23rd Bristol Planning Law and Policy – 16 May 2024
Legal update

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INTRODUCTION

- Round-up from 19 May 2023 (day after last year's talk) through to 3 May 2024 (when I finished writing this one …)
- Focus very largely only on cases in England & Wales but a few from beyond …
- Look at:
- (1) The Supreme Court cases;
- (2) The Court of Appeal cases;
- (3) A selection of High Court decisions.

THE SUPREME COURT CASES

THE SUPREME COURT DECISIONS

- Just two this year and can deal with them quickly …
- (1) ***Wolverhampton City Council v London Gypsies and Travellers*** [2024] 2 W.L.R. 45: Did the Courts have the ability to grant so-called newcomer injunctions vs gypsies? ***Yes***.
- (2) ***SST v Curzon Park Ltd*** [2023] 1 W.L.R. 2762: In determining a Certificate of Alternative Appropriate Development (CAAD) under s. 17 of the Land Compensation Act 1961 could the decision-maker take into account other CAAD applications or decisions relating to neighbouring sites arising from the compulsory acquisition of land for the same underlying scheme? ***Yes***.

THE COURT OF APPEAL CASES

Westlaw suggests 15 CA cases in England & Wales in period;
I am going to look at 13 CA decisions;

(1) *R. (Suffolk Energy Action Solutions SPV Ltd) v S/S for Energy Security and Net Zero* [2024] EWCA Civ 277

- One of two CA cases this year challenging the same two DCOs – (i) the East Anglia One North ("EA1N"), and (ii) the East Anglia Two ("EA2"), Offshore Wind Farms.
- Those DCOs authorised two NSIPs, namely a generating station and associated grid connection and substation, and a National Grid NSIP comprising substation, cable sealing ends and pylon realignment.
- The DCOs authorised CPO of land needed for onshore works, from about 55 landowners.
- The majority of those landowners signed heads of terms with the developers which included a confidentiality clause, and a clause that the landowners would not oppose the DCO applications and would withdraw any objections already made.
- During the examination, the appellant complained to the panel that that clause was undermining the integrity of the planning process.
- But on the facts a number had still objected …

(1) *R. (Suffolk Energy Action Solutions)* cont.

- CA held:
  - (i) The use of non-objection clauses was legitimate;
  - (ii) The DCO process was inquisitorial so that decision-maker was under a duty to ensure that there was sufficient information to enable an informed and lawful decision to be made on the application for planning permission; and
  - (iii) Whether the effect of a non-objection clause had in fact meant that there was insufficient information to enable a planning decision to be made always had to be a fact-specific inquiry. And, no error in way that approached in this case.
- PTA to Supreme Court has been sought by the Appellant.

(2) *R. (Boswell) v SST* [2024] R.T.R. 14

1. Challenge to three trunk road improvement scheme DCOs for the A47;
2. Assessments included: (i) Do minimum – baseline including traffic from local growth and the other DCO schemes; (ii) Do something – baseline plus the individual DCO scheme (iii) Carbon emissions for each identified; and (iv) Carbon emissions for each scheme alone assessed against carbon budgets = Very small percentage
3. ISSUE: Did the S/S lawfully discharge the obligation to examine and assess the cumulative GHG emissions likely to result from each of the proposed developments?
4. Thornton J and CA held that the SoS had acted lawfully if not ideally.
5. Was not irrational to conclude that assessment of scheme emissions against the carbon budgets i.e. the total amount of carbon which is lawfully permissible was a cumulative assessment.
6. Also important to recognise context where receptor is planet – adding in emissions from local development is arbitrary – why add adjacent schemes and not ones elsewhere in country or indeed abroad.
7. PTA to Supreme Court has been sought by the Appellant.

(3) *R. (Substation Action Save East Suffolk Ltd) v S/S for Energy Security and Net Zero* [2024] EWCA Civ 12

- The second of the CA cases on the East Anglia One North ("EA1N"), and the East Anglia Two ("EA2"), Offshore Wind Farms. A no of JR grounds, including flooding and cumulative effects
- On flooding the question was whether the risk of surface water flooding at the development necessitated that a sequential test had been applied by the applicant when selecting the site for proposed development.
- The Court concluded that it did not saying ([43] and [44]) :
  - *"… The provisions of the Framework do not, however, require an applicant for development consent to demonstrate that there are no other sites reasonably available if any part of the development is to be located in an area where there is a risk of flooding from surface water. The same is true of the relevant paragraphs of the PPG …"*
  - *"… The decision-maker will have to be satisfied that a sequential approach has been applied at the site level to minimise risk and direct the most vulnerable uses to areas of lowest flood risk. How that is done, however, is a matter of planning judgment for the decision-maker subject to review on public law grounds. The relevant provisions of EN-1, the Framework, and the PPG do not require that wherever there is a risk of flooding from surface water, an application for development consent must demonstrate that there is no other reasonably available site with a lower risk of flooding."*
- NB this judgment obviously pertains to the 2021 version of the NPPF (substantially the same in 2023 version) and pre-2022 PPG.

(3) *R. (Substation Action Save East Suffolk Ltd)* cont.

"60. The relevant provisions of EN-1, the Framework and the PPG do not require an applicant for development consent to demonstrate that whenever there is a risk of flooding from surface water there are no other sites reasonably available where the proposed development could be located in an area of lower surface water flood risk. The risks of flooding from surface water are to be taken into account when deciding whether to grant development consent under section 104 of the 2008 Act. The way in which account is to be taken of that risk raises issues of planning judgment in the application of the relevant provisions of the policies. The judge was correct in her interpretation of the policy and in finding that there was no irrationality or other public law error in the way in which the first respondent dealt with this issue when granting development consent. The effects of other potential projects (which were not projects forming part of the developments forming the subject matter of the application for development consent) did not have to be the subject of a cumulative impact assessment before development consent was granted in the present case. The first respondent was entitled to defer consideration of the effects of the other projects as there was insufficient information available to make an assessment. Such information as was available on the likely effects of other potential projects was not relevant to the assessment of the significant effects of the projects forming part of the applications for development consent in the present case"

(4) *R (Together Against Sizewell C Ltd) v S/S for Energy Security and Net Zero* [2023] EWCA Civ 1517

- DCO for construction of nuclear power station.
- No permanent supply of potable water identified.
- Report undertaken for S/S found that the developer's stance did not address the need to fully consider the cumulative assessment of the environmental effects of the water supply to the power station and recommended that the DCO should not be granted unless the water supply issue was resolved.
- But the S/S considered that the power station and the water supply were two separate projects and that the environmental impacts, including the cumulative impacts, of the water supply would be sufficiently assessed when the water supply project was assessed later, once the proposal was clear.
- CA held: (i) S/S entitled to consider two projects not one (looked at criteria relevant to that assessment) and (ii) a decision-maker could rationally conclude that the consideration of cumulative impacts arising from a subsequent development that was still inchoate could be deferred to a later consent stage.
- NB same thrust of reasoning as ***R. (Substation Action Save East Suffolk Ltd)*** just looked at.

