



Neutral Citation Number: [2013] UKUT 0600 (AAC)

**Appeal No.** T/2013/38

**IN THE UPPER TRIBUNAL  
ADMINISTRATIVE APPEALS CHAMBER  
TRAFFIC COMMISSIONER APPEALS**

**ON APPEAL from the DECISION of Nick Denton TRAFFIC COMMISSIONER for  
London and the South East of England  
Dated 4 June 2013**

**Before:**

**His Hon Michael Brodrick,  
Stuart James,  
Andrew Guest,**

**Judge of the Upper Tribunal  
Member of the Upper Tribunal  
Member of the Upper Tribunal**

**Appellant:**

**HOBART COURT PROPERTY MANAGEMENT LIMITED**

**-v-**

**Respondents:**

**JOHN KENT and VALERIE KENT**

**Attendances:** For the Appellant: Jim Marsh AITAC Consultancy

**Heard at:** Field House, 15-25 Bream's Buildings, London, EC4A 1DZ  
**Date of hearing:** 8 October 2013  
**Date of decision:** 26 November 2013

**DECISION OF THE UPPER TRIBUNAL**

IT IS HEREBY ORDERED that this appeal be ALLOWED. The application to add a second authorised vehicle is granted subject to the following additional conditions:

- (i) Any vehicle authorised under the operator's licence shall be parked at the operating centre in the area between Rock Lane and a straight line extending to the north along the line of the west wall of the building immediately to the south of West Wood, (i.e. the straight line shown on the aerial photograph at page 109 of the appeal bundle, which is annexed to this decision).

- (ii) Save in emergencies, or on an occasional basis, there shall be no more than 4 movements of authorised vehicles per day. Taking an authorised vehicle out of the operating centre counts as one movement, returning it to the operating centre counts as another movement.
- (iii) In emergencies and/or on an occasional basis the Appellant is permitted to make no more than 8 movements in any one day.
- (iv) On each and every occasion on which 5 or more movements are made on the same day a written record shall be made of the 5<sup>th</sup> and each succeeding movement. The written record shall state the date and time of each such movement and the reason for the movement.
- (v) On each and every occasion on which 5 or more movements are made on the same day the written record shall be submitted to the Traffic Commissioner within 14 days of each date on which 5 or more movements take place.

**SUBJECT MATTER:-** Operating Centre, environmental issues.

**CASES REFERRED TO:-**

## REASONS FOR DECISION

1. This is an appeal from the decision of the Traffic Commissioner for London and the South East of England to refuse the Appellant's application to add one additional vehicle to its operator's licence
2. The factual background to this appeal appears from the documents and the Traffic Commissioner's decision and is as follows:-
  - (i) The Appellant is the holder of a restricted goods vehicle operator's licence authorising one vehicle. The licence was granted on 27 November 2009, subject to a number of conditions.
  - (ii) The authorised operating centre used by the Appellant is at Bumpkin Shaw Yard, Rock Lane, Hastings, ("the Yard").
  - (iii) The Appellant's predecessors at the Yard were Absolute Scaffolding Services Ltd. ("Absolute Scaffolding"). Their application to use the Yard as an operating centre was rejected at a Public Inquiry following opposition from local residents and Rother District Council. However the application was granted, subject to conditions, following an appeal to the Transport Tribunal. In its decision the Tribunal referred to the long and acrimonious history of the site and to strained relationships between neighbours. The Tribunal also said this: *"It is also apparent to us that the location and configuration of the site are unlikely to make it suitable for more vehicles to be based there. We do not see our decision as 'the thin end of the wedge' leading to future expansion"*.
  - (iv) Absolute Scaffolding moved to a different operating centre and the Appellant then applied to use the Yard as its operating centre. Following an advertisement in the paper used by Absolute Scaffolding no representations or objections were received. The Appellant was granted an operator's licence subject to the first four of the conditions, which had been attached to the licence granted to Absolute Scaffolding.
  - (v) Those conditions were: (a) that the entrance to the operating centre was to be kept clear at all times, (b) that the authorised vehicle was limited to 7.5 tonnes, (c) a restriction preventing operation, movement, loading or unloading of the authorised vehicle before 0800 or after 1800, Mondays to Fridays, or before 0800 or after 1230 on Saturdays, except in emergencies coupled with a complete ban on Sundays and Public Holidays and (d) that no vehicle maintenance was to take place at the operating centre. The conditions attached to the operator's licence granted to Absolute Scaffolding but omitted from the operator's licence granted to the Appellant were that the authorised vehicle should be parked on the eastern side of the site and that movements should be limited to two per day Monday to Saturday, one outbound and one inbound, except in emergencies.
  - (vi) In June 2012 the Appellant applied to vary the licence to authorise the use of a second vehicle. This application attracted representations from the Respondents and from Mr R D Gray.

