

CO/1446/2015

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

Royal Courts of Justice
Strand
London WC2A 2LL

Friday, 31 July 2015

B e f o r e:

MR JUSTICE DOVE

Between:
HORADA_

Claimant

v

SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT_

Defendant

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Mr Charles Banner (instructed by Government Legal Department) for the Defendant

Mr Richard Drabble QC (instructed by Wragge & Co) for the Interested Party

J U D G M E N T
(Approved by the Court)

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1. **MR JUSTICE DOVE:**

2. The background and the planning permission

3. Shepherds Bush Market was established around a century ago and provides an important retail facility for its customers. It comprises a significant number of small independent traders who sell goods from shop units and shops formed under railway arches and stalls. The trading environment is affordable and there is a diversity to the ethnic mix of the traders.
4. Whilst it is a highly prized asset of Shepherds Bush town centre, it is in need of physical regeneration and improvement. To that end, the Local Planning Authority, Hammersmith and Fulham Council ("the Council"), adopted a policy in their Core Strategy of

October 2011 as follows:

- i. "Strategic Site - WCOA 3
 - ii. **Shepherds Bush Market and adjacent land**
 - iii. Regeneration of the market and other adjacent land to create a vibrant mixed use town centre development of small shops, market stalls, leisure uses, residential and possibly offices; in accordance with the Shepherds Bush Market Supplementary Planning Document. Development should encourage small independent retailers and accommodate existing market traders.
 - iv. The core site will be the TfL market, former Pennard Road laundry site, Peabody Trust housing land and Broadway centre. Shop properties on Goldhawk Road should be included provided there are opportunities for relocation of the shopkeepers to new premises within the scheme. The scope for including land to the west of the market off Lime Grove, together with the privately owned market must also be considered."
5. On 30 March 2012 planning permission was granted for the phased redevelopment of Shepherds Bush Market and the adjoining land in outline form with access, layout and scale fixed. The mixed use scheme was described as follows:
- i. "Outline application seeking approval for access, layout and scale

(with appearance and landscaping reserved); for phased redevelopment of Shepherd's Bush Market and adjoining land comprising the demolition of existing buildings, the refurbishment and enhancement of the market, and the construction of new buildings ranging from 2-9 storeys in height (plus basement) to provide up to 212 residential units (up to 27,977sqm); and up to 14,052sq.m of non-residential floorspace comprising up to 6,000sqm of market/retail floorspace (Class A1), up to 4,000sqm floorspace of Food and Drink Uses (Classes A3/A5), and up to 4,052sq.m of associated servicing facilities and ancillary uses; including provision of landscaping and amenity/public space; access and parking (up to 85 vehicular spaces), up to 457 cycle parking spaces and associated works."

6. By virtue of condition 1 on the outline planning permission, reserved matters details were to be submitted in relation to the appearance of the buildings and the landscaping proposals. Other detailed matters also had to be addressed through the discharge of conditions.
7. Of particular relevance in relation to this case are conditions 5 to 7 on the planning permission, which provided as follows:
 - i. "5) The total breadth of Market Lane shall measure no less than 11.2 metres, and shall be comprised of 300mm - Arch recess, 3m to market walkway, 3m to allocated area for market stalls (including an area no less than 450mm and 300mm in width, either side of each stall to the east and west respectively), 3.9m for the Market Road and 1m from the east side of Market Road to the shop frontages.
 - ii. 6) Except in relation to the Drainage Works, no development shall commence until details of the Market Traders stalls and canopy design has been submitted to and approved in writing by the Local Planning Authority. The approved stalls and canopies shall be implemented before the stalls are occupied and shall be retained thereafter for the lifetime of the development.
 - iii. 7) No demolition or construction works shall commence until details of a market management plan have been submitted to and approved in writing by the Local Planning Authority. The market management plan will include, but is not limited to: timeline of the Drainage Works, operating hours, security, service charge, rent

collection, tenant support, marketing and promotions. The contents of the market management plan are to be agreed with the Local Planning Authority prior to the lodgement of the application to discharge this condition. The development shall be carried [sic] and operated out in accordance with the approved details."

