RE: THE NORTH FAIRGROUND SITE

ADVICE

I. INTRODUCTION

1. In this matter, I am instructed to advise by the Heath & Hampstead Society and the Vale of Health Society.

2. The case involves a site known as the North Fairground site on the fringe of Hampstead Heath. It has been the subject of many planning applications. Recently, there was an application for a certificate of lawfulness of proposed use, which the London Borough of Camden ("Camden"), as the local planning authority, failed to determine, followed by an appeal in 2019 which was dismissed by a decision letter dated 9th January 2020[1]. In my opinion, that appeal and the Inspector's reasoning are fundamental to the proper determination of the present application.

3. That application has now been made to Camden by Knightsbridge Parks LLP ('the Applicant") the owner of the site. The application is for a CLEUD (certificate of lawfulness of existing use or development) in the following terms: - "mixed use site for travelling show-people and a residential caravan site". In support of its application, the Applicant relies almost entirely upon previous findings by Camden and, in particular, upon the planning officer, Charles Thuaire's, witness statement in the earlier appeal. In addition, annexed to the planning statement accompanying the application are six statutory declarations from residents or previous residents and what is said to be an up-to-date site survey undertaken solely by the Applicant. The burden of its case is that, for the 10 years prior to its application dated 26th November 2021, there has been an established mixed use on the site.

[1] Appeal Ref: APP/X5210/X/17/3198526

II LAW

Town and Country Planning Act 1990

4. By s.171B: In the case of a change of use "….no enforcement action may be taken after the end of the period of ten years beginning with the date of the breach."

5. Under Part VII "Enforcement", there are a self-contained number of sections together headed "Certificate of Lawful Use or Development".

6. S.191: Certificate of lawfulness of existing use or development.

"(1) If any person wishes to ascertain whether—

(a) any existing use of buildings or other land is lawful

…….

he may make an application for the purpose to the local planning authority specifying the land and describing the use, operations or other matter.

(2) For the purposes of this Act uses and operations are lawful at any time if—

(a) no enforcement action may then be taken in respect of them (whether because they did not involve development or require planning permission or because the time for enforcement action has expired or for any other reason) ….

(4) If, on an application under this section, the local planning authority are provided with information satisfying them of the lawfulness at the time of the application of the use, operations or other matter described in the application, or that description as modified by the local planning authority or a description substituted by them, they shall issue a certificate to that effect; and in any other case they shall refuse the application.

(6) The lawfulness of any use, operations or other matter for which a certificate is in force under this section shall be conclusively presumed."

7. S.192: - Certificate of lawfulness of proposed use or development.

"(1) If any person wishes to ascertain whether—

(a) any proposed use of buildings or other land…. would be lawful, he may make an application for the purpose to the local planning authority specifying the land and describing the use or operations in question."

If a certificate is granted by the planning authority: "The lawfulness of any use or operations for which a certificate is in force under this section shall be conclusively presumed unless there is a material change, before the use is instituted or the operations are begun, in any of the matters relevant to determining such lawfulness": see sub-s (4).

8. By s.195, an appeal lies to the Secretary of State against a refusal or failure to give a decision on an application for a certificate. By s.196, his decision is final and may be challenged only in the High Court pursuant to s.288 and s.284.

Res Judicata

9. The legal expression res judicata (literally, the thing has been judged) is a portmanteau term which is used to describe a number of different legal principles with different juridical origins. One such principle is known as "issue estoppel". Even where the cause of action is not the same in a later action as it was in an earlier one, where some issue which is necessarily common to both was decided on the earlier occasion, then it is subsequently binding on the parties: **Duchess of Kingston's Case** (1776) 20 State Tr 355. Issue estoppel arises as a matter of public policy.

10. "Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to reopen that issue.": **Arnold v National Westminster Bank plc** [1991] 2 AC 93.

11. The position was summarised by the Supreme Court in **Virgin Atlantic Airways Limited v Zodiac Seats Limited** [2014] AC 160 at [22]:

"Except in special circumstances where this would cause injustice, issue estoppel bars the raising in subsequent proceedings of points which (i) were not raised in the earlier proceedings or (ii) were raised but unsuccessfully. If the relevant point was

not raised, the bar will usually be absolute if it could with reasonable diligence and should in all the circumstances have been raised."

12. In **Thrasyvoulou v Secretary of State for the Environment** [1990] 2AC 273, the House of Lords held that the doctrine of res judicata can apply to the field of public law and in particular to the field of planning law:

"The doctrine of res judicata rests on the twin principles which cannot be better expressed than in terms of the two Latin maxims "interest republicae ut sit finis litium" and "nemo debet bis vexari pro una et eadem causa." These principles are of such fundamental importance that they cannot be confined in their application to litigation in the private law field. They certainly have their place in criminal law. In principle they must apply equally to adjudications in the field of public law. In relation to adjudications subject to a comprehensive self-contained statutory code, the presumption, in my opinion, must be that where the statute has created a specific jurisdiction for the determination of any issue which establishes the existence of a legal right, the principle of res judicata applies to give finality to that determination unless an intention to exclude that principle can properly be inferred as a matter of construction of the relevant statutory provisions": per Lord Bridge at 289.

