IN THE UPPER TRIBUNAL **Appeal No. T/2016/36**
ADMINISTRATIVE APPEALS CHAMBER

Appellant:	**Darren John Worsley**
First Respondent:	**Waverley Borough Council**
Second Respondent:	**Surrey County Council**
Third Respondent:	**The National Trust**
Fourth Respondent:	**Churt Parish Council**
Fifth Respondent:	**Dr William Tate**
Sixth Respondent:	**Richard Nobbs**
Seventh Respondent:	**Andrew Blackwell**

ON APPEAL from: A DEPUTY TRAFFIC COMMISSIONER FOR LONDON AND THE SOUTH EAST OF ENGLAND

Reference:	**0K1112841**
Public Inquiry Date:	**1 June 2016**
Venue:	**Guildford**
Decision Date:	**7 June 2016**
Upper Tribunal Hearing Date:	**21 February 2017**

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

Upper Tribunal Judge:	**M R Hemingway**
Upper Tribunal Member:	**A Guest**
Upper Tribunal Member:	**G Inch**

111.9 Traffic Commissioners: Public Inquiries: Operating Centre

**DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)**

ON AN APPEAL AGAINST THE DEPUTY TRAFFIC COMMISSIONER FOR THE LONDON AND SOUTH EAST OF ENGLAND TRAFFIC AREA - GUILDFORD AREA

Decision

1. **This appeal does not succeed**. We confirm the decision of the Deputy Traffic Commissioner ("the Deputy Commissioner") given on 7 June 2016 following a Public Inquiry in Guildford on 1 June 2016 (reference OK1112841) to refuse the appellant's application to vary his operator's licence by increasing the number of authorised vehicles to four and adding a new operating centre at Borrow House Farm, Jumps Road, Churt, Farnham, Surrey, GU10 2LB.

Hearing

2. We held an oral hearing of this appeal at Field House in London on 21 February 2017. The appellant was represented by Mr C Newberry QC of Counsel. An officer from the first respondent local authority (Waverley Borough Council) was in attendance but did not speak at the hearing. The second respondent (Surrey County Council) was represented by Ms F Thomas of Counsel, the third respondent (The National Trust) was not in attendance nor represented, the fourth respondent (Churt Parish Council) was not in attendance and was not represented, the fifth respondent (Dr. William Tate) attended and represented himself and the sixth and seventh respondents (Richard Nobbs and Andrew Blackwell) were represented by Mr H Bowyer of Counsel. We are most grateful to everyone who has provided information and made submissions to us.

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 operators 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 operators 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 operators 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 operators 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.

14. (1) This section applies to any application for an operators licence in respect of which –

(a) any objection is made under section 12(1)(b), or

(b) any representations are duly made under section 12(4).

14. (2) A Traffic Commissioner may refuse an application to which this section applies on the ground that, as respects any place in his area which, if the licence were issued, would be an operating centre of the holder of the licence –

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

(b) the place in question would be unsuitable for use as an operating centre of the holder of the licence on other environmental grounds.

(3) The Traffic Commissioner may not refuse an application for an operators licence on the ground that any place would be unsuitable as mentioned in subsection (2)(b) if –

(a) on the date the application was made, that place was already specified in an operators licence issued by the Commissioner as an operating centre of the holder of that licence, or

(b) the applicant has produced to the Commissioner a certificate in force in respect of that place under –

(i) section 191 or 192 of the 1990 Town and Country Planning Act 1990, or

(i) section 90 or 90A of the 1972 Town and Country Planning (Scotland) Act 1972,

stating that its use as an operating centre for vehicles under any operators licence is or would be lawful.

17. (1) … on the application of the holder of an operators 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 ceased 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;

(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 (2)(b) or (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.

19. (7) The Traffic Commissioner may not refuse the application on the ground mentioned in subsection 6(b) if –

(a) on the date the application was made, the place in question was already specified in an operators licence issued by the Commissioner as an operating centre of the holder of that licence, or

(b) the applicant has produced to the Commissioner a certificate in force in respect of that place under –

(i) section 191 or 192 of the Town and Country Planning Act 1990, or

(ii) section 90 or 90A of the Town and Country Planning (Scotland) Act 1972,

stating that its use as an operating centre for vehicles used under any operators licence is or would be lawful."