- 8. A section 106 agreement was entered into in relation to the planning permission on 30 March 2012. With particular reference to the market, Schedule 15 contained covenants in respect of the future of the market. A steering group was to be established, including amongst its membership market traders, and it was to be consulted about the regeneration of the market: see Schedule 15, section 2.**
9. Rents and service charges were to be frozen for a period during the carrying out of the development works and clauses were included addressing continuity and terms and conditions in the traders' leases: see schedule 15, sections 4, 5 and 6.
10. The schedule included provisions for the development of a lettings policy in consultation with the steering group. The purpose of the lettings policy was stated as:
 - i. "7.1. The Owner shall prepare and following consultation with the Shepherds Bush Market Management Steering Group adopt a lettings policy for Shepherds Bush Market to promote:
 - ii. 7.1.1. the diverse nature and offerings within the market, including the uses and mix of business, to include specialisms in food, fabrics, furnishings, fashion and household goods within the market and that it remains a location for local and/or independent businesses and the goods on offer are appropriate to the market customer;
 - iii. 7.1.2. the regeneration of the market and improve its economic sustainability;
 - iv. 7.1.3. the nature and unique character of the market and that the market remains a location for local and or independent businesses by way of:
 - v. 7.1.3.1. the retention of existing traders;

- vi. 7.1.3.2. the setting a criteria for attracting and selecting new local independent traders; and
- vii. 7.1.3.3. the setting of rent and service charges levels on lease renewals and new leases will be affordable for small local businesses (entry-level)
- viii. 7.1.4. the matters referred to in paragraph 6.3 of Schedule 8...
- ix. 7.3. The Owner shall provide no less than twenty-five (25) stalls within Shepherds Bush Market to be let or licensed on terms and conditions conducive to attracting local small-to-medium-enterprises and entrepreneurs, including those from ethnic communities seeking low-cost entry to business start-ups, having regard to the Shepherds Bush Market Lettings Policy
- x. 7.4. The Shepherds Bush Market Lettings Policy shall provide for a proportion of available units to be let on shorter term/periodic tenancies or licenses and at rents or fees designed to provide an opportunity for local small-to-medium-enterprises and entrepreneurs including those from ethnic communities seeking low-cost entry to business start-up."

11. These provisions, it will be discerned, were directed towards providing a lettings policy to seek to secure the existing character of the market and also to provide for some element of affordability within the market for traders.

12. In addition, the schedule contained provisions to establish a Business Continuity Fund of £500,000 for the market traders to assist in respect of losses caused by the works. Other provisions included the establishment of a Shepherds Bush Market Works Liaison Group and the appointment of bespoke market managers.

13. The CPO

14. In 2013 the Council made the London Borough of Hammersmith and Fulham (Shepherds Bush Market Area) Compulsory Purchase Order 2013 using the power under

section 226(1)(a) of the Town and Country Planning Act 1990. The Order land included the market area. The broad purpose of the Compulsory Purchase Order was stated as follows:

- i. "The CPO is jointly promoted by the Council and the developer. The Council has made the Order to regenerate the area of Shepherds Bush Market and to secure its future in the long-term. The scheme is intended to facilitate regeneration of the market through a mixed-use development designed to *"improve and expand the [Market's] trading space, increase the variety within the market area, and establish a long-term management plan to promote and sustain the market."* The intention is to re-establish the market as a popular, sustainable and attractive London street market and a successful component of the Shepherds Bush Town Centre, which is coming under increasing competition from other developments within the Borough."

15. The role of the market was described in the subsequent Inspector's report in the following terms:

- i. "4.3.1. The importance of the market is the fundamental premise to the Council's exercise of CPO powers. It is one of the defining elements of Shepherds Bush. Retention and regeneration of the market is a priority for the Council as a means of maintaining the distinctive identity of Shepherds Bush Town Centre. The market is part of the social fabric of the area, providing a retail offer different and complementary to that offered by Westfield and other retail in and around Shepherds Bush. It has a long and rich history (established in 1914) and is important to the local economy, and to the social well-being of Shepherds Bush.
- ii. 4.3.2. The character of the market is one of small independent traders providing a diverse mix of products in food, fashion and household, mainly to the local population, combined with a specialism in textiles and haberdashery which attracts customers from a much wider area. It provides a social function to the local community; it is ethnically diverse in its nature and offers the opportunity for independent businesses to trade in an affordable environment not found elsewhere in the area."

16. Both of the quotations which I have set out above are taken from the Council's case to the

CPO inquiry.