- (vii) The Respondents live at West Wood, Rock Lane, Guestling, East Sussex. That property lies to the North of the Yard. When standing in Rock Lane facing into the Yard it is the adjoining property on the right hand side of the Yard. It follows that the two properties share a common boundary. The location of the properties can be seen from the aerial photograph at page 109 in the appeal bundle, (which is annexed to this decision). The boundary has been the subject of dispute and litigation over a period of many years.
- (viii) Mr Gray lives at Oaklands, the property on the far side of West Wood to the Yard.
- (ix) The representations made by the Respondents asserted that the Appellant's vehicle drove over their land to "*park load and unload West of the storage shed*", that conditions attached to the licence had been broken and that vehicles other than the authorised vehicle had been parked at the Yard. The most important part of this representation was that an additional vehicle: "*will result in yet more noise, fumes and vibration*". The Respondents urged the Traffic Commissioner to use his powers to prevent vehicles from using the Yard in a way that trespassed on their land. They also made detailed comments about what were said to be unlawful activities in relation to planning laws.
- (x) The representations made by Mr and Mrs Gray also referred to additional noise, fumes and vibration. In addition it raised matters relating to the nature of the use to which the Yard was being put and whether or not it came within the terms of a Certificate of Lawful use issued in respect of the Yard.
- (xi) The Appellant responded to these representations saying that the use of an additional vehicle would have a minimal impact on the environment and neighbours and "*will lessen vehicle movements*". In a later response the Appellant explained that as there would only be one driver for the two vehicles it was very unlikely that both would be used on the same day, hence there should be no extra nuisance.
- (xii) On 17 October 2012 a Traffic Examiner visited the Yard. His conclusion was that the number of vehicles authorised could be increased to two provided that the permitted hours of operation were imposed as a condition. In particular he said that: "*There is adequate room for parking and manoeuvring the two 7.5 tonne rigid HGV's that Mr Pearson has in possession*". The Traffic Examiner also pointed out that the movements and use of an authorised vehicle can be restricted, by conditions, whereas vehicles based elsewhere would have unrestricted access at all times.
- (xiii) On 27 March 2013 the Appellant was called to a Public Inquiry at which the application for an additional vehicle was to be considered. The letter set out the relevant statutory provisions and made it clear that prior to the Public Inquiry the Traffic Commissioner "*will usually visit the proposed operating centre so that he can see the site for himself and take his own observations into account when considering its suitability*". The Appellant was warned that the Traffic Commissioner would consider whether to take action in relation to the alleged breaches of the conditions attached to the licence.