4. We pause here to note that the provisions contained within section 14 are concerned with applications for licences whereas those in section 19 are concerned with applications for variation of existing licences. However, since the section 14 provisions are mirrored by the section 19 ones references which were made to section 14 by the Deputy Commissioner and the representatives may be treated as references to section 19.

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 the 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 holds a restricted operators licence with authorisation for the use of one vehicle. There is currently one authorised operating centre. On 9 October 2015 he applied to vary the number of authorised vehicles to four and to add an operating centre at the place specified in paragraph 1 above. It might, at this stage, be useful to say something about the proposed site for the new operating centre and its surrounding area.

7. The proposed site is in a rural location. It has been stated throughout the proceedings before the Deputy Commissioner and before the Upper Tribunal that the area is of importance because of particular types of wildlife to be found there and that it is also of particular scientific and historic interest. It is also considered to be an area of scenic beauty. Borrow Hill Farm is situated between two of three hills known locally as "The Devil's Jumps". It is indicated that a nature reserve surrounds the site and that the site is situated in a village called Churt.

8. There are in existence two certificates of lawful use issued under section 191 of the Town and Country Planning Act 1990 in relation to the place where it is proposed to have the operating centre. We shall say more about those certificates below but, for now, we would observe that one of those is dated 24 December 2014 and the other is dated 12 July 2013. The 2013 certificate records that a building on the site known as "Building 7" and which is rented by the appellant from the site owner, has been in use for what is referred to as "B8 storage" purposes for a continuous period of at least 10 years.

9. The application, at least insofar as it related to the proposed operating centre, generated what can fairly be described as extensive local opposition. Waverley Borough Council was primarily concerned with what it felt to be the inappropriateness of locating an operating centre in a green belt area and in an area which had been designated as one of outstanding natural beauty. It also had concerns regarding noise nuisance it thought might be caused if the proposal were to succeed. Surrey County Council's objections were, essentially, concerning road safety. In that context, it is worth noting at this stage that the location of the proposed operating centre is connected via a private unmade road to Jumps Road which is described as "a classified County road with a 40 miles speed limit and no footways or street lighting". Surrey County Council's concerns as to safety centred primarily upon risk of accidents which it said might be caused in consequence of large vehicles turning into and out from the access road at the point it entered Jumps Road though it also expressed some concern regarding the prospect of increased levels of smoke fumes, order, dust and dirt. There were also issues raised regarding the suitability or otherwise of the access road to be used by large vehicles bearing in mind its narrowness and what was said to be the difficulty vehicles would

have passing each other. In addition there were other objections raised by local residents in the vicinity some of whom have gone on to be become respondents in these proceedings before the Upper Tribunal. Further, the National Trust advanced written argument based upon the potential impact upon wildlife as did the Surrey Amphibian and Reptile Group. Many of the above concerns were echoed by Churt Parish Council.

10. Not surprisingly in the circumstances the Deputy Commissioner decided to hold a Public Inquiry. Prior to its being held, a report was prepared by a Traffic Examiner one Emma-Jane Morris. In summary, whilst the report referred to some possible difficulties if the application were to be granted she thought all of those could be overcome. In particular, she opined that the site itself was suitable for use as an operating centre, that the trimming back of foliage and the use of mirrors at the point where the access road entered Jumps Road would assist with safety and that though vehicles would not be able to pass each other very easily on the access road, which it was thought would benefit from resurfacing, it was adequate given that vehicle movements would be limited in number. She proposed licence restrictions concerning the hours of operation and the number of vehicle movements.

The Public Inquiry and the Commissioner's decision

11. The Deputy Commissioner carried out a site visit. Thereafter the Public Inquiry was held on 1 June 2016. There were a significant number of attendees and these included Mr Newberry QC, Mr Bowyer of Counsel and Dr. Tate all of whom also appeared before us. The Deputy Commissioner received oral evidence primarily from the appellant, one Mr C Saunders who had written an expert report relied upon by the appellant and from one Mr R Cooper, an employee of Surrey County Council. Pausing there, it is to be noted that the Traffic Examiner did not attend to give evidence. It had been intended that she would do so but those intentions were thwarted due to illness. Nobody asked for an adjournment. It is also to be noted that although the bulk of the Public Inquiry proceedings were recorded, the recording equipment failed towards the end so that the final part of the record of what was said was based upon written notes taken by both the Deputy Traffic Commissioner and his clerk.