17. The Claimant and the Shepherds Bush Market Tenants' Association objected to the CPO. A public inquiry occurred in autumn 2013 and the Inspector appointed to convene it reported to the Defendant on 10 February 2014 recommending that the Order should not be confirmed.
18. The Claimant led the case on behalf of the Association. In the case made, he objected to the Order in principle. In detail, he expressed concerns about the adequacy of the provisions in Schedule 15 of the section 106 obligation. Amongst a number of detailed concerns, he included criticisms of the amount of money available for the Business Continuity Fund, the lack of funding for the repair and refurbishment of the arches and the absence of detailed design proposals for the new market stalls that were part of the scheme.
19. In her conclusions, the Inspector structured her solution to the question of whether or not there was a compelling case in the public interest in support of the scheme and whether its public benefits outweighed any private losses that might occur by addressing four questions.
20. First, she concluded that the purpose for which the land was being acquired fitted in with the adopted planning framework for the area. The third question which she posed was whether the scheme was viable and she concluded that it was. The fourth question was whether the purpose of the CPO could be achieved by other means. On the evidence before her, the Inspector was not satisfied that it could.
21. Thus it was the second question which she posed, namely whether the making of the Order contributed to the economic, social and environmental well-being of the area, which turned out to be the fulcrum of her recommendation. Her conclusions commenced

with examining that issue in principle as follows:

- i. "12.6.10. Overall, the Orion redevelopment proposal has the potential to bring about significant improvements in the physical environment of the area, boost the area's economy and generate the social benefits associated with an improved market. The CPO would equally contribute to the area's wellbeing as an essential tool in facilitating delivery of those benefits.
- ii. 12.6.11. The benefits described would only materialise if the essential ingredients and uniqueness of the market and the Goldhawk Road shops are retained. In other words, if the development provides the requisite financial as well as physical conditions for an independent, small-scale, diverse and ethnic mix of traders and shopkeepers to continue trading at the market and on the Goldhawk Road frontage. Those objectives rely on safeguards to ensure that existing businesses or new operators with similarly qualitative and diverse offerings are protected as far as possible during and after the redevelopment process. The effectiveness of Schedules 15 and 16 of the s106 Agreement is a vital element of the consented scheme in this regard and considered below."

22. She went on to examine the detailed concerns about safeguarding the traders' interests.

She noted that both the Council and the Mayor of London considered that the provisions of the planning permission and the section 106 were adequate in this respect. She expressed herself satisfied with the proposals in relation to the steering group and the commitments for the rent and service charge freezes. The arrangements for continuity of service charges and rent reviews and the provision of the continuity fund also met with her approval.

23. Overall, she rounded off her conclusions on Schedule 15 in her report to the Defendant as follows:

- i. "12.6.16. The temporary arrangements will no doubt lead to difficulties and disruptions. However, any wholesale refurbishment or repairing programme is likely to cause similar levels of disruption. The SBMTA has been critical of the protection accorded through Schedule 15, but it would provide the necessary protection against hardship. Furthermore, it would

provide financial certainty and assistance to stall and shop unit businesses in the interim period, unless individual traders choose to cease trading or relocate elsewhere, with disturbance compensation due to them as necessary."

24. She then, however, went on to address aspects of the physical arrangements for traders.

She stated as follows:

- i. "12.6.17. The form and details of the replacement stalls will be confirmed when Condition 6 of the Orion planning permission is discharged. The stallholders therefore remain ignorant of the size, form or positioning of replacement stalls. Equally, the sizes of retail units are unknown. The arches are to remain in their current form, albeit with new frontages to their eastern facades. Stall and shop holders will be offered new premises but not necessarily on a 'like for like' basis.
- ii. 12.6.18. Without knowledge of the replacement provision intended, the traders cannot fully comprehend their future, nor plan for it. That level of uncertainty is unacceptable and provides a poor basis for assessing the extent to which existing traders would or could relocate to the refurbished market. The s106 provides no guarantees in that regard. The Charter is an aspiration but carries no force.
- iii. 12.6.19. The Parsons Brinkerhoff report of August 2103 [sic] provides a detailed account of the poor state of the arch units in the market. It reports on water running down walls, significant vegetation growth, health and safety issues and the extensive restorative work required to bring the brickwork to "B" condition. The arches are historically important elements of the market forming the backbone to the trading environment. Yet neither the Shepherds Bush Market Works (identified in the s106) nor the cost breakdown provided in evidence clarifies with any certainty that the arch units would be upgraded as part of the market refurbishment. The businesses housed in the arches are likely to see a fall in trade while the market works are being undertaken and may be unable to additionally fund the repair and upgrading of their premises at the same time. The retailers could face a precarious future without financial assistance for these necessary works.
- iv. 12.6.20. Furthermore, the sketches, images and examples referred to in the planning application material give me little confidence that the replacement market will maintain the diversity and

multi-ethnic culture of Shepherds Bush Market. The glazed facades to arched premises bearing brand names and canopy design studies, for instance, have little in common with the current nature and variety of Shepherds Bush offerings. The comparator referred to at the Inquiry (Old Spitalfields Market) bears none of the attributes of Shepherds Bush. Old Spitalfields is a covered market, with uniformly sized stalls lacking storage and locking facilities and surrounded by well-known multi-national outlets. The goods on offer are also very different to the range and mix at Shepherds Bush Market.