13. There were two conjoined appeals in **Thrasyvoulou**, the second of which (Oliver) is of some importance in the present case. There, the local planning authority served an enforcement notice, which the landowner appealed. Allowing the appeal, the inspector held that the whole site had an established use for storage purposes. The authority served a subsequent enforcement notice alleging a different change of use. The appeal against that notice was dismissed. The House of Lords held that an issue estoppel had arisen:

"It is submitted for the local planning authority that no relevant issue estoppel arises from the first inspector's decision because it concerned a part only of the site and concerned only a use for storage purposes. It seems to me, however, that the first inspector's decision involved by necessary implication the finding that the use in fact being made of the site at the date of service of the first enforcement notice was an established use, however described. It is expressly conceded in these proceedings

that there had been no material change in the character of the use between the dates of the two enforcement notices. Accordingly it follows, in my opinion, that the local planning authority are now estopped from asserting that there was a material change of use between 1963 and 1982 which expressly contradicts a finding made by the first inspector, which was not merely incidental or ancillary to his decision but was the essential foundation for his conclusion that no breach of planning control was involved in the use being made of the structure which was the subject of the first notice": per Lord Bridge at 297 (my underlining).

14. The Court of Appeal in **Unite the Union v McFadden** [2021] EWCA Civ 199 at [53] recently cited with approval the principle in **Thrasyvoulou**.

III. FACTS

15. The fundamental point which Lord Bridge made is that the doctrine of res judicata applies where a body is given jurisdiction to determine any issue which establishes the existence of a legal right. In the present case, the local planning authority, and the Secretary of State on appeal, are given jurisdiction to issue certificates under either s.191 or s.192 of the Act which conclusively determine the existence of a legal right, namely the lawfulness of a present or prospective use of land, and the consequential immunity from enforcement action. I accordingly advise that, if appropriate, the doctrine of issue estoppel could arise in this case.

16. In the 2019 appeal, a fundamental issue for the Inspector, Mr Murray, was the existing use of the site. Until he conclusively determined that use, he would not be in a position to determine whether the prospective future use would amount to a material change of use and thus be susceptible to enforcement action. The Inspector held at paragraph 4:

"The main issue is, whether refusal of the LDC application would have been well-founded. To succeed, the appellant will need to prove on the balance of probability that use of land as a site for the stationing of seven static caravans for the purposes of human habitation would not have involved a material change of use, if begun on

31 July 2017 (the date of the application). This necessitates consideration of the existing lawful use at that date."

17. He then noted (at paragraph 5) that the appellant wished him to assess the existing lawful use as "a mixed use comprising a showpersons' site use and a residential caravan site use" - in other words, precisely the same existing use as is now claimed by the Applicant and for which a certificate is sought.

18. The Inspector first considered Camden's case officer's delegated report (upon which the Applicant now relies) but concluded (at paragraph 15) that it was not for the Inspector to "assume" that the mixed use probably subsisted for 10 years (as the case officer suggested), but that it was for the appellant to prove that it did. He then considered in detail the evidence before him, including the survey reports (upon which the Applicant now relies) and the oral evidence called by the appellant. I pause here to comment that the appellant called its planning consultant, Ben Eiser, who at paragraph 4 of his proof of evidence accepted that the Inspector needed to consider the current lawful use of the site, which he (Mr Eiser) contended was a mixed use; Nick Laister, town planner, who likewise contended for a mixed use (see paragraphs 1.7 and 1.9 of the summary of his proof and paragraph 4 of his proof of evidence itself); and Mr Charles Abbott. All were cross-examined. Thus, although the appellant was alive to the need to prove the existing use of the site, it elected to do so by calling Messrs Eiser, Laister and Abbott and not by calling some or all of those residents, on whose statutory declarations the Applicant now seeks to rely.

19. As regards the survey evidence, the Inspector was not persuaded that it established on the balance of probabilities continuous occupation by non-travelling showpeople for a period of 10 years. The survey evidence "amounts to snap shots in time from 2004, 2005, 2010/11 and 2017. There could have been periods of many months or years during which even Mr [Henrik] Clarke was not living on the site. There is no presumption of continuity and, without more, it would be unsafe to assume that someone who lives in a caravan/mobile home has lived in the same location for ten years" (paragraph 21). Moreover, there was "no documentary evidence, such as

receipts for rent, logs of occupants or Council Tax records to demonstrate continuous residential occupation by people unconnected to the showperson's use" (paragraph 22).

