Neutral Citation Number: [2016] EWHC 1855 (Admin)

Case No: CO/962/2016

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/07/2016

Before :

MR JUSTICE GILBART
Between :

THE QUEEN **on the application of** **WORKING TITLE FILMS LIMITED**	**Claimant**
and	
WESTMINSTER CITY COUNCIL	**Defendant**
and	
MOXON STREET RESIDENTIAL (LUXEMBOURG) SARL	**Interested Party**

(Transcript of the Handed Down Judgment of

WordWave International Limited

Trading as DTI

165 Fleet Street, London EC4A 2DY

Tel No: 020 7404 1400, Fax No: 020 7831 8838

Official Shorthand Writers to the Court)

Alexander Booth QC and ***Rebecca Clutten*** (instructed by **K and L Gates LLP, Solicitors of London**) for the **Claimant**
Saira Kabir Sheikh QC and ***Charles Streeten*** (instructed by **Tri Borough Shared Legal Services**) for the **Defendant**
Russell Harris QC and Richard Turney (instructed by **Linklaters LLP, Solicitors of London)** for the **Interested Party**

Hearing dates: 28th June 2016

Judgment

As Approved by the Court

GILBART J :

LIST OF ACRONYMS USED IN THIS JUDGEMENT

WCC	Westminster City Council (Defendant)
WTF	Working Title Films Ltd (Claimant)
MSR	Moxon Street Residential etc (Interested Party)
TCPA 1990	Town and Country Planning Act 1990
PCPA 2004	Planning and Compulsory Purchase Act 2004
CILR 2010	Community Infrastructure Levy Regulations 2010

(a) Introduction

1. This matter concerns a challenge by a neighbouring occupier (WTF) to a grant of planning permission by the Defendant WCC on 12th January 2016 to the Interested Party MSR for

> "the erection of a building including excavation works to provide three basement storeys and six above ground storeys for mixed use purposes including up to 79 residential units, retail shops, restaurants, multi-purpose community hall, community space, cycle and car parking, servicing, landscaping, plant and other works"

on a site known as the Moxon Street car park in Marylebone.

2. The application for permission to apply for judicial review was refused by Hickinbottom J on 20th April 2016. On a renewal application to Ouseley J on 12th May 2016, a "rolled up" hearing was ordered.

(b) The proposed development, the objections and the Planning Officer's Report

3. That site is a single level car park owned by the Council, which site had been cleared of buildings in a slum clearance programme in 1966. It had been kept for educational use as a school, but is no longer required for that purpose. Part of the site is used on Sundays for a Farmer's Market for 30-40 stalls. A Planning Brief had been prepared by WCC in 2009. That Brief proposed a largely educational use. Also regarded as suitable uses alongside education were social and community uses, small scale leisure to serve local residents and workers, and a retained Farmers Market. The Brief also encouraged housing use, including affordable housing. At that time it had been earmarked as a suitable location for an Adult Education project, but that proposal has since been abandoned.

4. The scheme now proposed departed from the Planning Brief to some degree. It contained no educational provision, but was for the provision of a single new building with four street frontages, from which would rise four storeys with two more above them set back, and two basement levels. All of the floors above ground level would be used for residential purposes (a mix of market and affordable housing), while the ground floor and the first basement level would accommodate shops and community uses, including a community hall which on Sundays would form the central part of a

Farmers Market in combination with parts of the surrounding streets. Car parking would be provided in the basement.

5. The scheme made provision, within the 79 units, for 25 units of affordable housing, defined in the related s 106 agreement as "subsidised housing that will be available to persons who could not afford to rent or buy houses generally available on the open market."

6. The scheme attracted some support and some objections. The objections included an objection from the Howard De Walden Estate which is the freeholder of much of the adjoining land. While generally supportive of the scheme, the estate submitted that the scheme did not contain enough affordable housing. It also raised concerns about massing, design and the effects on daylight, which are not relevant to the issue before the Court. They included objection to the provision of retail units and restaurants, and concerns about the way in which the Farmers' Market was to be accommodated.

7. WTF objected by its solicitors. It noted that its clients were the lessees of a building on Aybrook Street. After reciting the success of WTF as a film company and taking the trouble to list some of the very well known people with whom it dealt, it turned to its actual concerns. It adopted the objections of the Howard de Walden Estate, but without identifying the objections in question.. It went on to complain of what it called "gross over development" and raised concerns about the effects of noise and vibration on meetings and editing, and about the effect of the scheme on the townscape of the area. However, it accepted the principle of the redevelopment of the site. Its objections were concerned with the way in which it was to be achieved. It is to be noted that none of those objections figure in the case it put before this Court at the hearing before me.