- (xiv) The Public Inquiry took place before the Traffic Commissioner on 9 May 2013. The Appellant was represented by Mr Carless. The Traffic Examiner was present and the Respondents appeared in person, as Representors.
- (xv) The Traffic Commissioner began by explaining that the purpose of the Public Inquiry was to examine the environmental impact of the application for a second authorised vehicle. He indicated that this involved considering the impact of noise, visual intrusion, vibration, emissions and road safety, but only up to the point where vehicles leave the operating centre and join the public road. The Traffic Commissioner went on to say: *“Those are the issues that we are looking at today. I am aware that there are a whole raft of other issues but they are not in my powers to decide or opine on”*. The Traffic Commissioner then explained the procedure, which he intended to follow.
- (xvi) Mr Pearson, a director of the Appellant company, gave evidence. He explained that the Appellant managed properties, carried out maintenance and repair work, cleared rubbish and supplied building materials and scaffolding using the Yard as the base for such work. He said that the Yard had a Lawful Use Certificate permitting use for storage and distribution of plant, scaffolding and building materials and planning permission for an office on the first floor of the workshop. He added that the Appellant is registered as a Waste Carrier.
- (xvii) Mr Pearson said that the authorised vehicle was a 7.5 tonne rigid tipper truck. He said that he had purchased a second vehicle, which was also parked on site. He had assumed that adding a second vehicle to the authorisation would be straightforward. The second vehicle was a ‘beavertail’, which would be used for transporting plant to and from the Yard within a radius of 25-50 miles from the Yard. He accepted that on occasions the use of the beavertail might involve a second journey, the first being to deliver plant, using the beavertail and the second, after returning the beavertail, being a journey using the tipper truck.
- (xviii) Mr Pearson was asked about emergencies. He said that there had been one or perhaps two over the last 5 years. He gave, as an example, the need to replace a piece of damaged scaffolding.
- (xix) Mr Pearson said that save for the odd occasion when the person concerned was unaware of the condition the entrance to the Yard was kept clear at all times. He added that if he did see someone park there he would ask them to move. He said that the Appellant had complied with the weight limit of 7.5 tonnes. He accepted that some repairs might have been carried out, for example changing a flat tyre or replacing a light bulb, but apart from such emergencies he said that the condition relating to maintenance had been complied with.
- (xx) Mr Pearson was then questioned about allegations that maintenance operations had caused an oil spillage. He accepted that there had been a spillage but denied that it was caused by maintenance. He said that it had been investigated by the Environment Agency who concluded that it might have been a case of malicious damage or theft of fuel from a vehicle. He added that the vehicle in question, an

excavator, had been moved off the site so that the source of the contamination had been removed.

- (xxi) The allegation that Mr Pearson started up one or more noisy and smoky diesel engines early in the morning and ran them all day was then put to him. He replied that he did use plant and machinery on the site and he accepted that some of it did smoke. He added that the lorry had to be started and run in the morning in order to build up pressure for the brakes and while a walk round check took place. He said that this would take 5 minutes but was pressed as to whether the walk round checks could be completed so quickly.
- (xxii) When questioned by the Traffic Commissioner Mr Pearson explained that there were times when he had to pay for a lorry to collect or deliver items of plant from the Yard, whereas if he was authorised to use the beavertail for that purpose it would save the additional cost without adding to the overall number of vehicle movements. He added that the cost saving would mean that he could be more competitive when quoting for smaller jobs.
- (xxiii) Mr Pearson was asked where the additional vehicle would be parked. He replied "*behind the building*". This appears to mean on the far side of the building to the entrance to the Yard. He was then asked about 'Zone 1' the area in which the Local Authority had permitted parking. He said that Zone 1 began at Rock Lane and extended for 27 metres into the site from the road, and included the position where the vehicle was parked.
- (xxiv) Mr Kent then gave evidence. It quickly became apparent that there was a dispute as to whether or not Mr Pearson had planning permission for the workshop or storage shed. The Traffic Commissioner asked for the number of the planning application so that he could make his own inquiries but he went on to question the relevance of this issue to the question he had to decide.
- (xxv) Mr Kent turned to the question of the oil spillage claiming that diesel fuel was stored at the Yard in 40 gallon drums without a bund. He asserted that some of the spillage came from these drums. At this point the Traffic Commissioner intervened to make it clear that this was a matter for the Council or the Environment Agency and not something over which he had any jurisdiction.
- (xxvi) Mr Kent then challenged Mr Pearson's assertion that the vehicle was parked within the area designated by the Local Authority for parking. Unfortunately the plan to which Mr Kent referred was not clearly identified but it appears to be the plan at page 97 of the Appeal bundle, forming part of a Planning Agreement dated 31 August 2000. The relevant paragraph of the agreement is 3.1.3 which says that: "*parking and plant are only to be located to the east of the Green Line with the exception of the Timer Rack and Storage Hut which shall not be replaced or reinstated*". Page 97 is copied in black and white but in evidence Mr Kent described it as a 'dotted line'. The only relevant dotted line on page 97 runs across the Yard just to the west of the wall of the building. The effect of paragraph 3.1.3 appears to be, judging by the plan, that the Local Authority have only given permission for parking between Rock Road and the furthest wall of the building, but have not permitted it behind the building. Mr Pearson was asked for his comment and he replied that the Local

Authority had written to him to say that he had permission to park up to 27 metres away from Rock Road. However he was unable to produce the letter. He said that he had not considered it to be relevant to the Public Inquiry.