5. *R (Fiske) v Test Valley BC* [2023] EWCA Civ 1495

- A post ***Hillside*** case …
- CA holds that a LPA determining an application for planning permission, which was incompatible with an earlier grant of planning permission for the same site, was not bound in law to take account of that incompatibility as an obviously material consideration in deciding the later application.
- The planning system did not preclude the possibility of several applications for planning permission being made and granted for different developments on the same site.
- Large developments often required modifications during design and construction. When that happened, the developer might be expected to make such changes through the normal planning process. In some circumstances, lawful steps could be taken to overcome any incompatibility between two or more planning permission to enable development to proceed. If that was not possible, the incompatibility would remain and the lawful implementation of one permission or the other, or both, would not be possible.
- However, LPA was not legally compelled to anticipate how the developer might later choose to deal with such inconsistency, or to assume that they would resort to unlawful means of doing so. That was not the LPA's job.

(6) *R (Spitalfields Historic Building Trust) v Tower Hamlets LBC* [2024] PTSR 40

- Issue: was a provision in a local authority's constitution which restricted voting by members on deferred applications for planning permission to those who had been present at the meeting at which the application had previously been considered, a lawful measure for the regulation of the planning committee's proceedings and business within the Local Government Act 1972 Sch.12 Pt VI para.42?
- Answer: No big surprises … yes …

(7) ***Kazalbash v SSLUHC*** [2024] JPL 255

- In contrast this is (in my view) a surprising decision!
- The proposed development was the conversion of a semi-detached dwelling house to two dwellings with a fence dividing the back garden into two. Planning permission was refused on the ground that the development would harm the character and appearance of the street scene and be contrary to the local plan policy.
- Judge below held that the inspector had taken into account an immaterial consideration in concluding that an existing extension to the building would harm the "s*treet scene*", given that the proposed development would not change the building's exterior, so that his decision was irrational.
- CA overturned Judge, "*character and appearance"* a larger concept than "*appearance"* alone and included such matters as building lines, plot widths, plot sizes and the composition of buildings on the street.
- The inspector's conclusion that the subdivision of the plot and the addition of the fence would cause the two plots to appear narrower than other properties, and would appear incongruous in the street scene, was an unassailable exercise of his planning judgement.
- His conclusion that the side extension as a separate dwelling would be contrary to the prevailing pattern of development was also beyond criticism.

(8) ***R (Plant) v Lambeth LBC*** [2023] EWCA Civ 809

- Policy on tree removal which provided that, where it was "*imperative"* to remove trees, adequate replacement planting would be secured based on the existing value of the benefits of the trees removed.
- A argued policy set an absolute prohibition so that any felling of mature trees was contrary to policy, and that the replacement planting provision did not provide an exception to that prohibition in policy, but merely provided for replacement planting if the prohibition in policy was breached because it was "*imperative*" to remove a tree.
- CA hold policy was dealing with when trees could and could not be removed so permitted removal of trees while remaining within policy
- The word "*imperative"* implied the conclusion reached as the result of an evaluative process in which all relevant planning considerations should be taken into account.
- The policy established a high bar that should act as an effective limitation upon the exception.
- Although not a definition, "*imperative"* might be understood as broadly synonymous with necessity. The variables that might be taken into account when interpreting "*imperative*" included: (i) the significance, quality and value of the tree to be removed; (ii) whether the proposed development could be implemented without removing the tree; (iii) the benefits sought to be achieved by the implementation of the scheme; and (iv) whether an alternative scheme could achieve the same or similar benefits without necessitating the removal of the tree.

(9) ***Persimmon Homes v Worthing BC*** [2023] PTSR 2029

- Point of general import here re impacts on settings of National Parks (and also AONBs – given same policy).
- Inspector's decision quashed for inadequate reasons.
- The requirement in para.176 of the NPPF (now para 182) to give "*great weight*" to conserving and enhancing landscape and scenic beauty "*in*" a National Park extended to proposals for development within the setting of the National Park, not only to development on sites within it.
- The policy distinguished between development inside and outside a National Park.
- It indicated one approach for the former, another for the latter.
- However, it included both, and both were to be considered under the "*great weight*" principle.
- The issue was therefore whether, on a fair reading of the relevant parts of the inspector's decision letter, his assessment of the likely effects of the development on the setting of the National Park showed how he had given "*great weight*" to the conservation and enhancement of the landscape and scenic beauty in the National Park? Answer "*no*".

(10) ***Braintree DC v SSHD*** [2023] 1 WLR 3087

- CA holds that Courts has no jurisdiction to consider a local authority's application for an injunction, pursuant to the Town and Country Planning Act 1990 s.187B, to prevent the Secretaries of State for the Home Department and Defence from using Crown land to accommodate asylum seekers.
- The application was caught by the prohibition in s.296A(2), which provided that "*a local planning authority must not take any step for the purposes of enforcement in relation to Crown land unless it has the consent of the appropriate authority*".

(11) ***R (Save Britain's Heritage) v Hertfordshire CC*** [2024] JPL 38

- The GDPO, Schedule 2 Pt.11 Class B provided that demolition of a building was permitted development, albeit subject to prior approval.
- Para.B.1(a) provided a three-limbed exclusion to Class B, namely (1) the building must have been rendered unsafe or be otherwise uninhabitable (2) by the action or inaction of a person having an interest in the land and (3) it is practicable to secure safety or health by works of repair or works for affording temporary support.
- The OR concluded that PD rights applied.
- OR found that the first consideration was whether there was any evidence to suggest that the building had been *intentionally* rendered unsafe or uninhabitable by inaction. OR concluded building was in good structural condition, gave no impression of neglect.
- Held OR erred by referring to whether the building had been "*intentionally*" rendered unsafe, as the first limb of the exclusion not affected by a belief that the building had to have been intentionally rendered unsafe or uninhabitable. And as one of the three limbs of the exclusion had not been satisfied, the proposed demolition did not fall within the exception.
- Some interesting observations on: (i) approach to interpretation of planning legislation; and (ii) legal challenges based on allegations that officer report failed to demonstrate that legislation understood.