20. The Inspector then considered Mr Abbott's evidence in some detail. It is sufficient to note that it was largely unsatisfactory in establishing an existing mixed use including residence by non-travelling showpersons. In particular, Mr Abbott was unable to say (i) whether Mr Henrik Clarke (on whose statutory declaration the Applicant now relies) was a permanent resident (paragraph 24); (ii) when Peter Whitehead (another person on whose statutory declaration the Applicant now relies) left the site or whether he had occupied the site continuously (paragraph 27); or (iii) when John Edwards (another person on whose statutory declaration the Applicant now relies) was in occupation (paragraph 28). The Inspector noted that, when re-examined, Mr Abbott conceded that his knowledge of the appeal site was "not good" (paragraph 30).

21. The Inspector concluded:

"I do not doubt that, to some extent, the site has been used for the stationing of caravans for residential use by persons unconnected with the use of the site as a travelling showpeople's site. However, whilst I note Mr Thuaire's view on behalf of the Council throughout the inquiry that there was a lawful mixed use, the evidence does not prove on the balance of probability that a primary use of the site as a residential caravan site commenced on or before 31 July 2007 and continued for 10 years thereafter without significant interruption…..[As] at the date of the LDC application, the appeal site was used for the accommodation of showpeople (including retired showpeople) in caravans and mobile homes and for the storage, maintenance, repair and testing of fairground equipment and vehicles" (paragraphs 31 and 32). The site was a classic example of a showpeople's site (paragraph 37). There was an "established showpeople's use" (paragraph 39). "Although the appeal site is not allocated [in the local plan] as a showpeople's site and it does not have planning permission, that is its existing lawful use" (paragraph 42).

IV. CONCLUSION

22. The issue that arose before the Inspector in the 2019 appeal for a certificate for lawfulness of proposed use, namely the existing lawful use of the site, is the sole issue now before Camden as regards the present application for a CLUED.

23. No one, least of all the Applicant in its planning statement, is suggesting that, in the interval between July 2017 and November 2021, the established use, whatever it is, has changed. Rather than seeking to build a wholly new case specifically related to the ten years up to 26 November 2021, the Applicant relies largely upon the pre-2017 evidence and the pre-2017 material before the Inspector. The statutory declarations annexed to the Applicant's planning statement do not advance the position as the Inspector found it to be by one iota (see the comments in the schedule annexed hereto).

24. The Inspector expressly rejected the appellant's (and indeed Camden's) assertion that the lawful use of the North Fairground site was mixed as a showperson's site and a residential caravan site. That was not merely incidental or ancillary to his decision but was the essential foundation for his conclusion that the proposed future use would involve a material change of use and that no certificate should be granted. The Applicant now seeks a certificate that the existing lawful use is that which the Inspector expressly rejected. In all the circumstances, I advise that the doctrine of issue estoppel prevents the Applicant as a matter of law from contending that the existing use of the North Fairground site was other than that found by the Inspector.

25. I further advise that Camden could and should reject the present application on the grounds that it is contrary to the Inspector's finding as to the existing lawful use of the site.

18th January 2023.

David Altaras

4 Field Court,

Gray's Inn, London WC1R 5EF

SCHEDULE (those giving statutory declarations)

Henrik Clarke

Said to have been on site since 2002. Admits "assisted with upkeep and maintenance of fairground rides" and therefore it is suggested that he could be classed as a showperson.

Shown on 2005 survey as "mechanic".

Shown on 2011 survey as "mechanic (maintains fair equipment)"

Shown on 2017 survey as "mechanic in Kentish Town – unrelated but sometimes helps"

Inspector's comments at paragraph 21.

Jemima Marriott

Said to have been on site for 7 years (ie since 2015) – therefore not resident for 10 years.

Not shown on 2017 survey.

Joe Hooper

Said to have been on site for ten years from 2000 to 2015 - therefore no longer there and was not in continuous residence for 10 years prior to 2021.

Not shown on 2005 or 2011 surveys.

Falafel van shown on 2017 survey "operated by non-resident at South End Green fair and elsewhere".

John Edwards

Said to have lived on site for 15 years (ie since 2007) and to be a showperson.

Shown on 2011 survey as "works at London Zoo fairground and fetes U empty"

Shown on 2017 survey as "fair helper".

Inspector's comments at paragraph 28.

Pete Whitehead

Said to have lodged in caravan from 2002 to 2005 and then to have lived on site in own caravan.

Said to have regularly helped as showperson.

Not shown on 2005 survey

Shown on 2011 survey as “musician helps out at fairs”

Not shown on 2017 survey.

Inspector’s comments at paragraph 27.

Stanley Merttans

Said to have lived on site for past 7 years since 2015 - therefore not resident for 10 years.

Said to deliver fairground vehicles to sites and assist in setting up rides – it is suggested that he could be classed as a showperson.

Not shown on 2017 survey.

Conclusion

None of the above are of assistance to the Applicant.