- (xxvii) After further inconclusive discussion the Traffic Commissioner made the point that while he was not going to deal with disputed planning issues it was perfectly legitimate to take into account that the Appellant's vehicle or vehicles would need to be parked where there was planning permission to park. Mr Pearson then said that he would be happy to park in front of the building if that was more convenient for the Respondents. Mr Kent agreed that this was a way forward. The Traffic Commissioner made it clear that he was concerned with vehicles not plant. However Mr Pearson went on to make it clear that he was referring to the additional vehicle not to both at which point Mr Kent said that he objected to Mr Pearson breaking the law in any way. The Traffic Commissioner then made it clear that it was not his responsibility to adjudicate on the property dispute. Nevertheless the Respondents went on to rehearse several of the allegations, which featured in the boundary dispute, accompanied by unsubstantiated personal allegations against Mr Pearson. In the end the Traffic Commissioner was obliged to tell the Respondents that he would have to ask them to leave if they carried on in the same vein. He decided to have a short break and suggested that anyone who was not prepared to behave rationally and keep to the point should not return.
- (xxviii) After a short break the Traffic Commissioner reminded Mr Carless of paragraph 17 of the Senior Traffic Commissioner's Statutory Document No. 4 indicating that information about any planning permission relating to an operating centre or proposed operating centre is a relevant consideration.
- (xxix) The Traffic Commissioner then indicated to Mr Kent that he would give him one more opportunity to speak about the real issue, namely the additional environmental impact of an extra vehicle. Mr Kent replied that the vehicle already authorised was too much for him and his wife so that a second one would be two too much. When pressed to give more detail he simply said that the application had been made: *"to be a nuisance to us"*.
- (xxx) An attempt to clarify where authorised vehicles would park led to further inconclusive discussion. Mr Pearson claimed that it would not be possible to park between the building and the road because of the storage containers currently in that area. He said that the planners wanted them sited there. On the other hand Mr Kent claimed that he had been told to remove one of them from the site.
- (xxxi) The Traffic Commissioner then called the Traffic Examiner to give evidence. He said that there was sufficient space in the yard for two authorised vehicles so that the real issue was the environmental impact. When Mr Kent began to cross examine the Traffic Examiner the Traffic Commissioner was compelled to intervene in an attempt to steer Mr Kent away from disputed planning and property issues.
- (xxxii) In answer to Mr Carless the Traffic Examiner agreed that a beavertail vehicle would be unlikely to make more noise than a tipper lorry. He agreed that there might be some advantage to the Respondents if a

vehicle was parked at the side of the building rather than behind it but he also pointed out disadvantages. Mr Kent interposed to say that while there were no windows in the side of his house facing the building there was a sloping roof and noise travelled though the roof.