12. In setting the scene the Deputy Commissioner, in his written decision of 7 June 2016, wrote this:

> " **The Public Inquiry**
>
> 2. At the Public Inquiry the applicant was represented by Clive Newberry QC, the Surrey County Council was represented by Richard Cooper and Victoria Choularton attended on behalf of Waverley Borough Council. All of the representors have been invited to attend the Inquiry and seven did so, represented by Counsel Harry Bowyer. The Traffic Examiner Emma-Jane Morris had prepared an environmental report dated 16 March 2016 and had been expected to attend but I was notified on the day prior to the Inquiry that she was unwell and unable to do so. Having received her written report I determined that it was not necessary to delay the Inquiry to enable her to attend.
>
> At the outset of the Inquiry I gave a brief summary of my remit in relation to the application and said that I had conducted a site visit to the proposed centre on 23 May 2016. When undertaking the visit I had introduced myself to Dr. Tate (one of the representors) who had been working in his garden close to the access road. I said that I had walked to the site across Dr. Tate's land and he had outlined the geography and boundary lines etc. I had made it clear to Dr. Tate that I could not discuss the merits or otherwise of the application and that we had not done so. Finally I outlined how I wished to manage the Inquiry in that each relevant matter would be taken in turn and I would hear submissions and

evidence on each. I confirm that I would also give all those present an opportunity to add further points if relevant."

13. We would observe that no criticism has been made of the Deputy Commissioner with respect to his limited and in our view entirely appropriate interaction with Dr. Tate whilst carrying out his site visit.

14. After dealing with various other points which were resolved in the appellant's favour, the Deputy Commissioner turned to what he described as the "environmental issues". He commented as follows:

> " 7. At the Inquiry there was considerable focus on the fact that a Certificate of Lawful Use or Development was in place for the land in question and the interface between planning decisions and operator licensing can be confusing. I consider it important therefore to clarify the law applicable to operators licences in relation to environmental issues which are the subject of the rest of this decision …"

15. He then set out part of the content of sections 12, 14 and 34 of the 1995 Act as well as regulations 14 and 15 of the Goods Vehicles Licensing of Operators Regulations 1995 before summarising the content of those provisions and their meaning in this way:

> " 8. The consequence of the legal framework outlined above is that when a Traffic Commissioner is dealing with a proposed operating centre which has a Certificate of Lawful Use as an operating centre the Commissioner still has to decide whether to grant the application and has the power under section 14(2)(a) of the Act to refuse an application on the ground that parking vehicles in the area of a proposed operating centre will cause adverse effects on the environment in the vicinity of the place in question. When determining whether to grant an application under these circumstances and whether to set conditions or undertakings on a grant the Commissioner may consider any of the issues detailed in Regulation 15 of the 1995 Regulations detailed above. As regards the application in hand the following environmental issues were, in my view, relevant to my decision and I received evidence and heard submissions in relation to each of them …"

16. He then identified the environmental issues as being those of safety with respect to the entry and exit of vehicles from Jumps Road to the access road and vice versa; the use and suitability of the access road and other environmental factors including noise pollution. Then, by way of explanation as to why he was resolving matters against the appellant, he said this:

> " **Findings and Decision**
>
> 12. The starting point for my consideration of this case is the list of prescribed considerations in regulation 15 of the Goods Vehicles (Licensing of Operators) Regulations 1995. Regulation 15(c) directs me to consider the status of any planning permission in relation to any land that has not previously be used as an operating centre. It was not submitted that the site has been used as an operating centre before. The site does have a Certificate of Lawfulness allowing vehicles to park in, turn at and access the site when doing so is associated with the storage of materials in the various buildings. The thrust of Mr Newberry and Mr Saunders submissions [the reference to Mr Saunders is presumably an intended reference to Mr Bowyer] were that in reality this gave unlimited access by any number of vehicles including goods vehicles and that the grant of an operators licence would benefit the situation in that conditions and controls could be put in place. Whilst I understand the force of the argument I do not accept it as conclusive. Followed to extreme it would mean that whenever a suitability (sic) worded certificate was in place the jurisdiction of the Traffic Commissioner was limited to endorsing the certificate and imposing conditions if necessary. It is clear to me from the legislation set out above that even if a Certificate of Lawfulness to use a place as an operating (sic) was in place (which in this case strictly it is not) then Traffic Commissioners still retain a discretion to

refuse an application under section 14(2)(a) of the Act and need to consider and balance all the matters listed in regulation 15 when doing so.

