



Neutral Citation Number: [2023] EWHC 1806 (Admin)

Case No: CO/383/2023

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/07/2023

Before:

SIR ROSS CRANSTON
sitting as a High Court judge

Between:

The King on the application of WHITESIDE
- and -
LONDON BOROUGH OF CROYDON
-and-
VALO SMART CITY UK LTD

Claimant

Defendant

Interested
party

MICHAEL FRY (instructed by **HOLMES & HILLS**) for the **Claimant**
MATTHEW HENDERSON (instructed by **Croydon LBC**) for the **Defendant**

Hearing dates: 12 July 2023

Approved Judgment

SIR ROSS CRANSTON:

Introduction

1. The claimant challenges the decision of the London Borough of Croydon, which I will call ‘the Council’ in this judgment, which granted consent for advertising as part of a new bus shelter outside his home in a suburban street in South Croydon, London. He says that the decision appears to be part of a broader project of replacing older bus shelters in his area which formerly displayed back-illuminated, double-sided poster advertising. The replacement bus shelters will have two-sided digitally illuminated advertising. Consequently, the claimant contends that there are broader implications of this judgment than for just this one bus stop.
2. The Council contends that there is no basis to the three grounds the claimant advances, a failure to consider the local development plan, a failure to conduct specific assessment of the impact of the consent for this specific site, and a failure to consult him and other neighbours. It also submits that permission should be refused because of the claimant’s significant delay in making the claim.
3. The challenge comes to this court following an order of Lang J on 12 May 2023 that there be a rolled-up hearing, and as a result the permission and the substantive stages have been considered alongside each other.

Background

4. The background to the Council’s decision as regards advertising and the bus shelter outside the claimant’s home was that the Council’s contract with its previous advertising partner was coming to an end. The interested party, Valo Smart City UK Ltd, proposed the installation of digital liquid crystal displays (“LCD”) at the 158 existing advertising sites in the borough - 110 bus shelters, 42 dual sided, freestanding rectangular poster advertisements, and six, large freestanding columns. The previous advertising at these sites was paper based.

Pre-application report

5. Given the scale of the programme, the interested party sought pre-application advice from the Council’s officers. This was reported to the Council’s planning committee on 25 March 2021.
6. In the pre-application report, the committee was told that it was being informed of this “to enable Members to view it at pre application stage and to comment upon it. The development does not constitute an application for planning permission and any comments made upon it are provisional, and subject to full consideration of any subsequent applications, including any comments received as a result of consultation, publicity and notification”: 2.1. The committee was also told that the report represented a snapshot in time, with negotiations and dialogue on-going; that the plans and information provided were indicative only; and that other issues might arise as more detail was provided and the depth of analysis expanded upon.
7. The committee was then informed that replacement bus shelters did not require planning permission since they benefitted from permitted development rights in

Schedule 2, Part 12, Class A (b) of the Town and Country Planning (General Permitted Development) (England) Order 2015, but that the proposed digital advertisements on the bus shelters and freestanding advertisements did need advertising consent for each of the 158 sites: 2.3. The project was time critical: 3.3. A high level breakdown of the sites showed that 40 of the 158 sites were in suburban areas and 21 within conservation areas: 4.3.

8. In relation to the principle of the proposed advertisements, the pre-application report said:

“6.4 The scheme does not result in the loss of bus shelters as they are being replaced in the same (or very similar locations). Advertising is being proposed in the same locations, albeit there is a change from paper based adverts to digital adverts. Officers consider that there would be no material change of use proposed and therefore, the proposed scheme is acceptable in principle, subject to detailed design that responds to the specific characteristics of each individual site.”

9. The pre-application report covered design and townscape matters. It read in part:

“6.15 Whilst there has been much discussion on the overarching design, detailed discussions have not yet taken place on the specifics for each location. This is an important step and the applicant has been advised that site-by-site analysis is required in order that the specific proposals and specific siting considerations can be fully assessed and any issues can be resolved at pre-application stage.”

Brightness was adjustable, and the intensity reduced at night: 6.28.