- v. 12.6.21. The impasse with traders not wishing to engage due to lack of information and the developers unable to move forward without full knowledge of individual requirements is inhibiting progress. However binding/enforceable measures are needed to be assured that the replacement premises (stalls and shop units) would be suitable and affordable enough for traders to return to the site in sufficient numbers and maintain the market's character. Moreover, businesses occupying the arch units must also be provided with the security that their premises would be upgraded to address the defects identified in the Parsons Brinkerhoff report and which fall within the owner's responsibility. In the absence of clear assurances along those lines, the social and environmental well-being sought is not likely to be achieved should the Order be confirmed."

25. Her overall conclusions on this issue of the well-being requirement were articulated as follows:

- i. ***"Conclusions on contributions to well-being***
- ii. 12.6.36. The Orion scheme has been found by the Council (and the Mayor) to be policy compliant, as it would meet the London Plan and Core Strategy regenerative objectives. In doing so it has the potential to bring about the benefits described. Close examination of the evidence, however, has led me to conclude that the current Orion proposal lacks the mechanisms to be assured of retaining the number, mix and diversity of traders in the way explained above. They are vital to the distinctiveness of the market and the Goldhawk Road shops. Therefore, insofar as it would facilitate delivery of the redevelopment scheme promoted, the CPO would not fully achieve the social, economical and environmental well-being sought."

26. Rounding up whether there was a compelling case in the public interest and whether or not the public benefits outweighed the interference with the private lives involved, she

concluded in her report as follows:

- i. "12.10.6. All of that said, without full knowledge of the replacement accommodation in the new development, it is not possible to establish whether new trading conditions would be sufficiently affordable or suited to the needs of traders currently operating in the market. Lack of certainty regarding necessary upgrades to the arched premises also places a question mark over the long term trading and survival position of businesses occupying the arches. Equally, in the absence of measures to secure the affordability of replacement shop units, the commercial future of the Goldhawk Road shopkeepers cannot be assured. Without such certainties in place, there is some doubt in my mind whether the scheme granted permission (or any subsequent redevelopment proposal) could deliver on its promises of retaining if not all then the majority of traders and shopkeepers. They are vital to the market and to the vibrancy of the area.
- ii. 12.10.7. The Order is not tied to any particular scheme but its purposes are not deliverable while the uncertainties highlighted prevail. The compelling reasons for it therefore fall away."

27. Finally, the Inspector drew her overall conclusions together in the following manner:

- i. "12.11.4. As explained earlier, the guarantees and safeguards are not sufficiently robust to be assured that genuine opportunities exist for current traders or shopkeepers (or similarly diverse businesses) to continue trading in the market and Goldhawk Road. Without such assurances, there is a real risk that the market and replacement Goldhawk Road shops would not provide the ethnic diversity, independent or small scale retailing environment central to the appeal of this part of the town centre. While such uncertainties exist, the personal losses and widespread interference of private interests arising from confirmation of the Order cannot be justified."

28. As I have set out above, the upshot of this reasoning was that the Inspector recommended that the Order should not be confirmed. Her report and recommendation were passed to

the Defendant. On 10 October 2014 the Defendant issued his decision confirming the Order and disagreeing with the recommendation of the Inspector.

29. The key passages in that decision which engage with the differences between his conclusion and that of the Inspector are as follows:

- i. "Economic, Social or Environmental well- being
- ii. 14. The Secretary of State has considered the Inspector's conclusions in relation to the extent the proposed purpose of The Order will contribute to the achievement of the economic, social or environmental well-being of the area at IR 12.6. at (IR 12.6.10). The Inspector concludes that overall the Orion proposal has the potential to bring about significant improvements in the physical environment of the area, boost the area's economy and generate the social benefits associated with an improved Market, with the Order will equally contribute to the area's well-being as an essential tool in facilitating delivery of those benefits. The Inspector concludes (IR 12.6.11) that these benefits would only materialise if the essential ingredients and uniqueness of the Market and the Goldhawk Road shops are retained and the development provides the requisite financial as well as physical conditions for an independent small scale, diverse, and ethnic mix of traders and shopkeepers to continue trading. The Inspector notes that these objectives rely on safeguards to ensure that existing businesses or new operators, with similarly qualitative and diverse offerings are protected as far as possible during and after the redevelopment process and that the effectiveness of schedules 15 and 16 of the Section 106 agreement are a vital element of the Order scheme in this regard. The Inspector concludes at IR 12.6.36 that the Order scheme would not fully achieve the social, economic or environmental well-being sought as it lacks the mechanisms to be assured of retaining the number mix and diversity of traders.
- iii. 15. The Secretary of State has carefully considered the Inspector's conclusions on the Order schemes contributions to well-being. The Secretary of State considers that sufficient safeguards are in place to ensure that regeneration of the market to create a vibrant mixed use town centre development will be achieved and that existing Market traders and shopkeepers or new operators with similarly qualitative and diverse offerings will be protected. The Secretary of State is satisfied that the Council will ensure that the policy requirements of WCOA3 will be met through a series of planning conditions that will be reviewed and approved by the Council and through the safeguards provided within the Section 106 agreement which are enforceable by the Council.

