IN THE UPPER TRIBUNAL **T/2016/031**
ADMINISTRATIVE APPEALS CHAMBER

Appellant:	**Tunnell Grab Service Ltd**
First Respondent:	**Waverley Borough Council**
Second Respondent:	**Karen BROCK**
Third Respondent:	**David HARRIS**
Fourth Respondent:	**Surrey County Council**
On Appeal From:	**Traffic Commissioner for the South Eastern and Metropolitan Traffic Area**
Reference:	**OK0232355**
Public Inquiry Date:	**7th April 2016**
Venue:	**Guildford**
Decision Date:	**23rd May 2016**
Appeal to Upper Tribunal:	**20th June 2016**
UT Hearing date:	**8th November 2016**

DECISION OF THE UPPER TRIBUNAL
ON AN APPEAL AGAINST THE TRAFFIC COMMISSIONER

Upper Tribunal Judge H. Levenson
Upper Tribunal Member J. Robinson
Upper Tribunal Member A. Guest

100.9 Traffic Commissioners: public inquiries: parties to an authorised operating centre application

T/2016/0

DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)
ON AN APPEAL AGAINST THE TRAFFIC COMMISSIONER FOR THE SOUTH EASTERN AND METROPOLITAN TRAFFIC AREA

Decision

1. T**his appeal does not succeed**. We confirm the decision of the Traffic Commissioner ("the Commissioner") given on 23rd May 2016 following a public inquiry in Guildford on 7th April 2016 (reference OK0232355) to refuse the appellant's application to add a new operating centre at Yew Tree Nursery (or "Stonescapes"), Guildford Road, Cranleigh GU6 8PA.

Hearing

2. We held an oral hearing of this appeal at Field House (London) on 8th November 2016. The appellant Tunnell Grab Service Ltd was represented by Chris Over, solicitor of OTB Eveling LLP. The first respondent, Waverley Borough Council, was not represented. Ms Brock and Mr Harris appeared in person. The fourth respondent, Surrey County Council, was represented by Felicity Thomas of counsel. Other local residents had applied to be parties but their applications were not determined. They included Mr and Mrs Disley. In exercise of our powers under rule 33 of The Tribunal Procedure (Upper Tribunal) Rules 2008 we permitted their daughter Kirsty Disley to address us on their behalf.

The Legal Framework

3. So far as is relevant the Goods Vehicle (Licensing of Operators) Act 1995 provides as follows (references are to section and subsection numbers):

> 7(1) A person may not use a place in a traffic area for vehicles authorised to be used under an operator's licence issued to him in respect of that traffic area unless that place is specified as an operating centre of his in that licence.
>
> 7(3) In this Act "operating centre" in relation to any vehicle means the base or centre at which the vehicle is normally kept, and references to an operating centre of the holder of an operator's licence are references to any place which is an operating centre for vehicles used under that licence.
>
> 12(1) Any of the persons mentioned in subsection (2) may make an objection to the grant of an application for an operator's licence on the ground –
>
> (a) …
> (b) That any place in the traffic area concerned which, if the licence is issued, will be an operating centre of the holder of the licence will be unsuitable on environmental grounds for use as such.
>
> 12(2) The persons who may make such an objection are –

(a) a prescribed trade union or association;
(b) a chief officer of police;
(c) a local authority; and
(d) a planning authority.

12(4) Where an application for an operator's licence is made, any person who is the owner or occupier of land in the vicinity of any place in the traffic area concerned which, if the licence is issued, will be an operating centre of the holder of the licence may make representations against the grant of the application on the ground that the place will be unsuitable on environmental grounds for use as such.

12(5) A person may not make representations under subsection (4) unless any adverse effects on environmental conditions arising from the use of the place in question as an operating centre of the holder of the licence would be capable of prejudicially affecting the use or enjoyment of the land mentioned in that subsection.