8. There was a lengthy and thorough Planning Officer's report, which recommended approval. It addressed the full range of policies in the Development Plan and in national policy which were germane to the proposal, and all the points of objection. It is unnecessary to recite most of them, because the issues now relevant to this challenge can be shortly stated.

9. In the report, it referred to the issue of the Farmers' Market. WCC was also to consider a separate proposal closing Aybrook Street and other streets, for the purpose of holding a Farmers' Market, which would result in the Farmers' Market being accommodated partly within the community hall in the scheme, and partly within those highways. It had received a great deal of public support. Having identified this proposal the report went on

> " As previously mentioned there is no specific policy requirement to provide the market (although it is an aspiration of the planning brief) and so the solution proposed is considered to be an imaginative way to retain the facility and at the same time achieve a wider community benefit in the form of a multi-purpose hall available for other community groups outside of market days. The hall would be leased at a peppercorn rent to the City Council who would manage it, thereby ensuring its continued availability for market use. The City Council would facilitate a programme for using the space which would be licensed for cultural, enterprise and arts events, funded by the rents received but run on a not for profit basis."

It went on to identify WCC City Plan Policy S 34 as encouraging such a proposal.

10. There were other elements of social and community use provided in the development: a space which could be used for a doctor's surgery and a space for a health club. Neither require further comment here.

11. The report also dealt with the question of affordable housing. UDP policy H4 and City Plan Policy S16 sought provision of affordable housing within large residential developments. WCC's informal policy (i.e. not derived from the Development Plan) was that 35% of the residential floorspace provided should be provided in the form of affordable housing. The Planning Officer's report stated:

> "the proposed scheme provides 3411 m^2 of affordable housing which is 27% of the total residential floorspace. The applicant's argument for providing less than the policy compliant amount is that the scheme also provides an amount of social and community provision which is in excess of that required by planning policy but which is provided in order to meet more of the other aspirations of the planning brief. In particular a community hall is being …included which is being given to the City Council as a peppercorn rent and which will secure the continuation of the farmer's Market as well as providing for other community purposes. It is accepted that the social and community provision of this site is exceptionally high…….and in normal circumstances the provision of a GPs surgery and a health club would be sufficient provision, and that the community hall is therefore an added benefit.
>
> It is also considered that the provision of a public car park only 20 spaces short of its current capacity when the planning brief only required 'some pay and display' replacement spaces is also an added benefit to the continued wellbeing of the District Centre.
>
> It is therefore accepted that the level of social and community uses and public car parking significantly enhances the development.
>
> The applicant's submitted viability study states that the full amount of affordable housing cannot be achieved because of the cost of providing the community hall and replacement public car parking. For economic viability reasons these would have to be removed from the scheme in order to achieve 35% affordable housing. The applicant's viability study has been reviewed by an independent consultant appointed by the City Council who agrees with these conclusions. It is considered that in these circumstances it is more beneficial for the scheme to provide the community hall and replacement car public car park balanced against a reduced amount of affordable housing in order to provide a better overall development."

12. The Report also addressed the issue of planning obligations. Having referred to the *CILR 2010*, it said that

> "For reasons outlined elsewhere in this report, a 106 legal agreement will be required to secure the following:
>
> – Provision of 25 affordable housing units on the site and control of rental levels attached thereto.

– The provision of the proposed community hall to the City Council at a peppercorn rent"

(Only those provisions of relevance to the claim are included)

(c) The planning permission and the s 106 agreement

13. The permission granted was subject to 35 conditions. Many of them were protective of the interests of neighbouring or nearby occupiers (for example those relating to the control of demolition operations, internal storage of waste, parking provision and noise). Another required the provision of at least 75 residential units, but no more than 79.

14. There was also an agreement under s 106 *TCPA 1990* whereby MSR entered into various obligations. They included

i) an obligation not to occupy more than 50% of the market housing units (i.e. the 54 units which were not affordable housing units) until the 25 affordable housing units had been completed, made ready for occupation, and transferred into the ownership of a Registered Provider approved by the WCC Director of Housing;

ii) an obligation to lease the community hall within the scheme to WCC at a peppercorn rent in accordance with the 'Community hall specification,' and other reasonable terms to be agreed. The community hall was to be provided, fitted out, prior to first occupation of a residential unit, and leased for 125 years for "social and community use" which was defined as " the provision of social and community facilities to serve the needs of local communities and others provided by the City Council or a local service provider or which are funded by a government department or a public body or voluntary sector with in Class D1 and/or Class D2 of the *Town and Country Planning (Use Classes) Order 1987*." That specification also identified the degree of fitting out required for handover.