Therefore, the Secretary of State disagrees with the Inspector's conclusions and finds that the proposal will significantly contribute to the economic social and environmental well-being of the area...

- iv. Public Sector Equality Duty
- v. 20. The Secretary of State has considered the Equality Act 2010 and that the decision may affect traders and shopkeepers of particular ethnic groups (IR 12.11.4) which are protected for the purposes of the Act. In making this decision, the Secretary of State has had due regard to the requirements of the Public Sector Equality Duty, in particular the need to eliminate discrimination, advance equality of opportunity and foster good relations between those with protected characteristics and others. The Secretary of State considers that any impacts (e.g. the lack of suitable and affordable replacement premises for existing and/or similar business) of the decision on these protected groups will be mitigated and provision made through a series of planning conditions and through the Section 106 agreement. Following careful consideration of these matters, the Secretary of State concludes that any impact of the decision is justified and proportionate.
- vi. Justification in the public interests and overall balance
- vii. 21. The Order should be confirmed only if there is a compelling case in the public interest to justify sufficiently the interference with the human rights of those with an interest in the land affected. The Secretary of State considers that the proposed purpose of the Order, including the redevelopment and regeneration of the area, will significantly contribute to the achievement of the promotion or improvement of the economic, social and environmental wellbeing of the area. The Secretary of State considers that the purpose for which the land is being acquired fits in with the adopted planning framework for the area. The Secretary of State is satisfied that sufficient safeguards are in place to protect traders and shopkeepers through a series of planning conditions requiring the review and approval of the Council and through the Section 106 agreement which can be enforced by the Council to ensure that a development in line with the relevant planning framework can be delivered.
- viii. The Secretary of State considers that the potential financial viability of the scheme has been demonstrated, and that no adequate alternatives exist in terms of achieving the purpose of the proposal, particularly in light of the urgent need to redevelop the Market. Having regard to these and to all other matters, the Secretary of State has concluded that there is a compelling case in the public interest to justify sufficiently the interference with the

human rights of those with an interest in the land affected."

30. The Compulsory Purchase Order was published on 13 February 2015 in the light of this confirmation provided by the Defendant.

31. The law

32. This is a challenge brought by virtue of section 23 of the Acquisition of Land Act 1981.

This is an error of law jurisdiction and therefore it is incumbent upon the Claimant to demonstrate that there is some public law error in the decision which has been reached.

33. The relevant principles in this context, albeit that they are only generic principles of public law, were helpfully gathered together by Elias LJ in the decision of the Court of Appeal in Margate Town Centre Regeneration Company Ltd v Secretary of State [2013]

EWCA Civ 1178 at paragraph 17 as follows:

- i. "17. The applicable law is not in dispute and so I will summarise the relevant principles briefly.
- b) "A CPO should only be made where there is a compelling case in the public interest. An acquiring authority should be sure that the purposes for which it is making a CPO sufficiently justify interfering with the human rights of those with an interest in the land affected": see para. 16 of Circular 06/2004. To similar effect are certain observations of Lord Denning MR in *Prest v Secretary of State for Wales* [1982] 266 EG 527.
- c) A consequence of principle (a) is that "the draconian nature of the order will itself render it more vulnerable to successful challenge on *Wednesbury/Ashbridge* grounds unless sufficient reasons are adduced affirmatively to justify it on the merits": per Slade LJ in *De Rothschild v Secretary of State for Transport* (1988) 57 P. & C.R. 330.
- d) The grounds of challenge under section 23 do not entitle the court to revisit the merits of the decision, only to see whether there is any legal or procedural error in the confirmation: see the observations of Sullivan J, as he was, in *R (James Powell and Others) v Secretary of State for Communities and Local Government* [2007] EWHC 2051 (Admin) para.3.