(12) ***Devine v SSLUHC*** [2023] PTSR 1548

- Mr Devine's farm, which he acquired in 2000, contained a 19th century barn.
- He carried out extensive works on the barn over the years without planning permission.
- In 2018 he made five applications for planning permission for various proposed conversion works and change of use to a single dwelling.
- An EN was issued.
- In ***Sage v SSETR*** [2003] 1 W.L.R. 983Lord Hobhouse made it clear that the "*character and purpose*" of a structure against which a LPA had taken enforcement action fell to be assessed by examining its physical and design features, and cautioned against an investigation of the intentions of the developer/landowner at intervals in the relevant planning history, and undue reliance on the actual use to which the structure had been put from time to time.
- However, the developer/landowner's intentions were not said to be an immaterial consideration.
- So, Inspector not erred in considering intentions in decision.

(13) ***Caldwell v SSLUHC*** [2024] EWCA Civ 647

- CA upheld the decision of Lieven J that an Enforcement Notice enforcing against a material change of use cannot require the removal of operational development which is the "*source of or fundamental to the material change of use*".
- So, for operational development to be within the scope of an Enforcement Notice enforcing against a material change of use, it must be subordinate or secondary to, the change of use.
- The ***Murfitt*** principle cannot be used to justify the removal of a building or other operational development which is a "*separate development in its own right*".

Some further thoughts (1)

- Did anyone notice how many of these CA concerned DCOs?
- The Government did - https://www.gov.uk/government/news/lord-banner-kc-to-lead-review-on-national-infrastructure

- *"The review builds on wider government reforms to streamline the process for Nationally Significant Infrastructure Projects (NSIPs), which are often held up by legal barriers and judicial reviews.*
- *Banner, assisted by fellow barrister Nick Grant, will explore whether NSIPs are unduly held up by inappropriate legal challenges, and if so what are the main reasons and how the problem can be effectively resolved, whilst guaranteeing the constitutional right to access of justice and meeting the UK's international obligations.*
- *Even unsuccessful challenges can set major projects back years in delays. This includes new road improvements, offshore wind farms and waste water management facilities."*

Some further thoughts (2) - My view: *Judicial review under the Planning Act* 2008 J.P.L. 2009, 4, 446-451

- *"It seems to the author likely that the Planning Act will result in future years in a large number of legal challenges to planning decision-making on major infrastructure projects. There are many reasons for this.*
- *First, the Government argues that the Planning Act will give communities a "far greater say" on such projects. This is a view which has received little support from those outside Government. The opposing view is that communities will feel increasingly disenfranchised by the process leading to the grant of a development consent and this will, in the author's opinion, make all the more likely legal challenges whether to the development consent ultimately granted or to other decisions along the way including the adoption of an NPS. Such challenges may well be seen as the only remaining genuine opportunity to air objections to such proposals. What is more, such challenges are, it seems, to be all the more likely for two reasons: (... (2) the growing influence of the Aarhus Convention ...*
- *Secondly, crucial to the new system are NPSs. The Government has confirmed that those on airports and nuclear power will be site-specific. Recently the Communities' Minister, Baroness Andrews, at the committee stage of the Planning Bill in the Lords insisted that NPSs, including those which are location-specific, will not prejudge consent decisions. But the reality is that the Planning Act (deliberately) curtails the ability to question the merits of decisions taken at the NPS stage at the later consent stage. There is express provision of the right to challenge in the High Court adopted NPSs. The importance of NPSs under the Planning Act will mean that those opposed to development the subject of an NPS may feel compelled to challenge the NPS especially where it is site-specific. Such challenges will, in the author's opinion, become a regular feature in the High Court. In contrast, challenges to national planning policy in the form of PPGs or PPSs have not been a common occurrence ...*

HIGH COURT DECISIONS

Introduction

- So many decisions, Westlaw suggests 62!
- Cover a wide range of subjects, including:
  - EIA
  - Habitats/ecology
  - The ***Hillside*** fallout
  - JR of condition discharges
  - More DCO cases …
  - Planning procedural matters
  - Other planning law matters
  - Planning High Court procedural matters
  - Climate change
- So, a selection only …

EIA

5 cases this year, more than last year …

R (BW Farms Ltd) v SSLUHC [2024] EWHC 217 (Admin)

- Challenge to EIA screening decision by S/S.
- Proposal to develop a site by making internal alterations to existing livestock buildings through excavation inside each building in order to facilitate the construction of a slatted floor system, and the installation of ridge-mounted ventilation fan.
- S/S concluded was EIA development because of uncertainty over the cumulative impact of the development's effect on odour exposures and ammonia deposition; he said that this meant that he could not reasonably conclude that there was no likelihood of significant effects, and therefore an EIA was required.
- Grounds all failed. C argued: (i) approach to uncertainty flawed; (ii) not considered baseline use; and (iii) inadequate reasons.
- All fail. On (i) – a precautionary approach given screening not full assessment. On (ii) found EIA Regs did not require consideration of baseline at screening stage only at next stage when preparing the ES.

R. (Pennine House Ltd) v Bradford MDC [2024] EWHC 608 (KB)

- Landscaping works for the improvement of the highway
- These were capable of being PD under Sch.2 Pt 9 of the DMPO. However, pursuant to art. 3 if a development fell within the EIA Regs it would not be classed as PD unless the LPA first adopted a screening opinion that it was not EIA development within the meaning of the EIA Regulations.
- Court held that the screening opinion that the landscaping works were not EIA development was fundamentally flawed.
- The opinion made repeated references to the impacts of the works being capable of being controlled by planning conditions, whereas it would not be possible to impose such conditions if the works were permitted development.
- The opinion was therefore prepared on a false basis and its conclusion was based on irrelevant and incorrect considerations. So not PD.
- It was also significant that the screening opinion was only issued on 31 July 2023, when the works were actually commencing, which was indicative that the LPA had failed to apply its mind to the need to go through the pre-conditions for establishing whether the works were PD.