My finding is that both the legislation and the situation in this particular case require me to consider the suitability of the proposed operating centre in all aspects. If the application is granted it will mean that the access road and the proposed operating centre are sanctioned as suitable by me for use by up to four 32 tonne vehicles each day. I find that this will be a material change to the land in the vicinity of the proposed site. Despite the various calculations and forecasts as to past and future vehicle movements the statement that was made to me and not disputed was that the current traffic levels to the site are light with few goods vehicles. If the application is granted the immediate potential even with the undertaking offered by Mr Worsley is for 4 movements per day for each of 4 vehicles i.e. 16 movements per day. An operator's licence would also mean that the vehicles could be normally kept at the site which may be in contrast to the Certificate of Lawfulness which requires parking to be associated with the storage purposes only.

13. I find that the key areas to consider are the safety of the access onto Jumps Road and the effect on the residents if the access road is used by the authorised vehicles. In relation to the safety aspect when I visited the site I noted the restricted vision in both directions and in particular when looking to the left. This aspect was the major part of the objection put by the Surrey County Council and had been one of the reasons for the refusal of planning applications. Traffic Examiner Morris said in her report that the position could be aided by removal of foliage, goods vehicles turning left when leaving the access road and by further use of mirrors. However she also states that goods vehicles normally turn right to avoid a weight restriction and it is accepted that the operator does not own the land containing the foliage. In her report she also states that 'if all road users applied good driving practice and the Highway Code then exiting the site can be done safely'. It is an unfortunately (sic) fact of life that not all drivers drive in the way she described and in my view risk cannot be accessed on that basis. In relation to historical information of accident the fact that here (sic) have been no personal injury accident is relevant although I am mindful there does appear to have been at least one damage only accident. It would be wrong to have to wait for an accident involving personal injury to occur to say that danger exists.

14. I also find that the representations as to the unsuitability of the access road are compelling. It is evident that there are very few passing places, particular for large vehicles and this will mean vehicles reversing for distances and/or using the private driveways of the residents. A 'worse case scenario' is a vehicle of any size opting to reverse out onto Jumps Road to allow another vehicle to exit.

15. As regards the noise that will result if the application is granted I have decided that this will also be included in my reasons for refusal. If it was the only factor I may have been persuaded otherwise but it is so closely related to the use of the access road which is where the noise will mainly emanate from. It is also a fact that the proposed site and access road are in a highly unusual rural setting and viewed subjectively the noise from four 32 tonne vehicles will be an unreasonable intrusion for the residents on the use and enjoyment of their properties.

16. In conclusion I have determined that the application should be refused on the grounds of the safety considerations where the access road meets the highway, the suitability of the access road and the detrimental effect on the environment that the noise caused by the movement of the requested vehicles would have.

17. I have considered the conditions put forward on behalf of the operator of landscaping, direction of exit from the site, repairing the access road surface, hours of operation, exits/entry in forward gear and limiting the movements of vehicles to four per day each. These do not limit sufficiently the adverse effects in relation to the use of the access road and the safety implications as vehicles enter and exit from the highway that would be caused and I conclude therefore that the application should nevertheless be refused."

The written grounds of appeal to the Upper Tribunal and the written responses

17. Mr Newberry QC prepared the grounds. Since those grounds have been prepared by a clearly competent representative the points contained therein are the only ones upon which we have focused in our consideration of this appeal.

