Planning case law update

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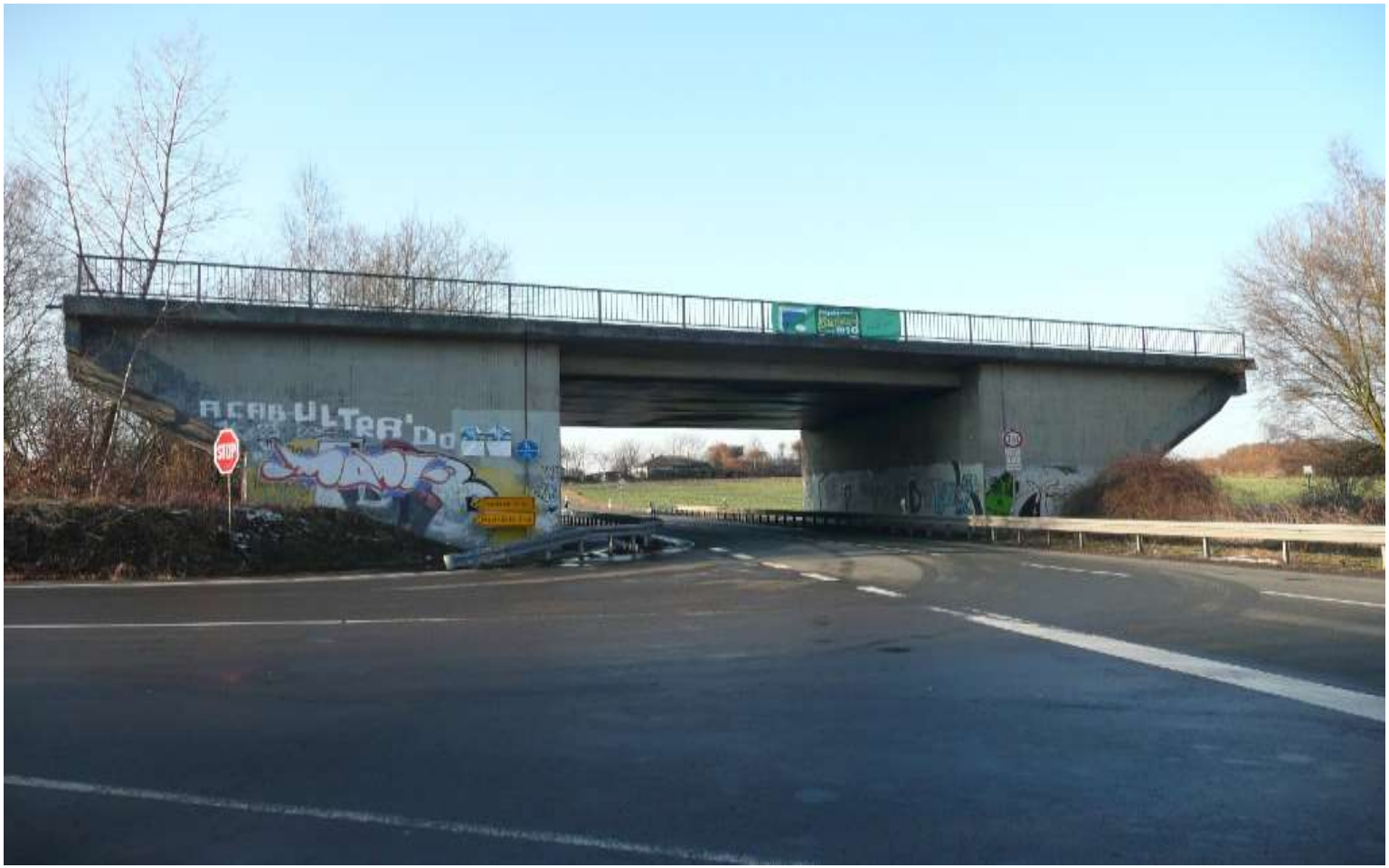
Cases