- (xxxiii) After further exchanges generating more heat than light the Traffic Commissioner observed that he had better bring matters to a close because there was going to be no meeting of minds on the matter. He indicated that he would give a written decision.
- (xxxiv) On 15 May 2013 the Appellant wrote to the Traffic Commissioner enclosing a number of documents intended to confirm points, which he had made in the course of the Public Inquiry.
- (xxxv) The Traffic Commissioner gave a written decision dated 4 June 2013. He set out the history of the use of the Yard as an operating centre and referred to the evidence which we have summarised above. He pointed out that one of the conditions attached to the operator's licence granted to Absolute Scaffolding was that the authorised vehicle: *"shall be parked on the eastern side of the site"*. He went on to state that that condition had not been included when the Appellant was granted an operator's licence because no objections or representations had been received in response to the Appellant's application.
- (xxxvi) The Traffic Commissioner referred to his site visit on the evening of 8 May 2013. He said that at the time of his visit both the authorised vehicle and the beavertail were parked to the west of the building.
- (xxxvii) The Traffic Commissioner then dealt with the allegations that the Appellant company had breached one or more of the conditions attached to the licence. The Traffic Commissioner concluded that no breach of any of the conditions was made out on the evidence. He then turned to the application itself and said: *"I am satisfied, on the balance of probability, that allowing an additional vehicle to operate from the parking location where it is currently stored (in an inoperable condition) would amount to a real interference with the Kents' comfort or convenience of living and the enjoyment of property according to the standards of the average person and that these effects outweigh the legitimate commercial interests of the applicant"*.
- (xxxviii) The Traffic Commissioner went on to give six reasons for reaching this conclusion. First, he pointed out that the absence of any condition restricting parking meant that there was a real interference with the Respondents' comfort and convenience and their enjoyment of their property as a result of the fumes and noise from the authorised vehicle, which would be exacerbated by a second vehicle. Second, he relied on the passage in the Tribunal's decision in the Absolute Scaffolding appeal which we have quoted at paragraph 2(iii) above. Third, he said that he was not persuaded by the argument that the position of the Respondents would be worse were the additional vehicle to be based at another operating centre. Fourth, he referred to the issues in relation to planning permission. He indicated that he had made an approach to Rother District Council and had been provided with a copy of the Planning agreement and the plan attached to it. He said that the Council had confirmed that the green line on the plan had been defined as 27 metres from the boundary with Rock Lane. The Traffic Commissioner went on to say: *"It is*

*apparent from my observations and the photographs in the traffic examiner's report that Mr Pearson is currently parking vehicles west of the green line (ie more than 27 metres from Rock Lane) in breach of this obligation".* Fifth, the Traffic Commissioner took into account that if the variation was granted there was nothing to prevent both vehicles being used on the same day. Sixth, the Traffic Commissioner referred to an offer by Mr Pearson to erect a wooden fence pointing out that it was unlikely, in itself, to be sufficient to contain vehicle noise and emissions from within the yard.

- (xxxix) The Traffic Commissioner went on to say that despite the first five of these points: *"I might still have been prepared to grant the application if Hobart Court had agreed to the proposed condition that it park the two vehicles east of the office shed (between the office and Rock Lane). This is the location which is furthest from the Kent's bungalow and bedroom and the one where they are least likely to be affected by noise, vibration and emissions from vehicles warming up in the morning. The Kents were prepared to accept such a solution and the location was indeed suggested by the Traffic Examiner as being the most suitable one. In effect this was the lost condition (v) of the Upper Tribunal's decision 2008/542 on the licence of Absolute Scaffolding. The solution would have been in conformity with the permissions granted by the Local Authority. However Mr Pearson said that parking his vehicles there would not be possible as it was already the location of two containers parked in his yard and therefore he could not accept the proposal".*
- (xl) On the basis that parking and operating two vehicles on the west side of the building would cause additional nuisance to the Kents amounting to a real interference with their comfort and standard of living the Traffic Commissioner refused the application.
- (xli) On 14 June 2013 the Appellant appealed against this decision. The original grounds of appeal appear to be set out in a letter from Mr Pearson, attached to the Notice of Appeal in which he invited the Traffic Commissioner to review his decision. In summary terms the points raised were: (i) concern that Mr Kent had contacted the Traffic Commissioner in advance of the Public Inquiry, (ii) the absence of any complaint that two of the conditions attached to the licence held by Absolute Scaffolding had been omitted from the Appellants' licence, (iii) the views of the Traffic Examiner, who had visited the site, contradicted those of the Tribunal, who had not done so, (iv) the fact that the Traffic Commissioner had visited the site without notice and whether he had a sufficient view of the site, (v) a challenge to the evidential basis for the finding of an environmental impact, (vi) reiteration of the fact that Mr Pearson was the only driver, (vii) confirmation that Mr Pearson had made contact with Leeds about the addition of another vehicle, (viii) failure to mention threats and abuse on the part of the Kents, (ix) a dispute about the effectiveness of the proposed solution, (x) failure to take into account that the Kents opposed any movement of vehicles in the Yard, (xi) a dispute as to whether the Traffic Commissioner was correct to conclude that at the time of his site visit both vehicles were parked outside the area for which planning permission for parking had been granted, (xii) a dispute as to whether the proposed solution would be an effective solution.