18. In summary, it was contended that the Certificate of Lawful Use or Development ("the Certificate") brought into play section 14(3) of the 1995 Act because it had the effect of authorising the site's use as an operating centre. It was also said, in this context, that the Deputy Commissioner had been wrong to conclude that the certificate did not authorise a relevant operator to park vehicles on that site overnight. We suppose, therefore, that the fundamental argument was that the certificate operated conclusively such that, given its effect, the Deputy Commissioner was precluded from refusing the application. Further, it was argued that the Deputy Commissioner had made an error of fact in that whilst the evidence was to the effect that there would be eight vehicle movements per day he has erroneously concluded that there would be 16. Further still, it was contended that the Deputy Commissioner had reached a view regarding potential noise difficulty without having sufficient evidence to properly do so and, in particular, without his having any expert evidence to support that view. To make such a finding on the basis of the very limited material before him was, it was said, "materially unfair".

19. Mr Bowyer, on behalf of Richard Nobbs and Andrew Blackwell, provided a written response of 1 November 2016. It is lengthy but, essentially, the points being made were that the grounds had not dealt with the important consideration of safety: that the Certificate had no relevance because it did not, in terms, authorise the use of the site "as an operating centre for vehicles used under any operators licence"; that since the Deputy Commissioner had refused the application under section 14(2)(a) of the 1995 Act as opposed to 14(2)(b) the certificate issued was not relevant on that account anyway and that the safety concerns were weighty ones.

20. Ms Thomas, in a skeleton argument provided on the morning of the Upper Tribunal hearing, pointed out that the appellant through his representatives and indeed for that matter the Deputy Commissioner, had been relying upon or looking at the "wrong certificate". In that context it was said that the appropriate one was not the one of 24 December 2014 but the earlier one of 12 July 2013. In any event, though, she like Mr Bowyer argued that for such a Certificate to have any relevance it would have to specifically refer to the authorisation of the site "as an operating centre". In any event, even if it were to be thought that the 2013 Certificate could have potential relevance, its content could not be said to relieve the appellant of the need for the site to be included on an operators licence for the parking overnight of vehicles weighing more than 3.5 tonnes. The Deputy Commissioner had not misunderstood the effect of the certificate. As to the claimed mistake regarding the number of vehicle movements, that mistake could not have impacted upon the outcome because the use of the access road by up to four 32 tonne vehicles each day would represent, as the Deputy Commissioner had found, a material change to the land in the vicinity of the proposed site and such conclusion could not be affected by any miscalculation as to the movements. As to noise, some written concerns as to that had been raised by local residents including Dr. Tate, Mr Nobbs and Mr Blackwell. The Deputy Commissioner was not required to base his view on specialist and expert evidence. Nevertheless, his view as to noise had played only a minor part in his overall decision which would have been the same even without that issue.

21. It is right to say that we did receive further submission from other respondents and for which we are grateful but we have not addressed them here because it is the above submissions which have addressed what we have ultimately regarded as the salient points with respect to this appeal.

The oral hearing before the Upper Tribunal

22. Representation was as stated above and, in large measure, the oral submissions reflected the written ones. Mr Newberry QC, though, made some additional points which built upon what he had said in his written grounds. He stressed, in the context of safety, the lack of evidence of accidents in the area of concern (the place where the access road enters Jumps Road) and the ways in which, for example, by trimming back foliage and using mirrors, any safety risk could be further minimised. He suggested that the Traffic Examiner's report was a document of very particular evidential relevance given that it was a document specifically prepared for the benefit of the Deputy Commissioner and for the purposes of the Public Inquiry. So, the Deputy Commissioner was required to attach substantial weight to it and, if reaching a view which differed from its recommendations, he was required to offer a detailed explanation as to that. That had not been done. The Certificate did permit overnight parking of vehicles and, in terms of substance, the Certificate effectively permitted the use of the site as an operating centre. The error regarding the number of vehicle movements was very significant insofar as it had relevance to the safety and noise issues. Further, the Deputy Commissioner had actually reached a perverse decision because use of the site, as matters stood, was entirely unregulated and the granting of a licence with suitable conditions would improve matters. In any event, the Deputy Commissioner had not properly explained why he was not granting the variation sought with conditions as opposed to rejecting it.

23. Mr Bowyer reminded us that we were not conducting a simple rehearing of the facts. He further reminded us that the Deputy Commissioner had undertaken a site visit for himself. So, he was in a position to assess matters such as safety. As to noise, it was common sense that the sorts of vehicles envisaged would generate significant noise but the decision would have been the same even without that aspect to it. The Certificate (whichever one) does not bite for the reasons argued in the response of 1 November 2016.