10. The potential impact on neighbouring occupiers’ living conditions, the pre-application report stated, was one of the critical considerations: 6.32. This part of the report added:

“6.33 It is noted that in many of the existing locations (particularly in commercial areas), the existing poster (paper) adverts are back-lit and the change to digital advertising may not be significant. However, in more residential locations, there may not be the same level of illumination to advertisements. A full assessment will need to be carried out for each individual site of the existing illumination and the impact of the illumination proposed by the digital advertising and details submitted with any future application.”

11. The minutes of that meeting suggest that Members were concerned with range of other matters concerning the scheme but not with the issues arising in these proceedings.

Application for advertising consent

12. The interested party applied to the Council for consent for digital advertising on a replacement bus shelter in essentially the same location outside the claimant’s home as the previous bus shelter. The application noted that this was in a quiet, residential, suburban location. Frequent traffic on the road was noted. Photographs of the previous shelter showed that it was near the boundary of the claimant’s property with

the highway. A plan in the application showed that the replacement bus shelter would be narrower, giving more room for passing pedestrians. Apparently the new bus shelter would be some 15 metres from the closest elevation of the house itself. At the time of the application photographs showed established fencing and planting adjacent to the proposed shelter.

13. The application explained that there were two digital screens in a small hub cabinet in the proposed bus shelter. These screens would have the primary function of displaying Transport for London customer information as well as local area information for the public (maps and bus routes). They may also be used to display messages from the Council. Then forming an end panel to the bus shelter would be an 80 inch, two-sided digital screen, with advertising, measuring 2.270m in height, 1.180m in width and 0.25m in depth. Advertisement consent was sought for both the small format digital screens and the large panel.
14. In May 2021 the existing bus shelter outside the claimant's home was removed. The bus stop itself remained.

Officer's report

15. The decision to grant the advertising consent was made by the Council's head of development management under delegated powers.
16. There was an officer's report. The report set out the officer's decision to approve the application subject to specified conditions (paragraph 2), before going on to explain the nature of the application and the location (paragraphs 3.1-3.2). The report stated that there had been no consultation letters sent out to neighbours, and that no representations had been received (para 4.1).
17. Paragraph 5 of the report set out the considerations behind the decision to approve the application and that these were contained in the Town and Country Planning (Control of Advertisements) (England) Regulations 2007. These powers were to be exercised, the report said, "in the interests of amenity and public safety taking into account the provisions of the development plan, and any other relevant material factors": 5.1. As to amenity, paragraph 5.2 stated:

"Factors relevant to amenity include the general characteristic of the locality, including the presence of any feature of historic, architectural, cultural or similar interest. Factors relevant to public safety include the safety of persons using any highway; whether the display of the advertisement is likely to obscure or hinder the interpretation of any traffic sign; and whether the display of the advertisement is likely to hinder the operation of devices used for security, surveillance or for measuring the speed of any vehicle."

18. The principal issues, the report went on to explain, were amenity and public and highway safety: 5.3.
19. Amenity was dealt with at some length. There was, first, reference to paragraph 136 of the National Planning Policy Framework, which notes that the quality and character of places can suffer when advertisements are poorly sited and designed: 5.4. The report then detailed the importance of the public realm as follows:

“5.5 The quality of the public realm has a significant influence on quality of life because it affect’s people’s sense of place, security and belonging. London Plan (2021) Policy D8 ‘Public Realm’ requires development proposals to ‘ensure the public realm is well-designed, safe, accessible, inclusive, attractive, well connected [and] related to the local and historic context’. Furthermore, advertisement lighting ‘should be carefully considered and well-designed in order to minimise intrusive lighting infrastructure and reduce light pollution.’

5.6 The Mayor of London’s ‘Expanding London’s Public Realm - Design Guide’ specifies that the ‘the size and visual presence of commercial operators should be subordinate to its wider public use’.

5.7 Croydon’s Public Realm Design Guide (CPRD) (2019) provides guidance on advertising and generally discourages advertising on footways within high footfall areas. Advertising should be integrated into bus shelter panels. Regarding bus shelters, the guide stipulates that where footway space is restricted, open sided bus shelters will be preferred. Where footway width allows for at least a 1.5m wide clear zone it is acceptable for bus shelters to have side panels. Lighting should be incorporated to enable safe use during evenings and night.”