- e) When deciding whether or not to confirm an order, the Secretary of State must have regard to all material considerations and must not take into account immaterial considerations. But it is for the court to decide what are material considerations: see *Tesco Stores v Secretary of State for the Environment* [1995] 1 WLR 759 at 764 per Lord Keith of Kinkel.
- f) The reasons for a decision must be intelligible and adequate. In determining whether those criteria are satisfied the decision letter must be read fairly as a whole, as if by a well-informed reader: *South Buckinghamshire District Council v Porter (No.2)* [2004] 1 WLR 1953 at 1964 per Lord Brown of Eaton-under-Heywood.
- g) The Court should interfere only if the decision leaves a "genuine as opposed to a forensic doubt" as to what has been decided and why: *Clarke Homes Limited v Secretary of State* (1993) 66 P. & C.R.263, 271 per Sir Thomas Bingham M.R.
- h) Where a decision maker has erred in law the decision should be quashed unless the court is satisfied that the decision maker would necessarily have made the same decision had the error not been made: see *Simplex GE (Holdings) Ltd v Secretary of State for the Environment* [1988] 3 PLR 25 at 42 per Staughton LJ."

34. The grounds

35. Clearly, in that the Inspector reached her conclusions to recommend that the Order should not be confirmed on the basis of his client's objections, Dr David Wolfe QC, who appeared on behalf of the Claimant, endorsed those findings of the Inspector. However, he accepted the Secretary of State was entitled to reach different conclusions from the Inspector. In doing so, he submitted that the Defendant fell into error.
36. In his skeleton argument, the error identified and focused upon was the failure of the Secretary of State to properly understand Schedule 15 of the section 106 obligation and its consequences in terms of the effectiveness of the mechanisms that will be available to secure the future of the market and its traders.
37. It was contended in the written argument that in truth the provisions of the section 106, and in particular Schedule 15, do not contain the necessary protection for traders so as to

secure continued vitality and diversity of the market.

38. In oral submissions, this argument was developed further into a contention that the Defendant had set himself as a litmus test for confirming the order not simply compliance with policy WCOA 3, but also and additionally the protection of the suitability, affordability and diversity of the market for the tenants, in particular those currently occupying it.
39. It was contended that the provisions of Schedule 15 could not achieve that objective which had been set for himself by the Defendant. For instance, only 25 units out of the 138 units within the market were within the affordability obligation in Schedule 15. Similarly, the freezing provisions for rent and service charges were, for example, only time-limited.
40. In terms of the physical arrangements, the Inspector had pointed out the need for details of the new stalls and for the refurbishment of the arches. It was submitted that these points were well made. These omissions were, it was submitted, significant and the Secretary of State's failure to recognise this was a material misdirection and an error of law on his part.
41. In the alternative, it was submitted that if the Secretary of State's focus had been purely compliance with policy WCOA 3 and he had, in fact, not required adequate protection to be made of the suitability, affordability and diversity of the market, he ought to have said so and provided reasons for setting that alternative objective. The failure to give those reasons in that circumstance was said to be an alternative error of law on his behalf.

42. Conclusions

43. There can be no doubt but that the interests of safeguarding the Shepherds Bush Market

with its current qualities and character in terms of retail opportunities for traders and shoppers was a key material consideration in determining whether the well-being requirements integral to the power to make the CPO were satisfied. In my view, there was a danger in Dr Wolfe's submissions of decoupling the requirements of policy WCOA 3 and the interests of the traders. The need to "accommodate market traders" was specifically recognised in the terms of policy WCOA 3. In my judgment, a correct understanding of that policy embraces the key material consideration which I have set out above and incorporates the need to take steps to preserve the suitability, affordability and diversity of the market.

44. The real issue, as the Inspector recognised at paragraph 12.6.11 of her report, was whether the planning permission and the section 106 contained the mechanisms to achieve the objectives which were in mind. The Inspector's acknowledgement in that paragraph that the protection should be achieved "as far as possible" properly recognised that this protection could not be certain or absolute. It involved an evaluation of the measures which were on offer and their effectiveness.
45. There were two areas which were the subject of contention: firstly, the contents of the section 106 obligation and secondly, the physical requirements to create a regenerated environment for the market.
46. So far as the section 106 and Schedule 15 is concerned, I am unable to read the Inspector's conclusions as criticising or rejecting its proposals. Her overall conclusion on Schedule 15 is at paragraph 12.6.16 set out above and endorses the arrangements which were provided.
47. It is said by Dr Wolfe that the question of long term affordability and any long term guarantees to the traders were left hanging by the Inspector's conclusions. Insofar as that

is the case, the answer is that the Inspector did not define the absence of such a provision as a gap in the safeguards in the section 106, which she considered provided sufficiently to pass the test which she had set herself in paragraph 12.6.11.