- (xlii) On 1 October 2013 Mr Kent provided the Tribunal with a substantial bundle of documents. He had earlier been informed of the nature of the appeal and the limitations to which the Tribunal was subject in relation to the admission of fresh evidence and the fact that the Tribunal cannot take into account any circumstance not in existence at the date of the decision which is the subject of the appeal. The last sentence of page 1 of Mr Kent's comments states: "*Very few of the available physical documents however were actually before the Traffic Commissioner*". In addition it is clear that some of the documents are dated after 4<sup>th</sup> June 2013. It follows that the material in this bundle must be approached with caution.
  - (xliii) The Tribunal was provided with copies of some other letters. We acknowledge that we have seen them but as they are both irrelevant and unhelpful we do not propose to make further reference to them.
  - (xliv) The Respondents explained that for various reasons, which we understand and accept, they felt unable to attend the hearing.
3. At the hearing of the appeal the Appellant was represented by Jim March of AITAC consulting. He sought and was granted permission to put forward amended grounds of appeal. These were accompanied by a helpful skeleton argument for which we were grateful. These two documents focussed on two points, first the conduct of the Public Inquiry and second the reasons given by the Traffic Commissioner for his decision.
  4. In relation to the conduct of the Public Inquiry Mr Marsh submitted that the Respondents were permitted to introduce too much irrelevant material and that they were not prevented from making defamatory and abusive comments directed at Mr Pearson.
  5. We acknowledge at once that the Traffic Commissioner faced a very difficult task. Fortunately it would appear that he appreciated from the outset that this would be the case and prepared accordingly. Very sensibly he set out the limitations of his authority at the start of the Public Inquiry, (see paragraph 2(xv) above). Achieving the right balance between allowing someone to 'have their say' about relevant matters, while excluding irrelevant matters, is not an exact science. A Traffic Commissioner who intervenes too soon runs the risk of valid criticism for preventing the witness from making a relevant point. A Traffic Commissioner who intervenes too late runs the risk of being swamped by irrelevant material because such a Public Inquiry is likely to degenerate into a free for all. A Traffic Commissioner who intervenes at the earliest practical opportunity after it becomes clear that irrelevant material is being introduced is likely to achieve a fair balance. The fact that the Traffic Commissioner has intervened in order to exclude irrelevant material should itself provide a clear indication to the other party that the irrelevant material will not be taken into account.
  6. In our view the Traffic Commissioner is to be commended rather than criticised for his conduct of this Public Inquiry. Setting out the issues and the fact that his powers in relation to the proposed Operating Centre were limited, and doing so at the very start of the Public Inquiry, was the correct and sensible way in which to begin. Thereafter he faced the difficulty that Mr Kent, in particular, was either unable or unwilling to accept that the Traffic Commissioner could not resolve disputed property or planning issues, nor could he determine who was responsible for the oil spillage. In our view the Traffic Commissioner intervened appropriately and in a way that should have made it clear that he would exclude irrelevant considerations from his mind when reaching a

decision. He sought to protect Mr Pearson from the personal comments made by Mr Kent, which appear to have been no more than unsubstantiated assertions. But it is unrealistic to expect him to have read Mr Kent's mind and to have intervened before the offending words were spoken. We accept that 'in the heat of battle' at the Public Inquiry some of the comments riled Mr Pearson to the point where he too began to stray from the real issues. As we have indicated a time came when the Traffic Commissioner, rightly in our view, decided that it would be sensible to have a short break. Sadly the effect was only temporary.