15. For completeness, the relevant Use Classes in the *Town and Country Planning (Use Classes) Order 1987* are:

"*Class D1. Non-residential institutions*

Any use not including a residential use —

(a) for the provision of any medical or health services except the use of premises attached to the residence of the consultant or practioner,

(b) as a crêche, day nursery or day centre,

(c) for the provision of education,

(d) for the display of works of art (otherwise than for sale or hire),

(e) as a museum,

(f) as a public library or public reading room,

(g) as a public hall or exhibition hall,

(h) for, or in connection with, public worship or religious instruction.

Class D2. Assembly and leisure

Use as —

(a) a cinema,

(b) a concert hall,

(c) a bingo hall or casino,

(d) a dance hall,

(e) a swimming bath, skating rink, gymnasium or area for other indoor or outdoor sports or recreations, not involving motorised vehicles or firearms."

(d) The challenge by WTF

16. That grant of permission is now challenged by WTF. Although five grounds were originally advanced, only one ground was maintained before me, which was not included in the original Claim, but first appeared in the Claimant's Reply to the Summary Grounds of Resistance of the Defendant WCC. That is an allegation that the provisions of the s 106 agreement recited at paragraph 14(ii) above were in breach of Regulation 122 of the *CILR 2010* , on the basis that it was not necessary to provide the Community Hall to make the development acceptable in planning terms.

17. Mr Booth accepted that there was nothing objectionable as such in the community hall being let to WCC at a peppercorn rent, nor to its being used for uses within Classes D1 or D2. His objection related simply to his contention that WCC should not have taken into account the benefits achieved through the s 106 agreement. When asked what it was that his clients now objected to about the development, it was that (1) WTF had an interest as a good resident of the City in seeing the maximisation of affordable housing and (2) that it had a fundamental objection to the community hall being capable of being used by WCC to generate revenue. He submitted that the hall need not be used for a Farmer's Market, but could be used for any purpose within Use Classes D1 and D2, and be a source of revenue to the Council. When asked why it was that that was objectionable from a planning point of view, Mr Booth informed the court that it was objectionable, because it might be let to anyone, giving the example of a film show for Russian oligarchs.

(e) Discussion

18. I heard very short submissions from Ms Kabir Sheikh QC for WCC (which I stopped when I had no need to hear from her further) and none from Mr Russell Harris QC, because I did not consider that this claim called for any reply.

19. I shall start by saying something of the provenance of Regulation 122 of *CILR 2010.* It reads

> "122.
> (1) This regulation applies where a relevant determination is made which results in planning permission being granted for development.
>
> (2) A planning obligation may only constitute a reason for granting planning permission for the development if the obligation is—
>
> a) necessary to make the development acceptable in planning terms;
>
> b) directly related to the development; and
>
> c) fairly and reasonably related in scale and kind to the development."

20. The test of necessity in Regulation 122(2) (a) was originally not a test in law of the materiality of a planning obligation. Indeed that was the reason why the challenge failed in *R v Plymouth City Council ex p Plymouth and S Devon Co-op Society Ltd* [1993] 67 P and CR 78. It was a test of policy, and not a test in law – see Hoffman LJ in *Plymouth* at page 90, and Lord Keith *in Tesco Stores v Environment Secretary* [1995] 1 WLR 759 at 769 D-770 A, Lord Hoffman at p 777 B-C, 780 A-781C. The tests in (b) and (c) in Regulation 122 also go wider than the law did before its enactment. The test of materiality in law was hitherto that to be material, the provisions in a 106 obligation (a) had to have a planning purpose, (b) be related to the permitted development and (c) not be *Wednesbury* unreasonable (see Russell LJ in *Plymouth* at p 82 and Hoffman LJ at p 87*).* It follows that there are now tests in law which to some degree were not tests of law before their enactment. While I agree with him that the effect of Regulation 122 was drawn from previous Circulars, I respectfully disagree with Bean J in *Welcome Break Group and Others v Stroud DC and Gloucestershire Gateway Ltd* [2012] EWHC 140 at paragraphs 49 and 50 where he treats the ratio of the *Tesco* case on the issue of necessity as still holding good. It is clear that the question of what is "necessary" is now a test in law, which it was not beforehand.