48. Her conclusions that the section 106 provided "the necessary protection against hardship"

is reflected in the Defendant's conclusions. I can see no basis for suggesting any misdirection in the Defendant adopting the Inspector's conclusion in this respect.

Through her report and the documentary evidence that was available, the Defendant was fully cognisant of the scope and limitations in the section 106. The requirements were not comprehensive in the sense of providing a universal guarantee to each and every trader and no outcome could be certain, but the obligation was part of a suite of measures

which were:

- i. "sufficient safeguards... to ensure that regeneration of the market to create a vibrant mixed use town centre development will be achieved and that existing Market traders and shopkeepers or new operators with similarly qualitative and diverse offerings will be protected."

49. Thus, the criticisms which are raised by Dr Wolfe in relation to the extent and reach of the obligations in Schedule 15 of the section 106 obligations were not a misdirection.

They were fully understood by the Defendant in reaching his conclusions and his conclusions were that they were sufficient in order to achieve the objective in mind. It is important to recall, of course, as I have set out above, that that was a conclusion which the Defendant shared with the Inspector in her conclusions.

50. Turning to the physical measures which the Inspector was troubled about, there are three elements to that issue.

51. Firstly, the absence of the design of the stalls was of concern to the Inspector. However,

it is important to remember that these details were to be provided and proposed solutions would be controlled by the Council through the discharge of condition 6. In my judgment, the Defendant was entitled to rely on that condition and the Council's oversight of the details provided as meeting the Inspector's concern.

52. Secondly, albeit the third point raised by the Inspector, the Inspector was concerned about the details of the external appearance of the market. In a similar vein, however, those details, it will be remembered, were to be provided and approved by the Council through the reserved matters process. Once more, in my judgment, the Defendant was entitled to rely upon the reserved matters approval process as a means of meeting and addressing the Inspector's concerns in this respect.
53. The third point which was raised by the Inspector was the need for repairing of the arches to respond to the matters identified in the condition report which had been prepared and which formed part of the evidence before her. As the Inspector noted, addressing this disrepair was not covered in the section 106 obligation and the cost breakdown for the scheme did not clarify "with any certainty that the arch units would be upgraded as part of the market refurbishment".
54. It is important, in my view, to understand the measure of disagreement between the Inspector and the Secretary of State on this issue. The Inspector was concerned about the lack of certainty that the arches would be refurbished. The Secretary of State was satisfied that there were sufficient safeguards without that certainty being provided or guaranteed. The Secretary of State was not saying that the market could or would be successfully regenerated without those repairs being tackled. It was simply that he was satisfied that there was not a need for certainty in the legal mechanisms for the project in order to achieve that objective.

55. In reaching that conclusion, I am entirely unconvinced that there was any misdirection by the Defendant in reaching his conclusions. It was a conclusion which was open to him on the basis of the material before him about the project taken as a whole.

56. Conclusions

57. For the reasons which I have set out above, there was no error of law in the decision which was reached by the Defendant to confirm the CPO and this challenge must fail.

58. **MR JUSTICE DOVE:** Yes, Ms Jones.
59. **MS JONES:** My Lord, you indicated at the end of the last hearing that any consequential matters would be dealt with by way of written submissions.
60. **MR JUSTICE DOVE:** Yes.
61. **MS JONES:** That has been our expectation.
62. **MR JUSTICE DOVE:** I am very happy. I do not imagine there is any --
63. **MS JONES:** I have --
64. **MR DRABBLE:** My Lord, I am entirely happy with that as far as costs are concerned, although I do not imagine there is any live issue as to costs --
65. **MR JUSTICE DOVE:** Yes.
66. **MR DRABBLE:** -- certainly not as --
67. **MR JUSTICE DOVE:** Well, you are not here for the Secretary of State --
68. **MR DRABBLE:** Quite.
69. **MR JUSTICE DOVE:** -- but I am sure he will be asking for his.
70. **MR DRABBLE:** He will be asking for his and I am not asking for mine.
71. **MR JUSTICE DOVE:** Well, that is helpful too. Yes.
72. **MR DRABBLE:** There have been some suggestions in e-mails exchanged between counsel about the timetable for any further dealing with consequentials.
73. My clients are concerned we have a fairly rapid answer on permission to appeal.
74. **MR JUSTICE DOVE:** Well, can I think aloud, because I was thinking about that?
75. **MR DRABBLE:** Yes.
76. **MR JUSTICE DOVE:** My thinking aloud, which is available to be shot down in flames, is this.
77. As I understand it, time for appeal will run from today. I am going to be away -- yes,

I think it does, it is today, I am pretty confident of that -- which means by the time I return to the country on 19 August, it is going to hard up against any limits.