20. There was then reference to location and positioning, the previous shelter, and the difference between the historic advertisements on that previous bus shelter and the proposed new digital advertisements, as referred to earlier in the judgment: 5.8-5.11. The report continued:

“5.12 Public benefits of the proposed development include regular slots for community and public advertising (10 seconds out of every 60 second cycle). The proposed digital advertising generates a revenue stream, a proportion of which will also provide an important revenue stream for the Council.

5.13 Size and brightness: The size and width of the advertisements are subordinate to the pavement and do not dominate the immediate public realm.

5.14 The brightness of the proposed info panel and 80 inch advertisement will be set to a maximum brightness of 300 cd/m² between dusk and dawn to comply with ‘Guidance Notes for the Reduction of Obtrusive Light GN01:2011’ and its relevant publications and standards which permit a level of 300 cd/m² in a suburban or zone 3 area. The advertisements will not result in harmful levels of light pollution.

5.15 Overall the proposed advertisements are therefore considered acceptable in terms of design by reason of their size, positioning & illuminance and result in a neutral impact on the immediate area.”

21. The report concluded that it was therefore considered that the proposed development complied with “the above policies and guidance” and was recommended for approval: 6.2.

Planning consent

22. The formal “Consent to Display Advertisements” was dated 21 November 2022. The notice contained both standard and bespoke conditions. The conditions were those recommended in the Officer’s report. Four of these bespoke conditions are particularly relevant:

“7 The proposed signage/advertisement should operate at an illumination level no greater than 300 cd/m² between dusk and dawn, consistent with guidance set out in the Institute of Lighting Professionals (ILP) publication: “The Brightness of Illuminated Advertisements” (PLG05, January 2015).

Reason: In the interests of safety and to protect the visual amenities of the locality and to comply with Policies SP4 and DM12 of the Croydon Local Plan 2018.

8 The minimum display time for each advertisement shall be 10 seconds. There shall be no special effects that include noise, smell, flashing, or smoke. Full motion video is not permitted.

Reason: In the interests of safety and to protect the visual amenities of the locality and to comply with Policies SP4 and DM12 of the Croydon Local Plan 2018.

9 The interval between successive displays shall be instantaneous and the complete display screen shall change without visual effects (including fading, swiping or other animated transition methods) between each advertisement.

Reason: In the interests of safety and to protect the visual amenities of the locality and to comply with Policies SP4 and DM12 of the Croydon Local Plan 2018.

10 The free public Wi-Fi and CCTV must be managed in accordance with the agreed Valo Smart City Smart Bus Shelter Anti-Social Behaviour Management Plan (Prepared by Valo Smart City UK Ltd in Partnership with the London Borough of Croydon). The ASB management plan must remain in place for the lifetime of the device. Reason: In the interests of safety and to protect the visual amenities of the locality and to comply with Policies SP4 and DM12 of the Croydon Local Plan 2018.”

23. The Institute of Lighting Professionals’ publication referred to in condition 7, known as “PLG05”, is best practice guidance on illuminated advertisements. It seems that it is widely used by advertisers and local planning authorities. The guidance categorises an area into different zones - protected, natural, rural, suburban, and urban. The lighting environment for “suburban” is “medium district brightness”. The guidance then recommends maximum levels of luminescence for advertisements. Those recommendations depend on the size and location of the advertisement. For advertisements which measure more than 10m² in suburban locations, the maximum recommended luminance is 300 cd/m².

Claimant’s application for judicial review

24. The claimant was informed by a neighbour on Monday, 19 December 2022, that advertising consent had been given. That was about a month after it was issued. Later that week, 23 December 2023, the claimant emailed the Council to complain, stating that his legal representative would be in touch in the new year. The 6 weeks limitation

period for an application to this court expired on 2 January 2023. The claimant's current solicitors were instructed on the following day, 3 January 2023. On 17 January 2023 they sent a pre-action protocol letter to the Council, containing a suggestion for a stand still arrangement. The claim in this court was filed on 27 January and issued three days later on 31 January 2023.