- R (Ashchurch Rural Parish Council) v Tewkesbury Borough Council [2023] EWCA Civ 101
- Newcastle City Council v SSLUHC [2022] EWHC 2752 (Admin)
- Future High Street Living v Spelthorne BC [2023] EWHC 688
- R (Hayle Town Council) v Cornwall Council [2023] EWHC 389
- DB Symmetry v Swindon BC [2022] UKSC 33
- Arnold White Estates Ltd v The Forestry Commission [2022] EWCA Civ 1304
- Armstrong v SSLUHC [2023] EWHC 176 (Admin)
- Reid v SSLUHC [2022] EWHC 3116 (Admin)
- R (University Hospitals of Leicester NHS Trust) v Harborough District Council [2023] EWHC 263
- R (Day) v Shropshire Council [2023] UKSC 8
- Lazari Properties 2 Lts v SSLUHC [2023] EWHC 353
- R (Ibrar) v Dacorum BC [2022] EWHC 2425 (Admin)

The “bridge to nowhere”



“Salami slicing” and multi stage schemes

- See *R (Ashchurch Rural Parish Council) v Tewkesbury Borough Council* [2023] EWCA Civ 101
- Tewkesbury Area Draft Concept Masterplan Report (Jan 2018) to inform review of the Tewkesbury Joint Core Strategy in 2023. Proposed new Garden Town development.
- Phase 1 required construction of a new road link across railway line and new railway bridge
- Council secured £8million for construction of the bridge from the Housing Infrastructure Fund but application had to be submitted in 2017
- Terms of HE funding agreement required Council to use “best endeavours” to construct 826 houses commencing in 2021
- PP for bridge granted by Committee in April 2021

“Salami slicing” and multi stage schemes

- Screening opinion considered bridge in isolation and concluded no likely significant effects and EIA not required
- The OR advised that the impacts of the bridge should be taken into account in isolation not the proposed link road or housing
- However the public benefits included “enabling the delivery” of the Masterplan i.e. the wider benefits of the development
- Lane J dismissed challenge and held that the OR was referring to the public benefits of constructing the bridge at the current time, not the benefits of the wider development
- C of A disagreed…