21. I refer also to the decision of the Court of Appeal in *R(Hampton Bishop PC) v Herefordshire Council* [2014] EWCA Civ 878 at [46] where Richards LJ said

> "Regulation 122 can be seen in part as a codification of principles developed in the case law."

22. That is undoubtedly true. However in *Oxfordshire CC v SSCLG and others* [2015] EWHC 186 (Admin) that was cited incorrectly at [22] as

> "Regulation 122 can be seen *as part of* a codification of principles developed in the case law."

With respect, that is what it was not. It is in part, but it includes matters which were drawn from previous tests of policy, which had been expressly rejected by the Courts as tests in law of materiality.

23. I therefore turn to apply the tests in law found in Regulation 122. One must remember that the Community Hall was proposed in the application, and neither its provision, nor use, nor management are matters unrelated to the development in question. It is not suggested by Mr Booth that use of it for Class D1 or D2 purposes is objectionable per se, it having been permitted by the consent. His claim rests on the idea that it is objectionable for those uses to be carried on by the City Council in a way which produces some revenue (i.e. that the Council would charge for its use).

24. I shall start with the tests in (b) and (c). In this case the provisions of the s 106 agreement make the community hall available to the City Council as a way of ensuring that best use be made of it for community purposes. The Claimant could not and did not suggest any other way of achieving that end. That community hall formed part of the application. Given also that (rightly) the Claimant has no objection to the mechanism of the lease to the Council, it follows that it is directly related to the development. It is also plainly for a planning purpose, namely to see the community hall part of the development put to best use and effectively managed. Further there is no suggestion, nor could there be, that it does not fairly and reasonably relate in scale and kind to the development. That deals with sub-paragraphs (b) and (c).

25. Turning to (a), the question of whether it is necessary, the terms of the officer's report show that he was approaching it on the basis that the community benefit realised by provision of the Community Hall compensated for the fact that there would be an underprovision of affordable housing. In my judgement that was a planning judgement which the Council was entitled to make. Mr Booth QC sought to argue that relying on the fact of those benefits to compensate for the failure to achieve the higher percentage of affordable housing was a breach of Regulation 122. I disagree. Matters of weight and of planning judgement are for the decision maker, and the officer and his Council were perfectly entitled to think that the gain in one area made up for the loss in another. The exercise of judgement such as this is what has to happen when local planning authorities have to deal with planning applications in the real world. In the sense used in Regulation 122, this s 106 obligation was necessary, because it provided a countervailing benefit to set against the disadvantage of the underprovision of affordable housing.

26. So if any issue remains, it is WTF's objections to WCC controlling the uses as occupier. That cannot amount to an objection of any substance at all. If the community hall were not leased to WCC, MSR could lease it to anyone it wished, and there would be no breach of planning control in their doing so. WCC has said that it would not seek to make a profit, but even if it did so, that could not amount to an objection in planning terms. For underlying this claim is what appears to me to be a singular lack of understanding of how community provision is often made in this country. To listen to the case for WTF, and its worries that there may be private film clubs making use of the hall, one wondered if WTF and its advisers have any real grasp of what community facilities are, and how they are provided in the real world. Throughout the country there are community facilities owned by local authorities (be they city, borough, unitary, district, town or parish councils) which can be hired for community events. Some may be open to the public for an admission fee (e.g. the

local suburban dramatic society or the annual parish flower show) and some may not be open, but still involve payment to the Council (e.g. a wedding, or a keep fit class where one has to pay to take part). Some may be completely free to those attending, like (one suspects) a Farmer's Market, but still involve a charge being made by the Council to the organisers. Those are but examples. There is a whole range of activities which could take place, and properly so. That is the point of a community hall. Film enthusiasts might even be able to arrange a film evening for its members showing Working Title's excellent productions, or those more appealing to special interest groups, such as Russian emigrés (oligarchs or otherwise) who appreciate the films of, for example, Eisenstein or Tarkovsky. The Council will of course make a charge for use to those who book the hall, just as the MSR or any other lessee would have done had MSR not decided to lease it to WCC. Try hard though I have, I have been quite unable to understand why that prospect is in any sense objectionable.

27. Under s 70 *TCPA 1990* WCC was required to have regard to the Development Plan and to all material considerations, and by virtue of s 38(6) *PCPA 2004* it was required to determine the application in accordance with the Development Plan unless material considerations indicated otherwise. There was no suggestion before me that it failed in either respect. It was plainly material that the obligation in the 106 agreement would lead to the most effective use of the community hall.

28. I consider that this claim is one which is totally without merit. Permission to apply for judicial review is refused.