Legal and policy framework

25. Advertising approval falls under the Town and Country Planning (Control of Advertisements) (England) Regulations 2007 ("the 2007 Regulations"). These are made pursuant to section 220 of the Town and Country Planning Act 1990 ("the 1990 Act"). Under section 222 of the 1990 Act, where an advertisement is displayed in accordance with the 2007 Regulations, planning permission is deemed to be granted for any development involved in the display of that advertisement.

26. Regulation 3 of the 2007 Regulations provides, in part:

“(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)—

(a) factors relevant to amenity include the general characteristics of the locality, including the presence of any feature of historic, architectural, cultural or similar interest...”

27. An application for express consent under the 2007 Regulations must be made to the local planning authority: regulation 9(1). Regulation 12 sets out the steps the local planning authority must take on receipt of an application for express consent, but this does not include neighbour consultation. Regulation 13 (the duty to consult) provides for consultation of prescribed consultees before granting express consent, but this does not include neighbours. The power to deal with applications for express consent is contained in regulation 14, which also provides for notification of the applicant. Particulars of a decision must be included on the local planning authority's register of applications: regulation 24(1)(c).

Policy

28. Policy DM12 of the Croydon Local Plan is entitled "Advertisement hoardings". It reads, in part:

“DM12.1 To ensure advertisement hoardings positively contribute to the character and appearance of existing and new streets, the Council will require advertisement hoardings to:

a. Be designed to improve the public realm;

b. Demonstrate that the rear of the signs are well designed;

- c. Reinforce the special character of heritage assets and other visually attractive parts of the borough; and d. Ensure the location and size of hoardings does not harm amenity or conflict with public safety.

DM12.2 To ensure advertisement hoardings positively contribute to the character and appearance of the building on which they are attached:

- a. The design and proportions should complement the symmetry and proportions of the host structure;
- b. They should be located where they do not obscure or destroy interesting architectural features and detailing; and
- c. They should be located where they do not cover windows or adversely impact on the functioning of the building.”

The note to these provisions, “How the policy works”, states that the Council will expect signs and their supporting structures to be of a high quality, architectural design that positively enhance their setting.

- 29. The Council’s Supplementary Planning Guidance No. 8 (“SPG8”), now withdrawn, but incorporated into explanatory notes of the Local Plan, highlights the need “to ensure advertisements are sensitively located and design [sic] to minimise the impact on residential areas...”
- 30. London Plan (2021) Policy D8 Public Realm, part B, requires proposals to ensure the public-realm is well-designed, safe, accessible, inclusive, attractive, well-connected, related to the local and historic context. It also states that “[l]ighting, including for advertisements, should be carefully considered and well-designed in order to minimise intrusive lighting infrastructure and reduce light pollution.” Part K of policy D8 requires proposals to “ensure that street clutter, including street furniture that is poorly located, unsightly, in poor condition or without a clear function is removed, to ensure that pedestrian amenity is improved. Consideration should be given to the use, design and location of street furniture so that it complements the use and function of the space. Applications which seek to introduce unnecessary street furniture should be refused.”

The Grounds

- 31. This case is about advertising, not planning consent. The replacement shelter can, in my judgment, be delivered under permitted development rights: see Class A(b) of Part 12 of Schedule 2 to the Town and Country Planning (General Permitted Development) (England) Order 2015.
- 32. There are three grounds of challenge.

Ground 1: failure to consider local development plan

- 33. The claimant contends that contrary to regulation 3(1)(a) of the 2007 Regulations, the Council acted unlawfully because it failed to consider the relevant provisions of the local development plan. DM12 requires the Council to ensure that advertising positively contributes to the character and appearance of the area, in particular that it

is designed to improve the public realm: DM12.1(a). Public amenity can include the amenity of neighbouring occupiers.

