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FATAL FAILURE TO ENGAGE

Just three months after the widely reported decision of a planning Inspector, in October 2022, not to confirm the CPO for the Vicarage Fields scheme in Barking, an Inspector has refused to confirm the **Royal Borough of Windsor & Maidenhead (Nicholsons Shopping Centre and Surrounding Area at High Street, Queen Street and King Street, Maidenhead) Compulsory Purchase Order 2022**. The basis of refusal is however very different.

The scheme for which the CPO was made is the “Nicholson Quarter” development which involved the redevelopment of the existing Nicholson Centre to provide a mixed-use development including flexible retail and food units, offices, residential units, accommodation for the elderly and car parking. At the time of the inquiry, in November 2022, there were 11 outstanding objections to the CPO, three of them from owners of leasehold interests proposed to be acquired. Only one objector, leaseholder/occupier Smokeys Nightclub, appeared at the inquiry.

In his decision letter the Inspector agreed that the existing centre offered “an uninteresting and somewhat sterile environment, with no sense of place and little to attract customers to spend time there”, and that it was no longer capable of meeting modern needs and was “no longer a viable asset, nor one into which any landlord would be likely to invest the significant funds that would be needed to arrest the decline.”

He concluded that “the existing, somewhat mediocre shopping centre and car park buildings have a negative effect on the town centre’s character and appearance, and on the ability of users to move freely around the town centre.” In the light of his findings he was “satisfied that, in general terms, the replacement of the existing buildings would have the potential to benefit the town’s economic, social and environmental well-being.”

In contrast to the position in the Vicarage Fields CPO the Inspector was satisfied that the scheme was financially viable and that there were no legal or physical barriers and that, if the CPO were confirmed, the proposed redevelopment would appear to have a good prospect of going ahead.

On the merits of the proposed development he concluded that:

- the type of retail provision envisaged seemed well suited to Maidenhead’s present and likely future needs and would contribute to improving the town centre’s vitality and viability;
- the office elements in the proposed scheme would meet an established need and would help to sustain the local economy;
- the provision of around 650 dwelling units, on previously developed land in a central location, would be a substantial benefit to the town; and
- the scheme would bring about an improvement to the town’s transport infrastructure and movements.

So far so good. The Inspector then addressed the objections to the CPO. All except one were dismissed on the basis that the grounds were not sufficient to justify refusing to confirm the order.

However, over more than 12 pages of the decision letter, the Inspector addressed in detail the Smokeys Nightclub objection. The main grounds of the objection were that no suitable relocation premises had been offered, and that consequently the business faced the threat of extinguishment. It was, and had always been, owned and managed by members of the same family and the property had been refurbished in 2017 at a cost of around £500,000. It was claimed to be the only venue of its type in Maidenhead or the wider area, and the Inspector accepted that, at its pre-Covid peak, the club had an overall attendance of around 100,000 a year and currently had some 15,000 followers on social media. The owners and their families were dependent financially on the business and had an emotional attachment to it.

The Inspector concluded that the club *“has an importance to the town which exceeds its apparent size as measured merely in terms of floorspace, turnover or financial value”* and that its loss *“would have a significant adverse impact extending beyond the direct effects on the business itself and its owners, including on customers, staff and performers. As such, the business is one which is worthy of some effort to retain or relocate within the locality if possible.”*

It was the effort, or lack of it, to engage properly with the owners and to ensure the relocation of the business, or to accommodate it in the new development, which was the developer’s and the Council’s downfall. The Inspector’s conclusions included, amongst others, that:

- it should have been obvious to the developer that the owners’ main priority would be to secure the continuation of their business, and that this would require a settlement that covered their losses and costs but also allowed them the certainty of a suitable relocation;
- the efforts made by the developer and its agents seemed to have been *“little more than a token”* – *“the onus of finding a solution clearly fell on those who were proposing their displacement”* but there was no evidence of an attempt to find out the owners’ full property requirements or to help them to identify a suitable relocation site;
- at the time the Council agreed to make the CPO, the negotiation process still had some way to go before it could reach any conclusion so it followed that at that stage the use of a CPO could not reasonably have been seen as a last resort;
- at the date the CPO was made discussions regarding possible accommodation in the new development had not been concluded, so the position remained that *“compulsory purchase was not yet a last resort, and could not properly have been seen as such”*;
- the owners were entitled to be treated with respect and to expect a constructive approach, and their desire to secure the continuation of their business through a relocation, either within the scheme or elsewhere, was a natural and reasonable aim, and one that should have been central to any meaningful negotiations. The club’s evident popularity and public support might also have been expected to be taken into account in gauging what was an appropriate way of responding to the business’s needs. Even though the planned development was seen as bringing important benefits to the town, the Council and the developer were still under a duty to have regard to the impacts on affected owners, and to mitigate such effects where reasonably possible;
- nothing was preventing the developer from fully exploring the possibility of accommodating the club in the new development;
- the Council’s and developer’s failure over more than three years to provide any viable relocation options to keep the business alive demonstrated a lack of genuinely constructive engagement;
- whilst the owners could have been more proactive at times, the job of smoothing the path for the development fell to the Council and the developer, not to those who happened to lie in the way;
- although the owners would receive compensation there was no certainty, given the particular circumstances of their business, that this would leave them in a position equal to that which they had now.

In the light of these and other factors, the Inspector concluded that *“despite the proposed development’s acknowledged public benefits, it has not been demonstrated that those benefits could not equally be gained without the likely need for Smokeys to close, and without the consequential adverse impacts for both the objectors and the town. In these circumstances, the interference with [the owners’] human rights would be disproportionate.”* On those grounds he concluded that *“it has not been demonstrated that the confirmation of the Order is justified by a compelling case in the public interest”* and that accordingly the CPO should not be confirmed.

This decision clearly challenges some common perceptions about the rights of property and business owners and is another wake-up call to acquiring authorities and developers. In spite of the accepted and apparently considerable shortcomings of the existing centre and the merits of the proposed development, the CPO was thrown out primarily because the needs and rights of an owner-occupier were seen not to have been taken seriously enough and insufficient efforts had been made to ensure the preservation of a valued existing business.

Gerald Eve acted for several objectors at Vicarage Fields and for one of the leaseholder objectors at Maidenhead, and were also instructed to advise Smokeys on compensation in the event of the CPO being confirmed.

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