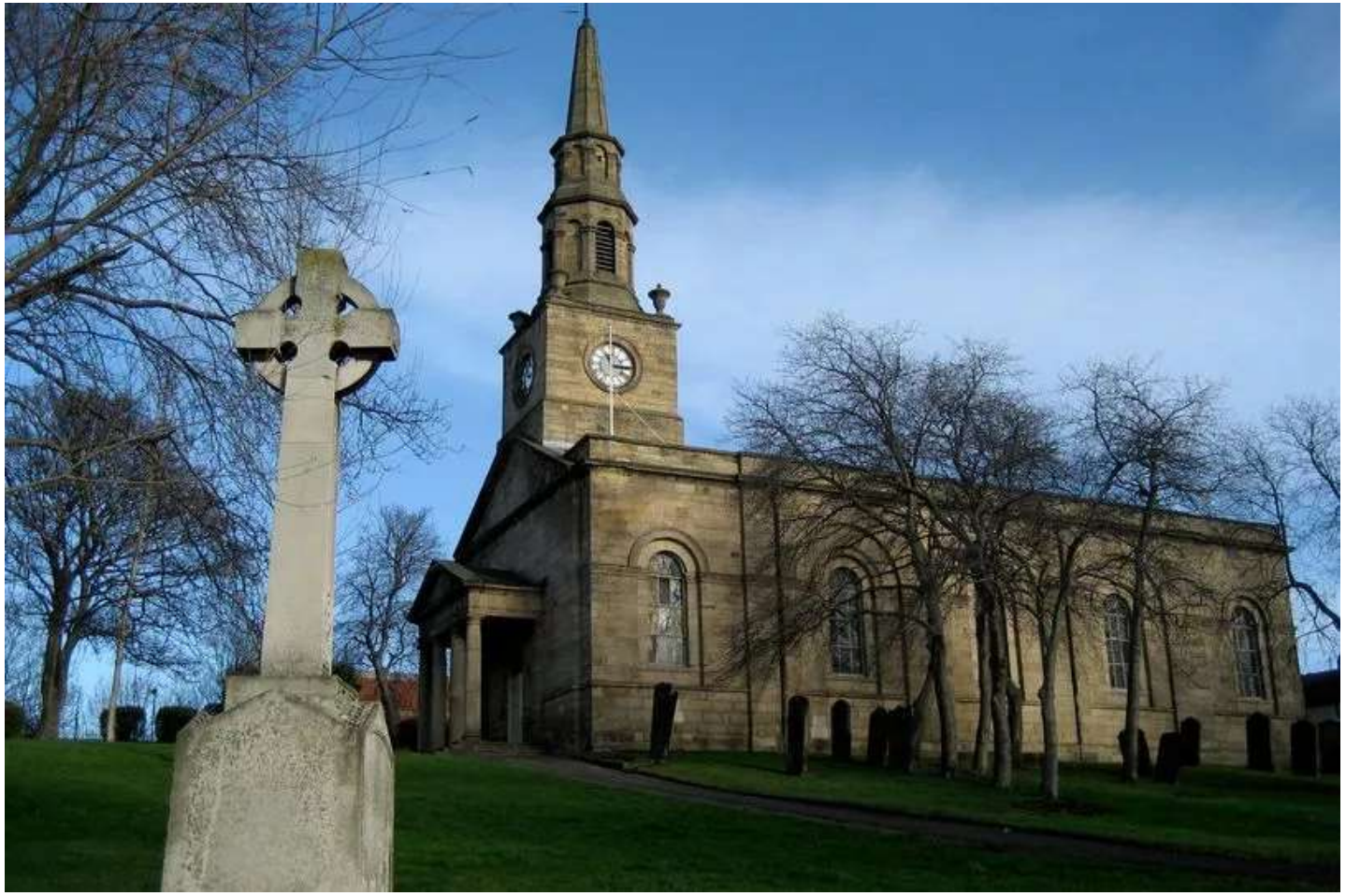
Salami slicing and multi stage schemes

- The benefits of a form of development and of enabling or facilitating such development are inextricably linked
- Court below failed to consider that, unless the future development came forwards, the bridge would go nowhere and serve no purpose
- Irrational to take into account benefits of the wider development without the harm
- By stating that these could not be taken into account OR went beyond expressing a view and misdirected the Committee
- Council conflated two questions: “is this application part of a larger project?” and “what are the significant environmental effects?” Uncertainties with assessing the latter do not affect the question of what constitutes a project. The Council failed to ask itself whether the bridge formed part of the wider project at all.

Material considerations post Committee

- See *R (Hayle Town Council) v Cornwall Council* [2023] EWHC 389 (Admin) for recent application of *Kides* principle
- Between resolution to grant PP and issue of DN, Cornwall decided to withdraw from promotion of roundabout improvement scheme. Argued that this was a new MC and the application should have been taken back to Committee.
- Lane J rejected claim. On a proper construction of the OR the upgrading works were not essential to the housing scheme.
- Also considered the second limb of *Kides*: whether the officer should reasonably have known of the change of circumstances. NB comments on evidence required to support sub-delegation of decision…
- See, also, *R (Hardcastle) v Buckinghamshire Council* [2022] EWHC 2905 (22 November 2022)

Heritage case law (1)



The heritage balance

- See *Newcastle City Council v SSLUHC* [2022] EWHC 2752 (Admin)
- Judgment of Holgate J dated 22 November 2022
- Council challenged grant of permission on appeal for controversial residential development on heavily constrained site
- Grounds of appeal included impact on Grade I listed church
- HE and LPA argued moderate "less than substantial harm"
- Developer: No harm or lower end of LSH
- Inspector found lower end of LSH in part because of absence of alternative design solution due to constraints

The heritage balance

- Ground 2(i): Council argued that the Inspector erred by taking into account absence of alternative design solution when assessing degree of harm rather than when weighing harm against benefits
- See HE Good Practice Advice 3 ("GPA3"):
  - Step 3: assess effects (beneficial/harmful) on significance
  - Step 4: explore ways to maximise enhancement and avoid/minimise harm
- Holgate J agreed. The Inspector took into account a legally irrelevant consideration:

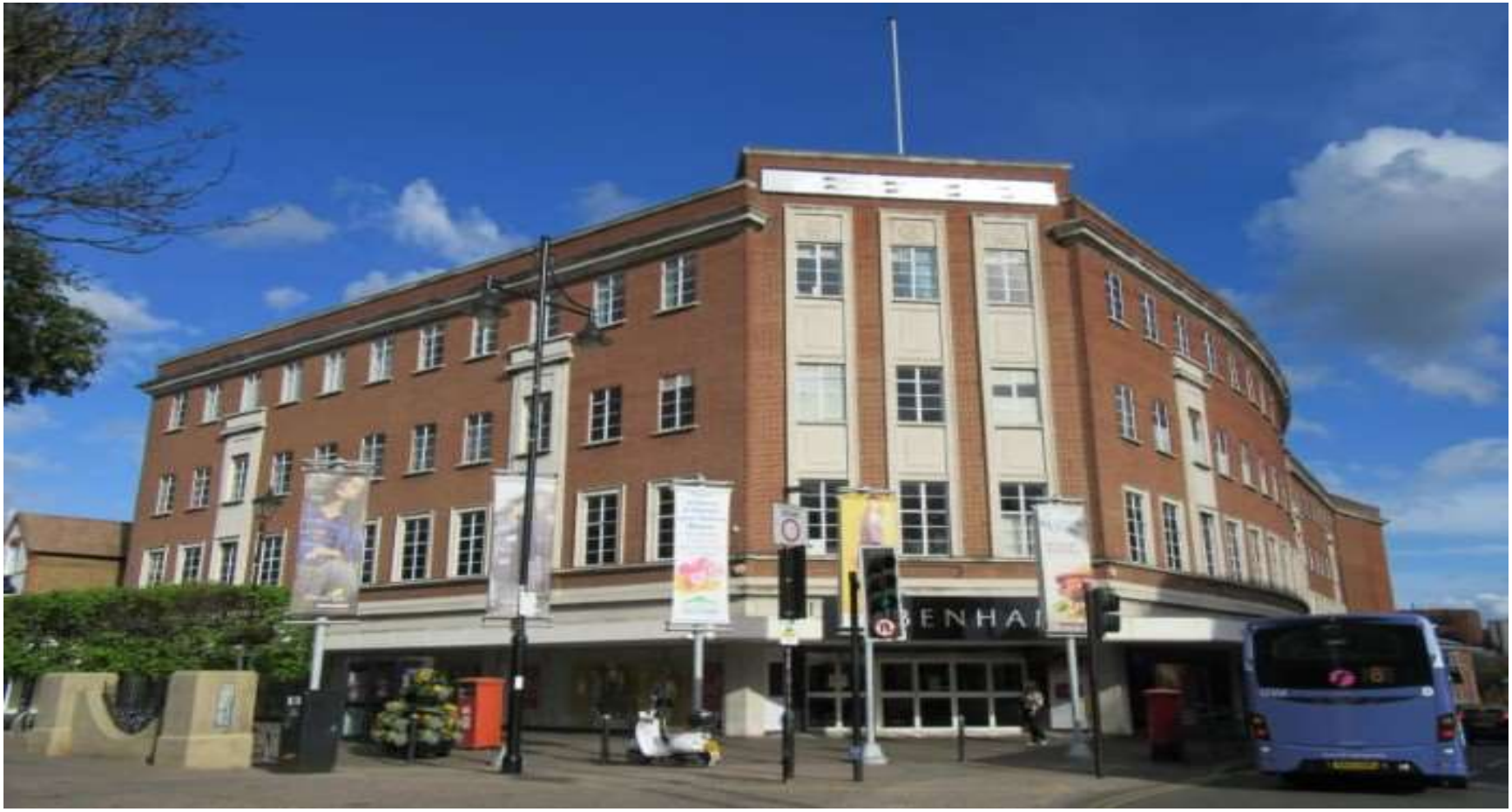
  "Even if that level of harm had been "minimised", in the sense that it could not be reduced further by adopting a different design solution, that tells the reader nothing about what that "minimised" level of harm amounts to." (para 71)