34. In considering amenity, the claimant submits, paragraphs 5.4-5.15 of the Officer's report do not even mention DM12. It is not possible to draw an inference that it did consider it when it is absent from the text. Reference to other material considerations such as London Plan (2021) Policy D8, Public Realm, which are similar, but different, cannot remedy this omission. Nor, in the claimant's submission, is there any reference to improving or positively contributing to the area or any consideration of the residential context of the site. It is simply assumed that because of the brightness standards the advertisements will not result in harmful levels of light pollution. The absence from the officer's consideration of advertising positively enhancing amenity and public safety of the area is summed up in paragraph 15.15, that there would be a "neutral impact on the immediate area." Finally, the claimant submits, the public benefits which are mentioned at paragraph 5.12 - free advertising for the Council and the "important revenue stream" - are immaterial considerations which the Council should not have taken into account.
35. In my view the Council did consider the local development plan. Conditions 7-11 in the "Consent to Display Advertisements" of 21 November 2022, which mirror the conditions recommended in the Officer's report, specifically mention DM12 - the reasons stated for imposing them are "to comply with Policies SP5 and DM12 of the Croydon Local Plan 2018". There is also the conclusion in the Officer's report; approval of the application is recommended because it complies with the policies and guidance mentioned previously in the report, and that includes DM12. As well, it seems to me that the claimant reads too much into DM12. It covers applications for both planning and advertising approval. In as much as it applies to the latter, the 2007 Regulations make clear in regulation 3(1) that it only has purchase with issues of amenity and public safety. Improving the public realm and positively enhancing the setting of advertising are only relevant in that context. Moreover, I accept the Council's submission that DM12 was considered in substance since there was consideration of policy D8 of the London Plan. It will be evident from the passages quoted earlier in the judgment that there is considerable overlap between the two as regards concern with improvements in the public realm.
36. All this is supported by horn book law that planning officers' reports to committee are not to be read with undue rigour, but with reasonable benevolence: *R (Mansell) v Tonbridge and Malling Borough Council* [2017] EWCA Civ 1314, [42], per Lindblom LJ. The same approach is to be adopted to the reports of delegated decision makers: *R (Hayes) v Wychavon District Council* [2014] EWHC 1987 (Admin), [27], per Lang J. Moreover, this law about how an officer's report is to be read disposes of the claimant's argument that paragraph 5.12 of this Officer's report, especially the reference to an income stream, demonstrated that the Council took into account irrelevant considerations. A benevolent reading of the report is that this constitutes instead descriptive material and background information about the advantages of the new digital advertising. There is no reference to this material when the officer sums up at paragraph 5.15 and the argument about immaterial considerations goes nowhere.

Ground 2: failure to assess the site

37. This ground has the greatest resonance with what would be the concern of a resident with a new bus shelter and advertising outside their home. Did the Council conduct a specific assessment of the impact of granting consent at that site? The claimant says it failed to do so contrary to what was said in the pre-application report at paragraph 6.4, where Members were advised that the detailed design would respond to the specific characteristics of each individual site, paragraph 6.15, which referred to a site-by-site analysis, and paragraph 6.33, which explained the need for a full assessment at each individual site of the change in illumination with the new digital advertising. In general terms, the claimant submitted, the report recognised that the impact on neighbourhood amenity was a critical consideration.
38. Yet, in the claimant's submission, none of this was done. As a matter of law the claimant characterises this omission in different ways - as ignoring an obviously material consideration (the changed illumination), as breaching the Council's *Tameside* duty ([1977] A.C. 1014, 1065A, per Lord Diplock) (duty to inquire as to whether there was a positive contribution to amenity), and as failing to offer adequate reasons (regarding amenity enhancement).
39. The Council downplays the pre-application report because it was produced at a very early stage in the planning process, was not endorsed by Members, and was not binding as the future. I express no final view on that submission. It was, after all, the only public document about this new scheme for advertising around the Borough. The better argument is that the language of the pre-application report does not go as far as the claimant would like. Paragraph 6.4 is concerned with the principle of the advertisements, not detailed design; paragraph 6.15 addresses design, but as an issue which could be resolved at the pre-application stage; and paragraph 6.33 explains the varying approach between applications in different locations.
40. Most important in my view is that the Officer's report grapples with the level of illumination for this site by reference to PLG05 and what was appropriate in a suburban (or zone 3) area. In other words, the Council used best practice to determine as a matter of planning judgment the degree of illumination which it would approve at this specific location. In my view this puts paid to the claimant's submissions about material considerations, the *Tameside* duty, and reasons. That is especially the case when the illumination with the new digital advertising was being addressed in a context where there was back-lit advertising previously. I accept the Council's submission that there was a site specific assessment.
41. In the course of submissions the claimant cited *New World Payphones Ltd v Westminster City Council* [2019] EWCA Civ 2250. There it was held that a telephone kiosk replacing two existing kiosks did not fall within the scope of development permitted by the Town and Country Planning (General Permitted Development) (England) Order 2015 since its illuminated advertisement display panel had the dual purpose of providing both electronic communications and advertising: [48]-[49]. The case has no application in this context since the advertising here does not depend on permitted development rights.