Frack Free Balcombe v SSLUHC [2024] J.P.L. 484

- All kinds of grounds …
- On EIA alleged failure to comply with EIA Regulations.
- The two limbs of the Claimant's argument were that:
  - (a) the decision makers failed to properly consider the project as a "*whole*"; and
  - (b) there was no consideration of greenhouse gas emissions in the screening opinion.
  - Also alleged a failure by the Inspector to consider the climate change impacts from the development, in particular an express consideration of the assessed and quantified level of greenhouse gas emissions from the development.
- All grounds rejected.

R. (Clarke-Holland) v SSHD [2023] EWHC 3140 (Admin)

- Another EIA screening challenge … unusual one …
- Court holds the S/S's use of permitted development rights under Class Q of the GPDO Sch.2 Pt 19, in order to mitigate an emergency consisting of the urgent need to accommodate asylum seekers, was lawful where the proposed development was on Crown land and the numbers of asylum seekers she had a legal duty to accommodate were at unprecedented levels.
- A screening direction that the proposed use of the sites was not likely to have significant effects on the environment was not irrational, despite the fact that it had been directed at a 12-month period of use even though a longer term use of the sites was envisaged.
- Shows how difficult to win screening challenges …

R. (Llandaff North Residents' Association) v Cardiff CC [2023] Env. L.R. 31

- JR of 2 decisions: (i) grant of PP for a pumping station to serve a mixed-use development with a minimum of 5000 homes on land in Cardiff ("the housing development"); and (ii) the discharge of a planning condition requiring a strategic foul drainage masterplan informed by hydraulic modelling which was attached to the grant of OPP for the housing development itself.
- The pumping station was needed to serve the housing development, but developer said it would also serve other existing and potential developments in the surrounding area.
- LPA was entitled to conclude that the two proposed developments were not part of the same "*project*" for EIA purposes based on factors including whether they were on adjacent sites, undertaken by the same entity, and functionally interdependent.
- The fact that the pumping station was needed for the housing development did not mean that it would not also serve other existing and potential developments in the area, and LPA was entitled to have regard to those matters.
- Challenge to discharge of condition rejected as not irrational.

Habitats

Just two I want to cover this year …

NRS Saredon v SSLUHC [2023] EWHC 2795 (Admin)

- A decision-maker who reduces the weight attributed to BNG, mistakenly considering that future legislative requirements would apply retrospectively, commits an error of law.
- Now EA 2021 in force this only has any bearing on cases where applications pre-dated coming into force.

Fry v SSLUHC [2023] EWHC 1622 (Admin)

- In context of nutrients issues …
- Can AA be required at the RM stage?
- (i) ordinary reading of Habs Regs suggests not, but must apply purposive interpretation in light of the Habs Regs and retained EU law case-law;
- (ii) Plus under Withdrawal Act - at time of decision - Art 6(3) of Habs Directive continued to have direct effect.
- NB also an issue re approach to Ramsar sites …
- Heard in CA – decision awaited.
- In any event law on EU law changed now …

The fallout from ***Hillside***

Look at the ***Dennis*** case, already considered ***Fiske*** above …

R (Dennis) v LB of Southwark [2024] EWHC 57 (Admin) (1)

- JR to grant NMA under s.96A of the TCPA 1990, the effect of which was to insert the word "*severable*" into the description of development for an outline planning permission.
- 2015 OPP for large scale mixed0use phased development.
- New detailed PP for one phase … ***Hillside*** issues e.g. if implements this detailed PP will right to build out under OPP be lost?
- LPA and developer agreed that since the OPP was for a phased development the phase in issue could be severed from the development, allowing OPP and the detailed PP to be built out together circumventing ***Hillside***.
- In an attempt to "formalise" the severability of the OPP, the IP made the s.96A Application, which was approved.
- This was challenged.

Dennis (2)

- Issue was whether the introduction of the word "*severable"* into the description of the development of the OPP was a "*materia*l" amendment, such that the use of s.96A to effect the amendment was ultra vires. It was argued that the OPP was always severable in principle since it was an OPP for a phased development and the purpose of the S.96A Application was merely to formalise that severability, therefore, the amendment was "*non-material*".
- All parties accepted that if, on a true construction, the OPP was in fact not severable prior to the S.96A Application, then the claim must succeed.
- Therefore, the key issue to be determined was whether the OPP was severable as granted.
- Holgate J holds that the OPP cannot be read as being severable prior to the S.96A Application because phasing of a development alone is not sufficient to amount to a *"clear contrary indication"* (as noted in the case of Hillside) that a permission is severable. This is because to conclude so would mean that all planning permissions (outline or detailed) for phased development are severable, thus ***Hillside*** would never apply to such permissions.
- Judge also said that while outline PPs provide a "*good deal of flexibility*" such that details of a scheme can be determined at a later stage, it still sets the parameters and framework within which details can be approved.
- Therefore, the phased nature of a development alone will not be sufficient to conclude that a permission is severable and indeed, in this case, it was not.
- Holgate J also doubted the legality of the introduction of the term "*severable"* on its own into the OPP, without clear limitations as to the manner of severability.

Hillside: Legislative reform?

- A recent government consultation proposes that the new section 73B of the TCPA 1990 can provide a solution to the issues created by overlapping, incompatible planning permissions.
- See https://www.gov.uk/government/consultations/an-accelerated-planning-system-consultation/an-accelerated-planning-system#varying-and-overlapping-planning-permissions

JR of discharge of conditions

A growing trend …

Saw above ***Llandaff North Residents' Association***

See https://www.planningresource.co.uk/article/1829342/legal-viewpoint-conditions-discharged-woods

More delay …

R (Laing) v Cornwall Council [2024] EWHC 120 (Admin)

- Condition required the submission and approval of a landscape and ecological management plan that complied (“*shall comply”*) with the recommendations of an earlier ecological appraisal report.
- This contained a number of requirements e.g. new hedgerow must be positioned to maximise connectivity across the site by connecting directly to retained hedgerows and that double the length of hedgerow to be lost had to be constructed elsewhere on site.
- Application to discharge condition - the ecological plan submitted with the application showed the removal of about 23 metres of hedge between the site and the road, and replacement with two hedges of a total length of 25 metres. The replacement hedges were not shown as connecting directly into the retained hedges.
- Officers discharged saying the appropriate test for discharging a condition was whether the application was "*satisfactory",* and that a condition could not be read in a way that imposed unreasonable requirements.
- Court quash: (i) condition *“shall comply”* and did not; (ii) no general obligation to give reasons for discharge but had here and they disclosed erroneous approach.
- On reasons - the Openness of Local Government Bodies Regulations 2014 reg.7 - created a duty to give reasons for a delegated decision where the decision affected the rights of an individual as not clear ecology condition impacted C.