17(1) … on the application of the holder of an operator's licence, a traffic commissioner may vary the licence by directing –

…

(g) that a new place in the same traffic area be specified in the licence as an operating centre of the licence- holder, or that any place cease to be specified;

19(4) Where the application is for a place in the traffic area concerned to be specified in the licence as an operating centre of the licence- holder –

(a) any of the persons mentioned in section 12(2) may object to the grant of the application on the ground that that place will be unsuitable on environmental grounds for use as an operating centre of the licence- holder; and
(b) subject to subsection (5) any person who is the owner or occupier of land in the vicinity of that place may make representations against the grant of the application on that ground.

19(5) A person may not make representations under subsection … (4)(b) unless any adverse effects on environmental conditions arising from the use of the operating centre or place in question would be capable of prejudicially affecting the use or enjoyment of the land there mentioned.

19(6) If any person duly objects or makes representations under subsection (4) against an application for a place in the traffic area concerned to be specified in the licence as an operating centre of the licence- holder, a traffic commissioner may refuse the application –

(a) on the ground that the parking of vehicles used under the licence at or in the vicinity of that place would cause adverse effects on environmental conditions in the vicinity of that place; or

> (b) … on the ground that that place would be unsuitable on environmental grounds other than the ground mentioned in paragraph (a) above for use as an operating centre of the licence-holder.

4. There are also detailed provisions about notice requirements and the form that objections and representations should take, but they are not at issue in this appeal.

5. Section 17(3) of the Transport Act 1985 (as amended) provides as follows:

> 17(3) The Upper Tribunal may not on any such appeal [against a determination of a traffic commissioner] take into consideration any circumstances which did not exist at the time of the determination which is the subject of the appeal.

Background

6. The appellant company, which is in the waste business, holds a standard national licence for six vehicles and one trailer. There are three authorised operating centres. On 24th August 2015 it applied to add a new operating centre to the licence (as specified in paragraph 1 above) for ten vehicles (no trailers). The same site had been used as an operating centre for two vehicles since 2002, first by a partnership until August 2006 and then by Stonescapes Limited (of which one of the partners in the previous partnership was a director and owned the site) as authorised on licence OK1061989. The business of Stonescapes Limited is selling stone for landscape gardening. There is no record of any objections to or representations against that use having been made in 2006. However, objections to the 2015 application were received from Surrey County Council and Waverley Borough Council.

7. Surrey's objections were largely on road safety grounds, raising the issues of the lack of visibility at the point where vehicles would join the public highway and the need for vehicles to use the entire width of the carriageway when entering or exiting the site. Waverley considered that the likely environmental intrusion would be unacceptable in the Green Belt and that express planning permission might be required for the change of use. It was or seemed unaware that the site was already in use by Stonescape Ltd as an authorised operating centre. On 29th March 2016 it informed both the site owner and the director of the appellant company that the lawful use of land was for the storage and display of stone and storage of materials for agricultural contracting and landscape gardening, use as an HGV operating centre would not be an ancillary use and any change would require express planning permission.

8. The Commissioner also received a large number of representations from local residents and in his subsequent decision (paragraph 6) highlighted the following points made in those representations:

> - the site lay within the Green belt and could not be used for industrial/commercial purposes

- the site was surrounded by residential properties which would be subject to visual intrusion, considerable noise, vibration, emissions, dust and light pollution
- road safety concerns in view of a recent fatality
- there was a history of flooding at the access point
- the access point was not wide enough for two vehicles to pass each other which might mean there would be queuing on the public road, adding to road safety concerns
- the certificate of lawful use did not cover the operation of HGVs
- the operator might use the site to store and transfer waste
- the operator might store fuel for the vehicles at the site.

9. A DVSA traffic examiner visited the site and reported on 27th January 2016. He reported that rigid vehicles should not need to cross the carriageway when turning left or entering or exiting and that sight lines at the access point were adequate. He recommended a clear separation or barrier between any parking area and areas where members of the public might pass, a log to be kept of any out of hours movements, markers reflectors and lights should be cleaned and functional before vehicles left the site, and during lighting up time exiting vehicles should turn right so as to minimise headlight nuisance (at the inquiry it seems to have been agreed that this would cause more trouble than it solved).

