in line with industry and planning standards on road safety.

35. Counsel submitted that the inspector had simply failed to discharge his statutory obligations in relation to these material considerations. In determining the Interested Party's appeal, he had confined his consideration only to the interests of amenity. He had ignored the interests of highway safety. Notwithstanding the advice both of the local highway authority and of the Interested Party, the inspector did not impose additional, specific conditions to control the operation of the digital display in the interests of highway safety. The specific conditions which he did impose were those that had been recommended by the Claimant's environmental health officer in the interests of amenity.

36. The inspector offered no reasons for not imposing specific, additional conditions in the interests of highway safety. It was impossible to discern from the reasons that he gave in his decision whether, on the one hand, he had concluded that such conditions were unnecessary (notwithstanding the advice of both the local highway authority and the Interested Party); or, on the other hand, he had simply failed to address that question. In either case, his reasoning was legally inadequate. The Claimant is unable to understand what the inspector decided and why he did so. Given the acknowledged importance of ensuring that operation of the digital display does not risk the safety of persons using the highway, the Claimant is substantially prejudiced by the inadequacy of the inspector's reasoning in his decision.

37. Ms Reid submitted that, if it was the case that the inspector decided not to impose specific, additional conditions in the interests of highway safety, then he acted unfairly. On the evidence before the inspector, it was the common position of both the Claimant (on the advice of the local highway authority) and the Interested Party that such conditions were needed in order to control day-time and night-time levels of luminance, to prohibit the display of moving images, to control the frequency of changes to the advertisement display and to ensure that such changes took place quickly. Fairness demanded that the inspector at least should give the parties the opportunity to make further representations on the need for those conditions in the interests of highway safety, before he made his decision on the appeal.

38. On behalf of the Defendant, Ms Sargent submitted that it was for the inspector to judge whether specific, additional conditions should be imposed in the interests of highway safety, on the grant of express consent for the proposed digital display poster at the appeal site. There was no basis for the adverse inference argued for by the Claimant, that the inspector had failed to consider that question. On the contrary, it was clear from both DL1 and DL10 that the inspector had considered the need for such conditions to be imposed. He had concluded that the standard conditions, taken together with the two specific, additional conditions that he did impose on the grant of express consent, were sufficient to address the interests both of amenity and highway safety in this case.

39. There is no reasonable basis for the adverse inference that the inspector failed to take into account the stated position of the Claimant, the local highway authority or the Interested Party on the question whether, and if so, what form of specific, additional conditions were necessary in order to address the interests of highway safety in this case. It was notable that there was a degree of overlap in their practical application between the specific conditions proposed in the interests of amenity and those proposed in the interests of highway safety. Conversely, although there was some general common ground between the local highway authority and the Interested Party on the subject matter of the conditions that they proposed, there were also differences. For example, the local highway authority took a different view to the Interested Party on the question of the limits to be applied to control the luminance of advertisements during both daylight and night-time hours.

40. The statutory obligation placed on the inspector by regulation 3 of the 2007 Regulations was to consider the need to impose specific conditions on the grant of express consent in the interests of highway safety. However, the inspector was required only to refer to the main issues in dispute. He did not have to mention every material consideration and adverse inferences should not readily be drawn from the fact that he did not do so. In this appeal, the only main issue in dispute was the impact of the proposed advertisement on the amenity of neighbouring occupiers. The Claimant did not criticise the adequacy of the inspector's reasons in addressing that issue. The reasons challenge was without merit.

41. Applying the second and third principles stated by Lindblom LJ at [6] in *St Modwen Developments Ltd v Secretary of State for Communities and Local Government* [2018] PTSR 746, [2017] EWCA Civ 16, both ground 1 and ground 2 should be rejected.

42. In response to ground 3, Ms Sargent submitted that this case was a clear example of those many cases where it will not be in the least unfair for the inspector to reach a judgment about the conditions to be imposed without first inviting further representations from the parties: *Jory v Secretary of State for the Environment Transport and the Regions* [2003] JPL 549; [2002] EWHC 2724 (Admin) at [26]. The inspector had the benefit of both the Interested Party's representations on that question and of the advice given by the local highway authority to the Claimant at the application stage. When the Claimant submitted its appeal questionnaire, it had chosen not to take the opportunity to add to the advice of the local highway authority on the question of conditions to address highway safety issues. Moreover, the Claimant had not taken the opportunity to submit a statement of case in response to the representations on that question made in Grounds of Appeal submitted by the Interested Party. In these circumstances, the inspector acted fairly in making his determination as to the need for specific conditions to be imposed in addition to the standard conditions, without further reference back to the parties. On analysis, the Claimant was simply seeking to retrieve the position after the appeal had been properly and fairly determined.