R. (Whiteside) v Croydon LBC [2023] EWHC 3289 (Admin)

- Another JR of the discharge of conditions.
- Ground of challenge – irrationality.
- *"Prior to the commencement of any construction, demolition and excavation works, details of the finished land levels of the proposed dwellings and finished levels of the amenity spaces and roots [sic] throughout the sites shall be submitted to and approved in writing by the Local Planning Authority. The development shall be carried out in strict accordance with the approved detail."*
- Claim fails
- Judge says "*it seems to me that the Claimant's real grievance is against the original grant of Permission itself*"

More DCO challenges …

Durham CC v SSLUHC [2023] PTSR 1735
R. (Galloway) v Durham CC [2024] EWHC 367

- Two cases dealing with the nightmarish boundary between what is an NSIP and what is not in the context of 49.9 MW solar farms, and the consequences of this …
- Two lengthy and detailed judgments from Chamberlain J and Fordham J
- One recommendation that the Banner Review could make that would reduce challenges is a completely free choice if an NSIP to go instead down TCPA 1990 route.
- Chamberlain J judgment useful on this.

R (Save Stonehenge WHS Ltd) v SST [2024] EWHC 339 (Admin)

- Second grant of the Stonehenge DCO, and second JR.
- Previously quashed by consent.
- Rolled-up hearing rejects multiple grounds, including climate change. Grounds included:
- Ground 5: The SST failed to have regard to the Carbon Budget Delivery Plan and the Net Zero Growth Plan (published March 2023) which together were an obviously material consideration
- Ground 6 – The SST failed to consider not applying the NPSNN as is it under review for being out of date in relation to obligations in the Climate Change Act 2008; or the SST acted irrationally in not departing from the NPSNN in relation to climate change.
- Ground 7 – The SST approach to EIA was unlawful in relation to the cumulative effect of greenhouse gas emissions from the DCO scheme and other committed road schemes.

R. (CPRE) v SST [2023] EWHC 2917 (Admin)

- Challenge to A57 Links Road DCO
- 22 ha of scheme on Green Belt
  - Ground 1: CC and cumulative effects – same as in ***Boswell*** see above
  - Ground 2: when concluding that the benefits of the scheme clearly outweighed the harm to the Green Belt such that there were 'Very Special Circumstances' justifying inappropriate development in the Green Belt, the S/S unlawfully failed personally to assess whether credible alternatives proposed might deliver substantially similar benefits with less harm to the Green Belt.
  - Court rejects that alternatives a mandatory consideration.

R (Dawes) v SST [2023] EWHC 2352

- Again, second time DCO granted to re-open Manston Airport and second time JRd. This time not successfully.
- Grounds related to, inter alia, fairness and climate change.

Planning procedural issues

S. 62A applications - ***R. (Low Carbon Solar Park 6 Ltd) v SSLUHC*** [2024] EWHC 770 (Admin)

- First case to consider s. 62A applications to PINS where LPA designated for poor performance;
- Clear from decision that applicants limited rights to respond to statutory consultee comments, at discretion of Inspector;
- *"In my judgment, other inspectors may well have admitted the claimant's rebuttal, but that is not the test …"* [49];
- "*I am satisfied that the claimant understood the gist of the objections of ECC and HE before making the section 62A application, from the previous application …"*
- **My advice: do NOT use s. 62A! Kangaroo Court process** - make normal application, and then appeal for non-det at earliest possible point.
- Second s. 62A challenge being heard in June.
- Until now all cases Uttlesford, but now other designated authorities …

Duty on LPAs to determine applications for approvals under condition after time limit on PP expires

- ***R. (Lisle-Mainwaring) v Kensington and Chelsea RLBC*** [2024] EWHC 440 (Admin)
- The general principle that applied to applications for planning permission, that once a valid application had been made, a local authority had a continuing duty to determine it, also applied to applications for approvals required under a planning condition.
- Applies ***Bovis Homes (Scotland) Ltd v Inverclyde DC*** 1982 S.L.T. 473, and ***R. (Goesa Ltd) v Eastleigh BC*** [2022] EWHC 1221 (Admin), [2022] P.T.S.R. 1473.
- The fact that such an application was made before the time limit on a planning permission had expired, and was determined after it had expired, was not a good reason to disapply that principle.

Project Genesis Ltd v SSLUHC [2024] EWHC 368 (Admin)

- Challenge to refusal of PP for energy from waste facility.
- One ground focussed on the S/S disagreeing with the Inspector on L&V matters despite not having himself visited the site. This old chestnut argued so many times before … always fails. So many cases holding S/S not required to visit the site to disagree on L&V matters or most other things. Are there any exceptions?
- Another ground useful reminder that under CIL reg. 122(2) the *"relationship*" between a planning obligation and a development had to be "*directly*" related, and not simply "*indirectly"* related.
- The UU put forward an obligation relating to the alleviation of fuel poverty scheme. This involved no direct supply of electricity or heat. It involved no discount for electricity or heat actually supplied. The households were not neighbouring to the development site; nor even in the close vicinity. They were not joining as a household would. Rather, they were to be making applications tested through the prism of fuel poverty eligibility criteria.
- So not directly related.

R (ASDA) v Enfield LBC [2023] EWHC 2049 (Admin)

- ASDA an objector to scheme for redevelopment of shopping centre.
- Sent an email saying application not going to Ctte on a particular date; so agent did not attend. Did in fact go to Ctte and approved!
- Argued legitimate expectation would not go to Ctte on that date.
- Claim rejected on basis no unfairness or prejudice: (i) ASDA concerns already before the Ctte; and (ii) lack of action by ASDA having discovered what happened.