10. The Commissioner decided to hold a public inquiry and sent out notices of this on 26th February 2016 for the inquiry to be held on 7th April 2016. On 6th April 2016 he received a letter from Surrey stating that its concerns about the safety and environmental impact could be overcome if the following conditions were imposed (paragraph 11):

(a) authorised vehicles will at all times park in the areas identified for that purpose on the plan;

(b) the authorised vehicles shall not exceed 32 tonnes gvw or 11 metres in length;

(c) only rigid vehicles shall use the operating centre;

(d) the authorised vehicles shall make no more than two movements [entry or exit] per day.

11. Immediately before the inquiry began the appellant circulated a paper clarifying its intention to use the site only to park its vehicles, there would be no new buildings or machinery and there was no intention to store or transfer any waste or fuel at the site. (This was subsequently confirmed during the hearing on behalf of the appellant).

The Public Inquiry and the Commissioner's Decision

12. The Commissioner's decision recorded (paragraph 14):

"Opening the public inquiry I explained that I had conducted a site visit earlier that morning. I outlined to the attendees the scope of the environmental factors

> I was able to take into account. I explained that I could consider the environmental impact of noise, visual intrusion, vibrations and emissions pollution but only in relation to properties in the vicinity of the operating centre and that the level of impact had to amount to a real interference with the comfort and convenience of living and the enjoyment of the property according to the standards of the average person".

13. In relation to his own site visit the Commissioner found (paragraphs 25 and 26):

> "25. At my visit to the prospective operating centre early in the morning of 7th April I saw that the area in which it is proposed that the vehicles are parked is largely screened by mature trees from any residential buildings. The parking place is also at a sufficient distance from any residential building as to make it unlikely that residents would be unduly disturbed by vehicle noise, vibration or emissions, at least not to the level of real interference with the enjoyment of property according to the standards of an average person.
>
> 26. The point at where vehicles from the operating entre will join the public highway is a different matter. I saw little to concern me from a safety point of view given the proposed low-level intensity of vehicle use and the view expressed both by the traffic examiner and Surrey County Council. But I did conclude that there are in fact two residences [TF Cottage and TF Barn] which are likely to be affected by vehicle noise, vibration and headlights (the traffic examiner confirmed this at the inquiry) as vehicles join or leave the public highway. During normal waking hours my judgment is that the level of operation (especially if the number of vehicle movements is capped) is unlikely to be so concentrated as to meet the test of real interference with the enjoyment of the property.

14. About 20 local residents attended the public inquiry and Mr Harris spoke on their behalf. He said that there were 120 houses within 500 metres of the site which stood to be severely affected by noise, visual intrusion, vibration, exhaust fumes, dust and light pollution from vehicle headlights and flashing orange beacons. He also referred to the safety issues mentioned above and to the rejection of previous planning applications in the vicinity.

15. The operator's director explained that the proposed use was parking only. Maintenance would be done elsewhere. The longer term plan was to keep the site as the only operating centre and to purchase the site and Stonescape Ltd's business. There would be 12 vehicles there. They were rigid tippers with cranes. They picked up aggregate and other rubble and took it to waste transfer stations and tips. Normal hours of business would be from 0600 to 1800 Mondays to Fridays and 0600 to 1400 on Saturdays. There might be emergency work outside these hours. An 0600 start was needed because vehicles were often required to be at a pick up point before 0700. He was willing to consider measures such as limiting the number of movements, switching off orange lights until away from the centre as well as the conditions suggested by Surrey and by the traffic [vehicle] examiner. If the Commissioner granted his application he would apply for planning permission (although he would not undertake not to operate in advance of such permission).