7. We are satisfied that the criticisms of the way in which the Public Inquiry was conducted are unfounded. This ground of appeal is rejected.
8. However before we leave this topic it may assist the conduct of future Public Inquiries if we reiterate a number of general points, which the Tribunal has made from time to time in earlier decisions. The starting point is that Traffic Commissioners have been created by Parliament to exercise powers, granted to them by Parliament, in relation to the operation of HGVs and PSVs. These powers do not extend to resolving disputed questions of property law, whether concerning ownership, boundaries, rights of way or any other issue. They do not extend to deciding whether planning permission would or should be granted for activity on land to be used as an operating centre. Nor do they extend to deciding who is responsible for a criminal offence or for an environmental incident. In each of these situations responsibility for taking any relevant decision lies with the relevant court, local authority, Police Force or Environment Agency. Where such a body has reached a decision a Public Inquiry must not be used as an opportunity to air the dispute all over again because it is not the appropriate venue for an appeal against the original decision. Instead where any of these issues has been decided the Traffic Commissioner and the parties should proceed on the basis that the decision is correct unless and until it has been shown to have been changed by a body lawfully entitled to determine an appeal from the original decision. Those who cannot or will not refrain from inviting Traffic Commissioners to make decisions in these areas must expect to be told, if necessary in forceful terms, that they are introducing irrelevant material which the Traffic Commissioner is not entitled to take into account.
9. This approach can be illustrated by one aspect of the present case. The Planning Agreement in relation to the Yard permitted parking in the area defined by clause 3.1.3 and by reference to a plan. Subject to clarification as to the precise area covered the parties were bound to accept that there was planning permission to park in that area. It follows, in our view, that it would have been wrong for the Traffic Commissioner to grant an operator's licence permitting authorised vehicles to park in an area falling outside that for which planning permission for parking had been granted. On the other hand it would have been open to the Traffic Commissioner, given the different considerations which he had to take into account, to grant an operator's licence subject to a condition that authorised vehicles must be parked in a particular part of the area for which planning permission had been granted. Of course a Traffic Commissioner who took such a course ought to explain why the condition was more restrictive than the planning permission.
10. Mr Marsh's criticism of the Traffic Commissioner's reasoning can be considered under two different headings. The first concerns his failure to give adequate reasons for his findings that a second vehicle would cause additional nuisance, coupled with a failure to take various other factors into account. The second concerns his approach to the Planning Authority, after the conclusion of

the Public Inquiry, and his failure to give the Appellant and the Respondents an opportunity to comment on the information he had been given. We will consider the second point first.

11. In doing so we begin with a general point of wider application. In our view the Traffic Commissioner was not well-served by the state of the papers in this case. We have annexed to this decision the aerial photograph, (page 109 of the appeal bundle) and a plan annexed to the Planning Agreement, (page 97 of the appeal bundle), because they illustrate the point. While the relevant properties are all clearly marked on the aerial photograph it would have been helpful if the points of the compass had been shown, particularly because the Planning Agreement refers to them, and it would have made a written description easier to follow. There are three lines on the aerial photograph. The photograph has been copied in black and white so there is nothing to indicate whether the lines are coloured and nothing to indicate their significance. Page 97 is also in black and white. It too lacks any orientation, which is unfortunate given that clause 3.1.3 of the Planning Agreement refers to parking and plant being located to the east of the green line. A dotted line has been marked on the far, (or west), side of the building to Rock Lane. The Public Inquiry clearly proceeded on the basis that this was the green line to which clause 3.1.3 referred. It would have been helpful if this had been made clear and it would have been helpful if its exact position had been shown. In his evidence Mr Pearson maintained that under the Planning Agreement parking was permitted in an area no more than 27 metres from Rock Lane. It would have been helpful to have had a plan marked with a line 27 metres from Rock Lane. The Planning Authority appear to think that this corresponds with the green line on the plan, whereas Mr Pearson believes that 27 meters allowed him to park on the west side of the building. A scale plan with the building and a line 27 metres from Rock Lane would have resolved this discrepancy.
12. In the course of the Public Inquiry the Traffic Commissioner invited Mr Pearson to submit evidence that he had planning permission to park to the west of the building. Mr Pearson did submit some documents relating to planning but they did not include an answer to this request. As a result the Traffic Commissioner decided to approach Rother District Council himself. The Council confirmed their interpretation of the Planning Agreement, namely that the green line on the plan marked a line 27 metres from Rock Lane. As a result the Traffic Commissioner took the view that the Appellant did not have planning permission to park vehicles to the west of the building.
13. The first question which we must consider is whether the Traffic Commissioner was entitled to approach Rother District Council after the conclusion of the Public Inquiry? In answering that question it is important to bear in mind the sequence of events. The Traffic Commissioner began, correctly in our view, by giving Mr Pearson an opportunity to provide this additional evidence. It was only after the Traffic Commissioner had not been provided with this material that he made his own inquiries. In our judgment having asked for this material but not received it the Traffic Commissioner was fully entitled to make his own inquiries. Having done so and having as he clearly thought achieved important clarification of an important issue the question is what should the Traffic Commissioner have done next? In our view the answer is clear, he should have asked himself whether it was necessary to give the Appellant and the Respondents an opportunity to comment on and/or challenge the clarification he had been given. Quite apart from anything else this might have resulted in