24. Ms Thomas relied upon her skeleton argument. She suggested that the Deputy Commissioner might have based his finding that there would be 16 vehicle movements per day upon oral evidence recorded in written form and which had been given by the appellant himself. However, she accepted that in the face of other evidence the Deputy Commissioner had not been right about that though she argued that his reasoning was, nonetheless, sound. There had been some detailed evidence regarding the safety issues before the Deputy Traffic Commissioner (in particular a detailed letter written by Mr Cooper and appearing from page 343 to 348 of the appeal bundle) and the Deputy Commissioner had looked at that aspect carefully. As to the Traffic Examiner's report that could not be described as being an unchallenged report. Mr Cooper had challenged some of the views contained therein in that letter. The Certificate does not permit overnight parking. The Deputy Commissioner had been under a duty to balance competing factors and that is what he had done. He had reached a sustainable conclusion largely on the basis of safety concerns.

25. Dr. Tate reminded us of the perhaps more obvious environmental issues concerning the natural beauty of the area and also that it was an area of some scientific interest. He too raised issues about safety.

Our reasoning with respect to the appeal

26. The jurisdiction and powers of the Upper Tribunal when hearing an appeal from a Traffic Commissioner are governed by Schedule 4 to the Transport Act 1985 as amended. Paragraph 17(1) provides that the Upper Tribunal is to have full jurisdiction to hear and determine all matters of law or fact. However, it is necessary to bear in mind that such an appeal is not, for example, the equivalent of a Crown Court hearing an appeal against conviction from a Magistrates Court, where the case effectively begins all over again and is simply reheard. Instead, an appeal before the Upper Tribunal takes the form of a review of the material before the Traffic Commissioner. In this context valuable guidance is to be found in a passage from paragraphs 30 to 40 of the judgment of the Court of Appeal in *Bradley Fold Travel Limited and Peter Wright v The Secretary of State for Transport* [2012] EWCA Civ 695. We also note that an appellant bears the burden of showing that a decision under appeal is wrong and that, in order to succeed, he must show that "the process of reasoning and the application of the relevant law require the tribunal to adopt a different view". Put another way, it might be said that in order to succeed an appellant has to demonstrate to the Upper Tribunal that a decision of the Traffic Commissioner was "plainly wrong".

27. We shall firstly address the points concerning the Certificate. As was explained to us, such certificates are issued where it can be shown to a balance of probabilities that a particular use has subsisted for a continuous period of 10 years. The issuing of such a certificate does not, of itself, constitute approval or acceptance by an issuing local authority that such use is appropriate or safe but it does effectively permit that use. The Certificate which the appellant has sought to rely upon was issued by Waverley Borough Council on 24 December 2014 and the certified use is stated to be:

> "… for B8 storage purposes together with associated parking, turning areas and access within the planning unit."

28. B8 usage, in a planning context is use of a site for storage and distribution purposes.

29. As touched upon above, and this did not seem to be in issue once the matter was raised, the properly applicable certificate was not the 2014 one but one issued on 12 July 2013 and which did not contain the wording "associated parking, turning areas and access within the planning unit". We remind ourselves that Ms Thomas had pointed out that the Certificate of 24 December 2014 did not cover the use of Building 7 which is the unit the appellant rents from the site owner. She acknowledged, though, that the 2013 Certificate did and she further acknowledged that the appellant might contend that parking was impliedly approved by that Certificate.

30. In fact, to a large extent we have concluded that the Certificate issue is to an extent to be characterised as something of a "red herring". Insofar as it is Mr Newberry QC's contention that the existence of the Certificate with its current wording (and this reasoning

would apply to either certificate) automatically precludes a refusal of the application we would disagree. Section 14(3) of the Act and its equivalent at section 19(7), on our reading, requires the existence of a Certificate stating in terms that it would be lawful to use a site "as an operating centre for vehicles used under any operators licence". The use of the word "stating" at section 19(7) strongly implies that. So, there is a requirement for a degree of specificity which is simply absent from either of the Certificates which might be relied upon here. Additionally and in any event, the view we have taken is the view previously taken in *1999 L34, L37 and L41 Norman Marshal Limited v West Sussex CC and Others* and in *2003/87 J Hansford* (see paragraphs 4 and 5 of the latter decision). We would have reached the same view absent those cases but we see no reason to depart from the logic contained therein.