78. Anyway, you do not have to ask me for permission to appeal. It is perfectly permissible, if the Claimant wants to appeal, to appeal to the Court of Appeal and not trouble me with any application. The jurisdiction of the Court of Appeal does not require you apply to me.

79. So it seemed to me, on the basis that I was not going to be in a position to deal with any written matters until 20 August, that de facto if there was going to be an application for permission to appeal, the sensible thing is that it should go straight to the Court of Appeal.

80. **(Pause)**

81. **MS JONES:** My Lord, what I am told is that our client is now away for a number of weeks, so we need time to put together any application for permission to appeal. It may be --

82. **MR JUSTICE DOVE:** Well, I cannot grant you that. That is the problem I have got.

83. **MS JONES:** Well --

84. **MR JUSTICE DOVE:** I do not believe I can.

85. **MS JONES:** There are provisions to extend time for an application for permission to appeal to be made to the High Court.

86. **MR JUSTICE DOVE:** Well, in the light of what has been said, I am not prepared to extend time because you have an alternative remedy, which is to lodge your application with the Court of Appeal.

87. **MR DRABBLE:** Can I make it plain?

88. **MR JUSTICE DOVE:** Yes.

89. **MR DRABBLE:** Our precise concern is seeing any application for permission to appeal disappearing into well into the autumn.

90. **MR JUSTICE DOVE:** Yes.

91. **MR DRABBLE:** That is precisely the situation which I wish to avoid.

92. **MR JUSTICE DOVE:** The whole point of having the Planning Court is to ensure that there are --

93. **MR DRABBLE:** Yes.

94. **MR JUSTICE DOVE:** -- swift and prompt decisions in relation to projects of this kind.

95. **MR DRABBLE:** Yes.

96. **MR JUSTICE DOVE:** There is no sensible reason why an application, if it is to be made, to appeal my decision should not be made directly to the Court of Appeal.

97. I accept what you say about your client's instructions, but I cannot help you in that regard, nor can I see that being a sensible reason to hold matters up.

98. The truth is that lodging the application with the Court of Appeal in some form or another, which would preserve your client's position, is not going to, in my experience, albeit now nearly a year old, engage masses of expenditure. It is always open to your client to withdraw that because it is your client's application in which none of the other parties have any particular locus.

99. **MS JONES:** We understand that, my Lord. **(Pause)**

100. **MR JUSTICE DOVE:** I can hear what is being said, but the reality is that no one in the Court of Appeal is going to look at your application for permission to appeal until I have approved the transcript. Those matters can occur simultaneously.

101. The transcript will be, I suspect, on my desk by the time I return from holiday on the evening of 19 August. I shall be in this building, albeit I am not supposed to be

because I am supposed to be on holiday on the 20th. If the transcript is with me by then, and I will ask now that if possible that time frame be achieved, I will turn it round on the 20th. By then I will have your applications anyway.

102. **MS JONES:** My Lord, so in terms of the other consequential matters, is that to be with you by 20 August then?

103. **MR JUSTICE DOVE:** I would think that would make good sense. It is an odd date to pick because I think it is a Thursday, but --

104. **MS JONES:** My Lord, I know actually that --

105. **MR JUSTICE DOVE:** -- unless you want to do it by the Friday before.

106. **MS JONES:** -- Mr Banner is away until the 24th, I understand, so he may request that somewhat more time is given in that respect.

107. **MR DRABBLE:** I think the only outstanding matter is for Mr Banner. I am not Mr Banner --

108. **MR JUSTICE DOVE:** No, you are not Mr Banner.

109. **MR DRABBLE:** -- but there have been some e-mails from Mr Banner.

110. The only outstanding matter is the application for costs and I am not aware that there is an issue, but I do not want to intervene in the costs matter.

111. **MR JUSTICE DOVE:** No, no, no.

112. **MS JONES:** No, my Lord. We do not have an issue with the ordinary order for costs being made.

113. **MR JUSTICE DOVE:** Well, then the only issue is the question of permission to appeal. As I have indicated, there is no reason why, if there is going to be an appeal, you cannot get on with it. You do not need my permission.

114. I accept that you need the transcript to do that and I will do everything I can to

make sure that that is returned, but it does depend obviously on the shorthand writer and the transcript being back in the building before me on the 20th and in a reasonable shape to turn round. So that is, I think, the best we can do.

115. Anything else? Good. Thank you very much indeed for your attendance.