Bramley Solar Farm Residents Group v SSLUHC [2023] EWHC 2842 (Admin)

- The High Court upheld the decision of an Inspector to consider, on appeal, a revised scheme.
- The changes made there consisted of "*changes to the masterplan to remove a small number of solar panels and a proposed forest school and car parking associated with the forest school. These areas will instead be replaced by landscape and biodiversity enhancement planting. The intended Appellant also seeks to amend the Description of Development to remove reference to the proposed forest school and associated car parking*".
- We all know of PINS guidance vs evolving appeals.
- The Inspector took the view that the changes were not substantial.
- The test being *"whether the change proposed is substantial or whether the development proposed is not in substance that which was originally applied for"*.
- In that case LPA did not oppose amendments.

R. (Simmonds) v Blaby DC [2023] EWHC 2217

- A PP and a listed building demolition consent were quashed where the local authority's decision-making process had been rendered unfair, as one of its committee members had chosen not to participate in the debate or vote on the developer's application, in reliance on mistaken advice that his discretion had been fettered.

R (Webb) v Bromley LBC [2023] EWHC 2091

- Interesting bias case!
- The decision of a planning committee to grant an NHS trust planning permission for the erection of an endoscopy unit at one of its hospitals was not tainted by bias arising from the role of one of the committee's members, who had voted in favour of the proposal, as a governor of the trust!!
- Why? That committee member had declared his interest at the outset of the planning meeting, in accordance with the local authority's code of conduct, and in no sense could he be taken as an advocate for the trust's activities.
- Really?! If not, the NHS would decision be the same?

R. (Velayuthan) v Southwark LBC [2023] JPL 1548

- Challenge to grant of PP:
- (i) Clear statutory publicity complied with;
- (ii) But quashed PP as LPA had breached a property owner's legitimate expectation to be consulted, as its Statement of Community Involvement had stated that it would go beyond its statutory consultation duties and consult affected neighbours of proposed sites.
- (iii) A PP could not be withdrawn for administrative error once granted, only quashed.
- (iv) Court rejected the further ground that the grant of PP had been invalid for being dated two months prior to the actual date of notification of the decision; under the statutory scheme PP took effect on the date of notification and there was no requirement that it contained any other date, so the error was irrelevant.

Taytime v SSLUHC [2024] EWHC 1053 (Admin)

- Only an applicant for PP may appeal under s. 78 TCPA 1990
- Deals with:
- 1] Assignment of a s. 78 appeal. There is no ability to assign appeals.
- 2] Consideration also of law of agency in planning appeals.
- 3] And what an Inspector should do if appeal being pursued by the wrong party.

Other planning law matters

Status of the PPG - ***Mead Realisations Ltd v SSLUHC*** [2024] EWHC 279 (Admin)

- C argued PPG was incapable of imposing a more stringent set of requirements than the NPPF
- Court rejected that:
- (1) Inspectors determining planning appeals were required to exercise their own judgment within the framework of national policy set by government.
- (2) However, the scope of the NPPF should not be overstated: in the determination of planning applications it was no more than "*guidance"* and, as such, one of the "*other material considerations*" to which the decision-maker must have regard
- (3) The weight to be given to conflict or compliance with the NPPF was a matter of judgment for the decision-maker, a decision with which the court could only intervene on public law grounds. That analysis applied also to written ministerial statements and PPG, Hopkins Homes applied.
- (4) Neither the NPPF nor the PPG had binding legal effect. As a matter of policy, PPG was intended to support the NPPF. While ordinarily, it would be interpreted and applied compatibly with the NPPF. Nonetheless, the S/S could adopt PPG which amended, or was inconsistent with, the NPPF.

Protect Dunsfold v SSLUHC [2024] JPL 183

- Challenge to decision by S/S to grant PP on appeal for an exploratory oil and gas drilling site.
- (1) the S/S had not been obliged to take into account his contemporaneous decision (at Ellesmere Port) refusing planning permission in respect of a different drilling site. Argued that the two decisions were irreconcilable in their approach to unmitigated carbon emissions. Rejected – the matters for determination in each case had not been sufficiently similar so as to require consistency in the planning decision-making process.
- (2) Also rejected a challenge that the inspector and S/S had chosen to depart from the policy in the first sentence of para.176 and the *"great weight*" to be given to harm to the AONB. As no positive indications to contrary Court would assume they applied that policy.

R. (BDW Trading Ltd) v Wrexham CBC [2023] EWHC 3474 (Admin)

- A case that really sums up our dysfunctional planning system and the collapse of any kind of plan-led system in recent years …
- Court holds that after a LPA which had received a planning inspector's recommendation that it should adopt a local development plan as modified which had been submitted for examination pursuant to the Planning and Compulsory Purchase Act 2004, the LPA was obliged to adopt the plan and was not free to decline to adopt it.
- Although s.67 of the Act said that a LPA "*may adopt*" a local development plan, when seen in context, the language of s.67 and the reference to "*may adopt*" was talking about the different ways in which adoption could be effected, or rather about the different forms of plan which could be adopted in different circumstances. It did not suggest that the LPA had any true discretion as to whether the plan should be adopted, and certainly did not indicate a discretion to decline to adopt.
- Following judgment, BBC story "*Wrexham councillors may face jail if planning vote rejected*", https://www.bbc.co.uk/news/uk-wales-67731930#:~:text=Councillors%20have%20been%20warned%20they,the%20council%20to%20adopt%20it.

Lochailort Investments Ltd v Somerset Council [2023] EWHC 1776 (Admin)

- There had been a successful challenge to a number of allocated sites in a Local Plan.
- Pursuant to Court order the LPA modified its policy, so as to exclude, from the development limits of the nearby settlement, an area of land previously allocated.
- JR by developer. C argued that should leave land with no designation so "*white land*" – neither in nor out of limits.
- Fails. The LPA had rightly considered that, in the light of that Court's decision quashing allocations, the extension of the village's development limits by the designation of a site as a site for development ceased to be justified and should be deleted.