31. There is also a further point with respect to the arguments that the existence of the Certificate (whichever is relied upon) precluded the Traffic Commissioner from refusing the variation application. The Deputy Commissioner made reference at paragraph 12 of his written decision to section 14(2)(a) of the Act and, on our reading, he was stating that either his refusal was exclusively under that subsection or it was in the alternative under that subsection as well as 14(2)(b). In fact, for the reasons explained above, those references to the Act are to be taken as references to the equivalent provisions in section 19 but that does not affect the point we are making. Mr Newberry QC did not specifically challenge the view of the Deputy Commissioner that a refusal under section 14(2)(a), (or 19(6)(a)) may encompass grounds relating to matters such as safety, the suitability or otherwise of an access road and noise. So, again, since section 14(3)(b) and indeed section 19(7)(b) will only apply if an application is refused under section 14(2)(b) or a variation is refused under section 19(6)(b) the basis or one of the bases for the Deputy Commissioner's decision was unaffected by the argument surrounding the Certificate.

32. Turning to the ground relating to the movement of vehicles, it seems to us quite clear, although this was unstated, that the Deputy Commissioner was relying for his conclusion that there would be 16 vehicle movements per day upon the oral evidence of the appellant at the Public Inquiry. Nevertheless, it is right to say that there was other documentation suggesting that what was envisaged would be eight vehicle movements per day on the basis that there would be four vehicles leaving the proposed operating centre each day to embark on a journey and then returning once that journey had been completed. Mr Bowyer and Ms Thomas both appeared to accept that the Deputy Commissioner had probably been in error with respect to the vehicle movement calculation although it was not accepted that that had made or had been capable of making any difference to the outcome. Mr Newberry QC, though, argued strongly that it was an error of real material significance submitting in his written grounds that the "Deputy Commissioner's impact assessment is based on twice the traffic flow and is therefore materially flawed".

33. To reiterate, there were three bases for refusal being safety, suitability of the access road and noise. As to the way in which safety links to the vehicle movement issue, the Deputy Commissioner's conclusion, which of course he had reached in light of the content of the Traffic Examiner's report and various other evidence before him including the written and oral views of Mr Cooper, was that having the sorts of vehicles envisaged entering Jumps Road from the access road, or vice versa, was simply unsafe. He explained his view as to that at paragraph 13 of his written reasons. We will say more about those reasons below but, for now, it is sufficient to say that his conclusion was clearly based upon the risk which would be

caused by those manoeuvres (which on any view would be carried out on a daily basis) rather than upon the amount of such manoeuvres which might be undertaken on any given day. Viewed from that perspective we do not see how the apparent factual error was capable of making any difference at all to that specific issue. Further, we would add that it does seem apparent that the safety concern was the Deputy Commissioner's primary concern. Indeed, on a common sense basis, one would expect that to be so.

34. Further, the Deputy Commissioner had evidence regarding the unsuitability of the access road and clearly did consider it to be unsuitable as explained at paragraph 14 of the written reasons. We did not detect any serious specific challenge to his conclusion as to unsuitability in either Mr Newberry's written or oral arguments though we do accept that the Traffic Examiner's report which we were invited to find had special status (see below) contained a view that, at least with resurfacing, it would do. The problems identified at paragraph 14 related to the lack of suitable passing places particularly for large vehicles. That, it seems to us, will be an ongoing difficulty whether or not there are eight vehicle movements or 16 vehicle movements each day Again, therefore, notwithstanding the considerable emphasis which Mr Newberry QC put upon this point, we do not see that any factual error made by the Deputy Commissioner could have impacted upon his conclusions regarding suitability.