16. Mr Harris said that these measures were not adequate to satisfy the representors' objections.

17. The Commissioner was of the view (paragraph 27) that operation before 0700 would cause "a strong likelihood of significant disturbance to the sleep of the residents in those properties" even if such operation were sporadic. An 0600 start "would also bring an early end to the residents' peace". On this point the operator's legitimate commercial interests should give way to the interests of the affected residents. Vehicles leaving between 0600 and 0700 on a routine basis and during the night on a (widely defined) emergency basis would "in my view constitute real interference with the affected residents' enjoyment of their property"

18. The Commissioner concluded that he would be prepared to authorise the operating centre for six (not the requested ten) rigid (not articulated) vehicles not exceeding 32 tonnes gvw, parked at the northern end of the site, with orange revolving lights switched off while on site, each vehicle limited to four departures or entrances per day and none before 0700 or after 2200 Mondays to Fridays (or after 1400 on Saturdays) or at all on Sundays and public holidays. This was put to the operator in a document of 4th May 2016 ("the interim decision") with an indication that if these conditions were not acceptable, then the application would be refused.

19. On 16th May 2016 the operator replied to the effect that the proposed start time of 0700 was unacceptable as the vehicles had to be at their first call by that time or earlier. It also indicated implicitly that even if the start time were 0600 the proposed limit of four per vehicle on the number of movements would have to be in addition to the operator's vehicles making deliveries to the site.

20. The Commissioner took the view that on the basis of the operator's proposals there would be "an unreasonable interference in the enjoyment of their property" for those in TF Cottage and TF Barn (paragraph 34) and in a written decision of 23rd May 2016 he formally rejected the application.

21. On 20th June 2016 the operator appealed to the Upper Tribunal against that decision of the Commissioner. There were various interlocutory case management directions in relation to the appropriate parties to the appeal and on 23rd September I refused an application that the Upper Tribunal make a site visit because this was inappropriate in view of the limitations on the Upper Tribunal's jurisdiction. I pointed out that:

> "The tribunal is not considering the matter totally afresh but is reviewing the finding of facts by the Commissioner in relation to the evidence (and then making its own decision on the basis of that review), does not usually admit fresh evidence, and has no jurisdiction to consider circumstances arising after the date of the decision that is under appeal".

The Submissions

21. Mr Over had prepared a written skeleton argument (dated 1st November 2016) raising one matter of statutory interpretation and enumerating five grounds of appeal. He addressed these matters at the hearing. Ms Brock and Mr Harris had prepared a 20

page written skeleton argument in reply and at the hearing they mainly relied on its contents. Surrey County Council had produced a brief written summary of its observations (dated 8th November 2016) and Ms Thomas also addressed us. We found all of this very helpful. All sides referred to matters which do not need to be addressed in this decision, either because they are not really relevant to the merits or legality of the Commissioner's decision, or because they refer to matters arising after the date of that decision, or because they would add little to our analysis and reasoning. We also observe that in the course of our proceedings there has been some confusion between the provisions of sections 12 (which relates to a new licence) and 19 (which relates to an operating centre).

Vicinity

22. The meaning of "vicinity" is not defined for the purposes of sections 12(4) or 19 of the 1995 Act. At some stage, although not in his final written decision, the Commissioner indicated that the meaning of "vicinity" was a bit of a grey area and that somewhere a mile away is probably not in the vicinity, somewhere 100 yards away is in the vicinity, and for anywhere in between the concept is not absolutely defined. Mr Over has pointed out correctly that this does not actually represent a correct statement of the law. We observe that in principle somewhere less than 100 yards away might not be in the vicinity and somewhere more than a mile away might be in the vicinity. It all depends on the context.

23. Section 19(5) excludes anybody from making representations under 19(4)(b) unless any adverse effect on environmental conditions from the proposed use "would be capable of prejudicially affecting the use or enjoyment of the land". Effectively that provision determines what land is in the vicinity and in the end that was the test applied by the Commissioner in his final written decision (paragraph 34).