R (Davis) v Oxford City Council [2023] EWHC 1737 (Admin)

- JR of 2 PPs for neighbouring developments
- Issues:
- (1) whether the s106 should have secured delivery of the relevant highway works by the County Council in addition to securing the financial contributions from the developer. Complained that there was no covenant on the part of the County Council in either s106 agreement to carry out the works, nor any kind of ***Grampian*** restriction on the development. Contributions material and a matter of planning judgment if need deliver works pre-development.
- (2) The apparent failure of the Council to place a draft of the planning obligation on the planning register, in breach of Article 40(3)(b) of the DMPO. No relief as no prejudice as OR gave HoTs and no evidence would have made any other reps is had draft.

Ward v Torridge DC [2023] EWHC 2629

- Fall-back position.
- Remember 2 requirements: (i) the applicant has a lawful ability to undertake the fall-back development; and (ii) the applicant can show that there is at least a "*real prospect*" that it will undertake the fall-back development if PP is refused – NB it does not have to be probable or likely: a possibility will suffice.
- Planning officer had erred in recommending that retrospective planning permission be granted for unauthorised development carried out on a farm to enable barns to be used for dairy farming.
- He had been entitled to consider the fall-back position that in theory, even if retrospective permission was refused, the barns could still be used for livestock pursuant to permitted development principles, but he had failed to consider whether there was a real prospect that the owners would continue to operate as a dairy farm without the unauthorised development.

R. (Widdington PC) v Uttlesford DC [2024] J.P.L. 133 |

- JR of PP for 4 homes. Site benefited from LDC for access to use land for a market.
- (1) In granting PP LPA had regard to fall-back position. But had not assessed likelihood of fall-back as a market happening. One factor material to the likelihood of holding a market on the site were indications that the local town council, which was the licensed operator of markets in the area pursuant to a Royal Charter, would not give permission for a rival market.
- (2) OR misleading on heritage: (i) internally inconsistent, in that it identified that there would be some less than substantial harm to the setting of two of the listed buildings, but then found that the proposed development would have no impact on the listed buildings' significance; and (ii) failed to provide members of the planning committee with a proper understanding of how their judgment, in weighing the adverse impact of the proposal on designated heritage assets against public benefits, was capable of affecting whether the tilted balance applied.

R (Tottenham Hotspur) v LB of Haringey [2023] EWHC 2569 (Admin)

- Approval of the major redevelopment scheme, which included, amongst other things, 2,929 homes, public realm improvements and commercial/community infrastructure near to THFC's stadium.
- Ground 1: The Claimant argued that the Council failed to lawfully assess the totality of the heritage impacts of the development.
- Ground 2: relates to implications of access and crowd control at the stadium, the Claimant argued: (i) that the Council unlawfully relied upon a section 106 Agreement and planning conditions to determine that crowd control matters for the stadium would be addressed; and (ii) the Council failed to lawfully apply the Agent of Change Principle.
- Challenge fails.

Barrett v Welsh Ministers [2024] JPL 501

- Implementation without compliance with a condition.
- Issue was whether it was prohibitive and went to the heart of the PP so as to render development unlawful.
- Condition related to landscaping approval, Inspector held it went to heart of PP.
- Court quashed.
- The inspector had carried out a site visit but did not record his findings. He stated that he had little doubt that the condition went to the heart of the planning permission, but he had not considered it in the context of the remaining landscaping matters, and did not give any further indication that the necessary fact-sensitive enquiry had been carried out.

Holystone v SSLUHC [2023] EWHC 1739 (Admin)

- S.73 application in GB for employment park in a quarry.
- OR recommended grant as new proposal – with taller building- would not have materially greater adverse effect on openness – that already consented scheme.
- Members disagreed and rejected, the relevant GB exception being the redevelopment of previously developed land, subject to openness being preserved (NPPF 149g)i). Inspector dismisses appeal, no VSC.
- Argued:
- (i) In assessing exceptions in NPPF needed to do so vs fall-back – rejected, fall-back a material consideration, but did not change NPPF tests;
- (ii) Proper exception was in fact NPPF 149d), which provides for the replacement of a building so long as the new building is in the same use and not materially larger than the one it replaces. But there was no building yet just a PP for one! Rejected!
- (iii) Inspector misunderstood employment evidence. Successful. Court held that C had been clear that the amended proposal would safeguard 10 jobs, would generate a further 15 to 25 direct jobs and another 10 indirect jobs. The Inspector seemed not to have grasped that these numbers were distinct from any employment-related impacts of the employment park as already consented– they were in fact a direct - result of the proposed variations to the conditions.

Kingston U-T v SSLUHC [2024] EWHC 2055 (Admin)

- A planning inspector had erred in finding that the change of use of land within the green belt to residential use as a private gypsy and traveller site was not inappropriate development within the NPPF para.150(e) "*material changes in the use of land (such as changes of use for outdoor sport or recreation, or for cemeteries and burial grounds)*".
- Residential uses did not fall within para.150(e), and the NPPF had to be read in conjunction with the Government's Planning Policy for Traveller Sites, which specified that traveller sites in the green belt were inappropriate development.

Swindon BC v SSLUHC [2023] EWHC 1627 (Admin)

- The proposed development was for 220 dwellings.
- The site was within a local plan where land had been allocated for 8,000 homes to be developed in distinct but interlinked villages, together with necessary infrastructure.
- The local policy set out a requirement that *"all development, where appropriate and within the context of economic viability, shall make provision to meet the cost of infrastructure made necessary by the development itself and cumulatively with other development"*.
- The policy's supporting text stated that where abnormal costs threatened the economic viability of development, exceptional circumstances might arise where the benefits of development outweighed the harm of not providing for infrastructure. Between 2016 and 2021, permission was granted to various developers for 6,800 of the 8,000 dwellings.
- However, the local authority had refused permission in the instant case because the proposal did not meet the cost of the infrastructure it would necessitate and, contrary to a further policy, it did not provide for a primary school.
- Allowed on appeal by Inspector.
- Court upholds decision.

Neighbourhood planning cases

- Two to note briefly:
- (1) ***R (Waverley BC) v Elstead PC*** [2024] EWHC 833 (Admin): published wrong versions of NP for purposes of referendum but no way of correcting this so apply to Court for JR to retrain itself from proceeding!
- (2) ***Spitalfields Neighbourhood Planning Forum v Tower Hamlets*** LBC [2023] EWHC 165: JR of Tower Hamlets Council decision not to make the Spitalfields Neighbourhood Plan. This decision was taken under s38A(5) Planning and Compulsory Purchase Act 2004, PCPA 2004. The separate residential and business referendums, which are part of the statutory procedures for making Neighbourhood Plans, had produced different results. One, the residential referendum, supported the making of the Plan, but the business referendum came to the opposite conclusion. The Council therefore had to decide whether or not to make the Plan. It decided to refuse to make the Neighbourhood Plan. The JR failed on all grounds.