Conclusions

43. Regulation 3(1) of the 2007 Regulations places a duty on a local planning authority considering an application for express advertisement consent to exercise its powers in the interests of public safety. For that purpose, the authority is required by regulation 3(1) and 3(2) of the 2007 Regulations to take into account the safety of persons using the highway. The safety of persons using the highway is a consideration expressly

identified by statute as a consideration that a local planning authority must take into account as a matter of legal obligation: see *R (Samuel Smith Old Brewery (Tadcaster)) v North Yorkshire County Council* [2020] PTSR 221, [2020] UKSC 3 at [30]-[31].

44. By virtue of section 79(1) of the 1990 Act, it was the duty of the inspector to discharge that legal obligation in determining the Interested Party's appeal against the Claimant's refusal of express consent.

45. By virtue of regulation 14(1) of the 2007 Regulations, it was open to the inspector to fulfil his legal obligation to take into account the safety of persons using the highway by imposing conditional controls on the operation of the proposed digital display. He was empowered to impose both the standard conditions set out in schedule 2 to the 2007 Regulations and, in addition, such specific conditions as he judged to be necessary for that purpose.

46. As a matter of planning policy, paragraph 132 of the Framework indicates that decision makers should consider exercising the power to impose conditions on a grant of express consent for the purpose of controlling both the siting, design and operation of the proposed advertisement in the interests of public safety. Paragraph 18b-068-20140306 of the Planning Practice Guidance states that one of the main types of advertisement which may cause danger to road users are externally or internally illuminated signs incorporating either flashing or static lights which, because of their size and brightness, may cause driver distraction. The Guidance refers to illuminated advertisements which are subject to frequent changes of display and which incorporate moving or apparently moving elements in their display. The Guidance states that it may be possible for hazardous traffic features to be removed by a range of measures, giving as examples re-siting the advertisement, screening of floodlights, changing the colour of lights or restricting the frequency with which the display changes.

47. In the present appeal, neither the local planning authority nor the local highway authority contended for the refusal of express consent in the interests of the safety of users of the highway. However, both the applicant for express consent, the local planning authority and the local highway authority contended for the imposition of conditions on the grant of express consent in the interests of highway safety. On the evidence before the inspector, there was no substantial disagreement between the Interested Party, the Claimant and the local highway authority as to the need for specific conditions to control the level of night-time illuminance, the use of moving images, the frequency of change between advertisements and the speed of change between advertisements. In particular, in paragraphs 4.4 and 4.5 of its Grounds of Appeal, the Interested Party reported on the basis of advice from road safety specialists that only static images should be displayed, that the changeover between advertisements should take place instantly to minimise the potential for driver distraction and that the frequency of change should be no greater than every ten seconds. The Interested Party clearly proposed that these matters should be controlled by the imposition of specific conditions in addition to the standard conditions for advertising.

48. On each of those matters, the local highway authority's advice was to the same effect. That advice was before the inspector, having been produced as an appendix to the Interested Party's Grounds of Appeal. The Claimant's planning officer's delegated report was also before the inspector and provided the basis for the Claimant's response to the appeal. That report recorded the planning officer's position, in reliance on the

advice of the local highway authority, that conditions should be imposed to control the operation of the proposed digital display in the interests of highway safety.

49. In order to discharge his duty under regulation 3(1) of the 2007 Regulations and, in particular, to take account of the safety of persons using the highway, the inspector was obliged to grapple with these representations. He needed to decide whether it was indeed necessary to impose specific conditions in addition to the standard conditions in schedule 2 to the 2007 Regulations, in the interests of highway safety. In order to address that question, the inspector needed to consider the nature and extent of the operational controls imposed by the standard conditions and, in the light of that consideration, to make a judgment whether (as both the Interested Party and the local highway authority contended) further specific operational controls were needed in the interests of highway safety.

50. In response to ground 1, Ms Sargent submits that there is no justification for the Claimant's argument that the inspector failed to do so. She points to DL1 and DL10 as demonstrating, when read together, that the inspector did indeed consider whether further specific conditions were necessary in order to address the interests not only of amenity but also of public safety. The inspector expressly directed himself by reference to paragraph 132 of the Framework. There is no justification, she submitted, for inferring that the inspector ignored or lost sight of the parties' contentions that specific conditions were required in order to control operation of the advertisement in the interests of highway safety. A fair reading of his decision was that he was simply not persuaded that such conditions were required for that purpose, given the effect of the standard conditions and the overlapping controls of the two specific conditions that he did impose. That was a matter for his judgment alone: *St Modwen Developments Ltd v Secretary of State for Communities and Local Government* [2018] PTSR 746, [2017] EWCA Civ 16 at [6].

51. There is force in these submissions, but I do not think that they really refute Ms Reid's core argument. That argument was that, in determining the appeal, the inspector considered only the first of the statutory considerations that he was obliged to address under regulation 3(1) of the 2007 Regulations, that is to say the interests of amenity. Read fairly and as a whole, there is nothing in the decision letter to indicate that the inspector grappled with the second statutory consideration, that is to say the interests of public safety including, in particular the safety of persons using the highway. Whilst neither the Claimant nor the local highway authority had contended that the appeal should fail on highway safety grounds, they did contend that specific conditions were needed to control the operation of the advertisement in the interests of highway safety. In that contention they were effectively supported by the Interested Party.