The Representors

24. Mr Over argued that the Commissioner erred in law in hearing from Mr Harris on behalf of all attendees as representors when none of them lived in the vicinity of the operating centre. The Commissioner did not determine whether Mr Harris lived in the vicinity. There was no preliminary considerations as to whether the representations made were "valid". The way the inquiry developed meant that there was no attempt to exclude inappropriate considerations or to establish who was a "valid representor". "The Commissioner should not have heard from a representor who he had not previously found was a relevant objector under section 19 of the Act". Mr Over also referred to the Senior Commissioner's statutory guidance but we did not find that very informative or helpful in this particular case.

25. Mr Over seeks to apply sections 19(4)(b), 19(5) and 19(6) in a way that could lead to a logical impasse with conclusions having to be reached before considering representations that might lead to those conclusions. That cannot be correct. Clearly the Commissioner must have some notion that a person might satisfy the test in 19(5) before considering what they have to say but what really matters is that in reaching his final decision the Commissioner was satisfied that he was taking into account only the statutory considerations and, in our opinion, the Commissioner in reaching his decision in this case did not stray from what the legislation provides. Certainly,

anybody whose view was properly considered was entitled to be represented by Mr Harris (whether or not Mr Harris occupied land in the vicinity) and did not have to attend the public inquiry in person. In fact, as we understand it, the occupiers/owners of TF Cottage and TF Barn did attend and were represented by Mr Harris. The fact that there were other attendees/aspirant representors involved does not vitiate the decision in relation to those whose position was properly taken into account.

The Environmental Effects

26. Mr Over next argued that the Commissioner failed to identify and explain the environmental effects on TF Cottage and TF Barn and should have sought more direct oral evidence about the effect of headlights at 6.00 am. In our view this requirement is too prescriptive. The concerns had been made plain and the Commissioner did not take account of matters of which it would not have been proper to take account.

The Process

27. Mr Over argued that the process by which the Commissioner reached his decision was flawed. He stated (paragraph 5.2 of his skeleton) "It was obvious from the outset that the Appellant's business model required a start at 6.00 am for some of his vehicles". An example of the reason for this was a particular contract in Catford (in south London). The Commissioner did not want to discuss Catford in particular but the point in general and, as seen above, indicated that the application would be refused if a 7.00 am start was not acceptable. The operator had replied that this suggestion was tantamount to a refusal but would accept a compromise of only four movements between 0600 and 0800. (We have noted that the Commissioner understood this to be in addition to the two movements of vehicles making deliveries to the site.) Mr Over suggested that the Commissioner disregarded this proposal but should have given it "special consideration" (paragraph 5.6). We do not agree. The Commissioner was giving the operator one final chance to meet his fundamental concerns. We do not see how this can possibly be read as disadvantaging the operator.

Four Movements

28. Mr Over argued that the proposed limit of four movements per day per vehicle was "illogical and perverse". The Commissioner had suggested this to meet Surrey's objections. Surrey was not represented at the hearing before the Commissioner. In fact, as Ms Thomas pointed out to us, in the interim decision of 4rd May 2016, the Commissioner had explained that this was part of a package of conditions which the Commissioner regarded "as essential if the balance between the legitimate commercial interests of the operator and the need to avoid overly adverse environmental effects on residents in the vicinity is to be preserved" (paragraph 31).

29. The operator's response of 16th May 2016 raised no objection to this limitation in principle provided it was applied from 0600 rather than 0700. We simply do not see how it can now be said that this proposal was illogical and perverse. It was a proposal that the operator did not accept but that the Commissioner had explained and justified. Further, ultimately it was not the basis for the refusal of the licence which, when it came to it, was the morning start time.

31. Mr Over's final ground was really a catch-all argument as to adequacy of reasons which adds nothing to the above and on which it is unnecessary to make any further specific comment.

Conclusion

32. We see nothing in the grounds of appeal to persuade us to overturn the Commissioner's decision. The basic findings of fact cannot be said to be plainly wrong on the evidence before the Commissioner, the law did not require the Commissioner to come to a different conclusion, and there is no material error of law in the decision. What is really being challenged is the Commissioner's judgment and there is no basis for us to interfere with it.

H. Levenson
Judge of the Upper Tribunal
23rd December 2016