Ground 3: failure to consult

42. Ground 3 is that the Council's decision was unlawful because it failed to consult the claimant. The duty to consult arose because there was a legitimate expectation that he

would be consulted. At the hearing the claimant only faintly pressed past practice as a basis for this; it was over 25 years previously when the Council consulted him about the previous bus shelter and full details of this were absent.

43. Rather the claimant founded legitimate expectation on part 3 of the Council's Statement of Community Involvement ("SCI") in November 2018 headed "Planning applications". It stated at paragraph 3.1 that it was vital that the community and stakeholders were involved in making decisions. Planning law required that there be consultation, as set out in the Planning Practice Guidance, but as well, paragraph 3.1 adds: "Community involvement can also help shape proposals so that they are more acceptable and appropriate..." Table 2 of the SCI provides for site notices and then for "neighbour notifications". Under the latter heading Table 2 states that as well as the neighbour notification letter sent to neighbours in accordance with the Town and Country Planning (Development Management Procedure) (England) Order 2015,

"the Council has decided that it will widen the scope of consultation as appropriate and on a case by case basis, especially where development might be of interest to those living on the opposite side of the street. The Council also adopts a pragmatic approach and notifies residents where they are separated by a public footpath or a rear access road."

44. In this case, the claimant submitted, it was unfair not to have consulted him. In the claimant's submission, the issue to be determined was the impact of the consent on the amenity of the area, and the persons in the best position to comment on that point were those who stood to lose the most from the application, the neighbours in the vicinity of the site. The advertisement at the replacement bus shelter was abutting the claimant's property, and clearly he was affected above and beyond the residents in general.
45. In my view there has been no clear, unambiguous, and unqualified undertaking that the Council will consult leading to a legitimate expectation that it would occur in this case. The SCI is dealing with applications for planning permission, not advertising consent, and even if the latter can be regarded as "quasi-planning" there is not a clear, unambiguous, and unqualified assurance that it falls within the SCI which is needed to found a legitimate expectation. In any event it leaves the Council considerable discretion as to when to notify. Cases such as *R (on the application of Majed) v Camden LBC* [2009] EWCA Civ 1029 and *R (on the application of Velayuthan) v Southwark LBC* [2023] EWHC 1396 (Admin) simply do not apply.
46. As to conspicuous unfairness as a basis the duty to consult the claimant, this will only arise in "exceptional cases": see *R (Plantagenet Alliance) v Secretary of State for Justice* [2014] EWHC 1662 (Admin), [98]. I accept the Council's submissions that this is not an exceptional case: it is routine case of advertising along with a replacement bus shelter, where previously there had been a bus shelter and advertising, albeit in a different format. As well there is nothing exceptional in the location, a suburban area; in the bus shelter itself; in the claimant's house and its surrounds; and in the absence of public consultation.

Application for extension of time

47. Given the conclusions reached on the three grounds, there is no need to consider the issue of the late filing of the application and whether an extension of time should be granted.

Conclusion

48. For the reasons given, although I grant permission I dismiss the claim and the claimant must pay the council's costs.