52. It is commonplace for inspectors in determining planning appeal decisions to address not only the objections raised to the grant of planning permission, but also the need for conditions to control the operation of the proposed development in the event that the appeal is allowed and planning permission granted. In my view, given the inspector's obligations under regulation 3(1) of the 2007 Regulations and the common position of the parties that such conditions were necessary in the case of the proposed digital display in the present appeal, it was necessary for him to address that question in his decision.

53. It is vital to have in mind those specific operational controls on the need for which the parties were essentially agreed, that is to say conditions to control the level of night-time illuminance, the use of moving images, the frequency of change between advertisements and the speed of change between advertisements. None of those particular controls would be effectively achieved simply by imposing standard condition 2 in schedule 2 to the 2007 Regulations. Of potentially greatest relevance was condition 2(a) in schedule 2, which I have set out in paragraph 25 of this judgment. However, that standard condition plainly does not provide the specific controls on both the frequency of change and the speed of change between advertisements on a digital display that the parties considered to be necessary in this case. Nor does condition 2(a) in schedule 2 prohibit the use of moving images on a digital display. I am, therefore, unable to accept that the inspector is to be taken to have decided not to impose specific conditions to control those matters in the interests of highway safety, because he judged such conditions to be unnecessary in the light of the standard conditions. That was clearly not the view of the parties to the appeal, and there is nothing in the decision letter, on a fair reading, to dislodge the obvious inference that the inspector did not grapple with that question.

54. I accept that in their practical effect, the two specific conditions which the inspector did impose on the grant of express consent will to some degree provide the operational controls proposed by the parties in the interests of highway safety. However, that seems to me clearly to be the consequence of the inspector's acceptance of the need for those two conditions to be imposed in the interests of amenity, rather than evidence of his intention through imposition of those conditions to control the operation of the digital display in the interests of highway safety.

55. For these reasons, in my judgment, ground 1 is made out. The Claimant has established that the inspector did fail to have regard to a material consideration, namely the need to impose specific conditional controls on the grant of advertisement consent in addition to the standard conditions, in order to control operation of the digital display in the interests of highway safety.

56. Turning to ground 2, Ms Sargent is plainly right to point out that the inspector gave perfectly proper and adequate reasons for his conclusion on the main issue in the appeal, the effect of the proposed advertisement on the amenity of neighbouring occupiers.

57. However, if I were wrong in my conclusion on ground 1, it seems to me that the Claimant's contentions in support of ground 2 would nevertheless be justified. It is not possible to discern from the reasons that the inspector gives in his decision whether, on the one hand, he has concluded that specific conditions to control operation of the digital display in the interests of highway safety are unnecessary, notwithstanding the advice of both the local highway authority and the Interested Party; or, on the other hand, he has simply failed to address that question. In either case, his reasoning is in my view legally inadequate. The Claimant is unable to understand what the inspector decided and why he did so on a question that he was obliged to consider both in order to fulfil his obligations under regulation 3(1) of the 2007 Regulations and in the light of the representations before him on the appeal. Given the acknowledged importance of ensuring that operation of the digital display does not risk the safety of persons using the highway, the Claimant is substantially prejudiced as a result.

58. I am not persuaded by Ms Reid's submissions in support of ground 3. In my judgment, Ms Sargent is correct in her submission that this case is one in which it was not unfair for the inspector to reach a judgment about the conditions to be imposed without first inviting further representations from the parties: *Jory v Secretary of State for the Environment Transport and the Regions* [2003] JPL 549; [2002] EWHC 2724 (Admin) at [26]. The inspector had the benefit of both the Interested Party's representations on that question and of the advice given by the local highway authority to the Claimant at the application stage. The Claimant had chosen to rely on the planning officer's delegated report. It had not taken the opportunity to submit a statement of case in response to the representations made in Grounds of Appeal submitted by the Interested Party. In these circumstances, the inspector acted fairly in making his determination without further reference back to the parties.

59. The claim succeeds on grounds 1 and 2. I do not accept Counsel for the Defendant's submission that relief should nevertheless be refused, on the basis that the necessary operational controls on the digital display are already effectively secured through the practical application of the second standard condition in schedule 2 to the 2007 Regulations. As I have explained, the general terms in which paragraph 2(a) of schedule 2 is expressed do not achieve the specific controls on the operation of the advertisement in terms of prohibiting moving images, the frequency of change between advertisements and the speed of change between advertisements which all parties considered necessary in the interests of highway safety in this case; and which led the parties deliberately to propose that further specific conditions be imposed on the grant of express consent notwithstanding the terms of the standard conditions. The decision to grant express consent will be quashed.

60. It remains only to record my thanks to Counsel for their assistance.