35. As to the noise, we shall consider the wider arguments surrounding the Deputy Commissioner's approach in a little more detail soon. Here, we are specifically concerned with the possible link between the noise and the number of vehicle movements. What the Deputy Commissioner had to say about noise appears at paragraph 15 of the written reasons. Assuming he is right that the use of the site as an operating centre and the consequent use of the vehicles would generate sufficient noise to constitute an unreasonable intrusion for local residents, we do not, once again, see that the number of vehicle movements would be a significant material factor. Eight vehicle movements per day is not an infrequent number in the context of the particular rural setting with which we are concerned and, whilst we do not think the noise aspect played any role of real significance in the Deputy Commissioner's decision, we do think that his view would have been unaffected by the numerical error because it was the volume of noise rather than the frequency of its occurrence which was his concern.

36. Turning to the specific ground of appeal relating to noise, we agree with Mr Newberry that there was no technical evidence and no estimates as to the likely decibel levels which would be reached. However, we find ourselves in agreement with Mr Bowyer when he says in his written response of 1 November 2016 that "it does not really require evidence to support the proposition that a 32 tonne aggregate lorry driven over potholes and sleeping policemen will make a noise". Whilst perhaps the Deputy Commissioner might have been assisted by some technical evidence we think he was perfectly entitled to apply his experience and common sense and that that is what he did. So we do not detect the unfairness which Mr Newberry asserts. Additionally and in any event, it is apparent from what the Deputy Commissioner said at paragraph 15 of his written reasons that he did not regard the noise issue as being a matter of real significance. He stressed that had it been the only factor raised in opposition to the appellant's proposal it might not have been sufficient to persuade him. On a full reading of the written reasons it is our view that even if he was not entitled to take the potential generation of noise into account (and we expressly conclude that he was) the outcome would have been the same bearing in mind the importance he obviously attached,

understandably, to safety issues as well as that of what he found to be the unsuitability of the access road. But we do not, anyway, say that his conclusion as to noise was plainly wrong.

37. There were, as noted above, some additional points made in argument to which we should refer. In particular, Mr Newberry QC, whilst not using this phrase, sought to argue, in effect, that the evidence contained in the written report of the Traffic Examiner ought to be accorded some sort of enhanced importance. We do not agree. The report contained relevant evidence and it was, therefore, to be considered alongside any other items of relevant evidence. However, we see nothing to suggest that there might have been any duty upon the Deputy Commissioner to treat it differently or to give it elevated status. He certainly did not ignore it and he dealt with what it had to say regarding safety quite fully at paragraph 14, going on to explain why he did not find the views contained therein persuasive. He was not plainly wrong to effectively prefer the detailed view of Mr Cooper.

38. It was argued at one point that the decision reached by the Deputy Commissioner was perverse because since there was no current source of regulation as to the driving of vehicles on and off the site, the granting of the application could only improve matters by affording an opportunity to place restrictions on the licence. That particular argument was, in our view appropriately and correctly, dealt with by the Deputy Commissioner towards the latter end of paragraph 12 of his written reasons. One of the points he was making there was that whatever might be said about lack of regulation or control, the reality was that the granting of the application would result in significant change with respect to vehicle movements as compared with matters as they currently stand. We see nothing wrong with that approach.

39. Mr Newberry QC sought to criticise the Deputy Commissioner for not granting the application with conditions as opposed to simply refusing it. He also argued that the Deputy Commissioner had failed to explain why the imposition of conditions would not satisfactorily address the concerns he had identified. However, it is clear from what was said at paragraph 17 of the written reasons that the Deputy Commissioner had the possible imposition of conditions in mind. He concluded that conditions which had been proposed would not be sufficient to address the issues concerning safety and the issues concerning the lack of suitability of the access road. It cannot be said, therefore, that he simply failed to consider whether the imposition of conditions might address matters in a satisfactory manner. Given the concerns particularly with respect to safety we are unable to say that his view that conditions would not satisfactorily address matters was plainly wrong.

40. Finally, as mentioned already, the Deputy Commissioner's written reasons and the written submissions of the parties have all referred to provisions contained within section 14 of the Act as opposed to section 19. However, it is section 19 which relates to variation applications. However since the relevant provisions in section 14 are, as again mentioned already, simply mirrored by the relevant provisions in section 19 any error on the part of the Deputy Commissioner is not one which matters to any extent at all.

41. It is on the basis of the above reasoning that we dismiss this appeal.

Signed

M R Hemingway

Judge of the Upper Tribunal

Dated: **11 April 2017**