Lullington Solar Park Ltd v SSLUHC [2024] EWHC 295 (Admin)

- Planning application for a 49.9MW solar farm;
- Nearly half of the site was BMV land.
- The inspector attached significant weight to the provision of clean electricity to around 17,300 homes, and moderate weight to BNG, long term landscape benefits and job creation, however he found that the loss of 10.5 hectares of Grade 2 BMV land and 23.1 hectares of Grade 3a BMV land and associated food production over the 40 year period of the proposed scheme outweighed the benefits of the scheme and amounted to a conflict with the development plan and the NPPF.
- Inspector found lack of robust assessment of BMV outside a study area outside of the site.
- C argued approach contradictory, by accepting that:
  - (i) it was not practicable or reasonable to require the Claimant to fully investigate every possible location for the proposed development within the study area or to demonstrate that there are no possible alternatives to the Site; and
  - (ii) the assessment carried out by C was deficient because of a lack of soil investigation outside of the site.

Planning High Court procedural issues

Lots of cases I could discuss

A whole talk in and of itself …

So just a couple of things to highlight…

Time limits in planning statutory review

- Remember unlike in JR in planning statutory reviews must both file and serve within 6 weeks
- If you don’t Courts generally very strict, see e.g.
- ***Home Farm Land Ltd v SSLUHC*** [2023] EWHC 2566 (Admin)
- ***Telford and Wrekin Council v SSLUHC*** [2023] EWHC 2439 (Admin)

Disclosure: ***Friends of the Earth v SSLUHC*** [2023] EWHC 3255

- Decision of S/S on call-in to grant PP for new coal mine;
- Cs seek disclosure of ministerial submission;
- Court refuses – S/S had agreed with Inspector – and reasons in DL;

Climate change

Covered a number of case under DCOs above

Two others to deal with …

M&S v SSLUHC [2024] EWHC 452 (Admin)

- Holding the S/S had on many grounds erred in refusing planning permission for the construction of a new mixed office and retail store at the western end of Oxford Street, London, contrary to the planning inspector's recommendation.
- Most notably the S/S had misinterpreted the National Planning Policy Framework para.152 by finding that there was a strong presumption in favour of repurposing and re-using buildings; while there was some encouragement for the re-use of buildings in para.152, but nothing that came close to a presumption.
- He had also failed to give adequate reasons for disagreeing with the inspector's findings on the lack of alternatives to the proposed development and on the harm to the vitality and viability of Oxford Street and the wider West End by refusing permission.
- Second recent quashing of S/S decision having departed from Inspector … other one Turnden on which re-determination awaited.

R (Rights Community Action Ltd) v SSLUHC [2024] EWHC 359 (Admin)

- In 2015, the then S/Shad issued a written ministerial statement (WMS) stating that "*local planning authorities will continue to be able to set and apply policies in their Local Plans which require compliance with energy performance standards that exceed the energy requirements of Building Regulations until commencement of amendments to the Planning and Energy Act 2008 in the Deregulation Bill … from then, the energy performance requirements in Building Regulations will be set at a level equivalent to the (outgoing) Code for Sustainable Homes Level 4".* Although the Deregulation Bill gained Royal Assent and became the Deregulation Act 2015, the amendments to the 2008 Act contained in it, and referred to in the WMS, were not commenced. In 2021, the government stated that it would not amend the 2008 Act and that local planning authorities would retain powers to set local energy efficiency standards for new homes.
- Inspectors examining Area Action Plan ("AAP") held that the net zero policy in the AAP was unsound since it conflicted with the national policy on exceeding the requirements of the Building Regulations set out in the WMS.
- Decision quashed as misunderstood the WMS. To interpret the WMS so as to prevent or restrict the ability of the LPA to set a standard higher than Code Level 4 was plainly wrong.
- Case also notable for Lieven J rejecting a narrow approach to standing based on whether there is a better placed challenger.

Some cases from beyond our shores …

Climate change and human rights …

- Don’t miss the ECtHR decision in ***Verein Klimaseniorinnen schweiz and others v. Switzerland*** (Application no. 53600/20)
- Likely to re-ignite further CC challenges domestically …

EU

- Some CJEU cases – so much less important to us now – as we have quit that "*euro court*" but:
  - (i) ***WertInvest Hotelbetriebs GmbH v Magistrat der Stadt Wien*** (C-575/21) [2024] Env LR 6 – can screening be based on size of development alone? No.
  - (ii) ***Hellfire Massy Residents Association v An Bord Pleanala*** (C-166/22) [2024] Env. L.R. 10 on species licencing and its separation from the planning process …

Mussington v Development Control Authority [2024] UKPC 3

- Privy Council decision.
- Two residents of Barbuda, one of whom was a trained biologist, had standing to apply for judicial review of a decision to grant a development permit to build an airstrip on the island.
- The residents had sufficient interest in the environmental issues raised by the development and in a failure to follow due process in planning procedures.
- In particular, the biologist's scientific background, his knowledge of the flora and fauna in the area, his status as a local resident, and his experience of conducting environmental assessments amply demonstrated a sufficient interest.
- On standing domestically see the ***Community Action*** case.

N. Ireland

- Please note also a number of NI cases on planning (including in NI CA):
  - ***Tesco Stores Ltd's Application for Judicial Review, Re*** [2023] NICA 34 24 May 2023 on alternative sites and supermarkets
  - ***Duff's Application for Leave to Apply for Judicial Review, Re*** [2023] NICA 56 20 Sep 2023
  - Holding that C lacked standing to seek JR of a LPA's refusal to take enforcement action in relation to quarrying activities.
  - C it was said did not have sufficient interest in the matter, as none of his rights were affected, he had not participated in relevant investigations and he was not a suitable representative of the public interest due to his lack of involvement in an action group or NGO and his lack of specialist knowledge of environmental matters.

LANDMARK
CHAMBERS

Q&A

Thank you

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