a re-consideration by Mr Pearson of the area in which he was permitted to park.

14. In our view where the new material goes to an important issue in the Public Inquiry the only fair course is to provide an opportunity to comment on and/or challenge any new material that the Traffic Commissioner is intending to take into account. It seems to us that initially, at least, the Traffic Commissioner would have been entitled to ask for written comments. If they revealed a dispute as to the position of a line 27 metres from Rock Lane it might have been sensible for the Traffic Examiner to be asked to attend with the parties to measure it and to produce a properly marked plan. We can well understand that the Traffic Commissioner would have wished to avoid re-convening the Public Inquiry in order to deal with this point. However that might have been necessary if one or both of the parties insisted.
15. In our view the Traffic Commissioner was plainly wrong in failing to give the parties the opportunity to comment on the information he had received from Rother District Council. For that reason the appeal must be allowed. Having reached that conclusion we do not need to consider the other main ground of appeal. We would simply say in relation to the criticism that the Traffic Commissioner visited the site unannounced (a) that the call-up letter made it clear that he was likely to visit the site and (b) that he was entitled to take the view that an unannounced visit might be more instructive.
16. As a result we must decide how to exercise the powers set out in paragraph 17(2) of Schedule 4 to the Transport Act 1985. That sub-paragraph enables us either to *“make such order as we think fit”* or to *“remit the matter for rehearing and determination by the commissioner in any case where the tribunal considers it appropriate”*. Given the history of this matter and having read the transcript of the Public Inquiry with care we are satisfied that it is not appropriate to remit this matter. Instead, having regard to the submissions made by Mr Marsh, which recognised that the parking arrangements for the authorised vehicles must comply with the terms of the planning permission we intend to exercise the power to make such order as we think fit.
17. We allow the appeal and grant the application for authority to operate a second vehicle. We do so subject to the following additional conditions, which apply to both authorised vehicles. For the avoidance of doubt all the conditions attached when the licence was granted also apply in respect of both authorised vehicles. The additional conditions are these:
  - (i) Any vehicle authorised under the operator’s licence shall be parked at the operating centre in the area between Rock Lane and a straight line extending to the north along the line of the west wall of the building immediately to the south of West Wood, (i.e. the straight line shown on the aerial photograph at page 109 of the appeal bundle, which is annexed to this decision).
  - (ii) Save in emergencies, or on an occasional basis, there shall be no more than 4 movements of authorised vehicles per day. Taking an authorised vehicle out of the operating centre counts as one movement, returning it to the operating centre counts as another movement.
  - (iii) In emergencies and on an occasional basis the Appellant is permitted to make no more than 8 movements in any one day.

- (iv) On each and every occasion on which 5 or more movements are made on the same day a written record shall be made of the 5<sup>th</sup> and each succeeding movement. The written record shall state the date and time of each such movement and the reason for the movement.
- (v) On each and every occasion on which 5 or more movements are made on the same day the written record shall be submitted to the Traffic Commissioner within 14 days of each date on which 5 or more movements take place.

*Michael Brodrick.*

**His Hon. Michael Brodrick, Judge of the Upper Tribunal,  
Principal Judge for Traffic Commissioner Appeals, President of the  
Transport Tribunal.  
26 November 2013**