The heritage balance

- Holgate J rejected ground 2(ii) that the Inspector failed to give "cogent and compelling" reasons for departing from the advice of HE on the degree of harm, applying e.g. *Shadwell Estates Limited v Breckland District Council* [2013] EWHC 12 (Admin) at [72]
- "Substantial reservations" about whether the case law establishes any principle or "higher" standard of reasoning:

  "Why should there be a different test where a decision-maker differs from the views of a statutory consultee? How is the court to assess whether the reasons given are "compelling and cogent" without trespassing into the "forbidden territory" of assessing the merits of the appeal proposal?"
- Unnecessary to resolve this question to decide the ground: failed on facts. Awaits further consideration...

Heritage case law (2)



Heritage: conservation areas

- See *Future High Street Living v Spelthorne BC* [2023] EWHC 688
- Judgment of Lane J handed down on 28 March 2023
- C scheme to demolish former Debenhams department store at Staines-on-Thames and replace with residential development
- PP refused by the Council by DN dated 6 June 2022
- JR of LPA's decision to extend Conservation Area to include the building. Decision dated 29 June 2022.
- LPA consulted on the decision and invited comments. C's heritage expert made representations but common ground that these were not considered before the decision.
- "Supplemental report" ("SR") prepared after PAP letter received purporting to address comments

Heritage: conservation areas

- C argued that:
  - the decision to extend the CA was a pretext to prevent its demolition and so unlawful (ground 1)
  - the SR was unlawful and the OR was seriously misleading by e.g. failing to advise that HE had previously declined to list the building (grounds 2, 3 and 4)
- JR succeeded on grounds 2, 3 and 4.
- The SR wrongly suggested that HE's decision on listing / architectural merit had no bearing on the CA designation test under s69 as these were "separate and distinct" tests. S69 seeks to protect "areas of special architectural or historic interest". HE's assessment of the qualities of the building for listing purposes was clearly relevant. The OR should have advised Members of this.

Heritage: conservation areas

- Courts are suspicious of *ex post facto* reasoning
- BUT ground 1 failed: “The evidence does not show more than that the desire to prevent the demolition of the Building was "*an* impetus" rather than "*the* impetus" for the relevant extensions to the SCA.” (108)
- Latest in line of cases on improper designation of CA to prevent demolition (See e.g. Trillium (Prime) Property GP Ltd v Tower Hamlets LBC [2011] EWHC 146 (Admin), R (Silus Investments S.A.) v London Borough of Hounslow [2015] EWHC 358 (Admin), R (GRA Acquisition Ltd) v Oxford CC [2015] EWHC 76 (Admin)
- Threat of demolition can prompt decision to designate. C has to show that CA designation is really a pretext. A high test…

Planning conditions

DB Symmetry v Swindon BC [2022] UKSC 33

- Judgment dated 14 December 2022
- Long running legal battle relating to employment site forming part of the proposed New Eastern Villages ("NEV") near Swindon. Application for PP submitted in 2014. PP granted in 2015 subject to 50 conditions
- An "*important element of the proposed NEV that the development sites within the NEV should be connected with each other and the wider road network*."
- Condition 39 at heart of the challenge

Planning conditions

"Roads

The proposed access roads, including turning spaces and all other areas that serve a necessary highway purpose, shall be constructed in such a manner as to ensure that each unit is served by fully functional highway, the hard surfaces of which are constructed to at least basecourse level prior to occupation and bringing into use.

Reason: to ensure that the development is served by an adequate means of access to the public highway in the interests of highway safety."

Planning conditions

- Two issues for the SC:
  - Whether lawful for the LPA to impose a condition requiring a developer to dedicate land to be a public highway
  - The proper interpretation of condition 39 and whether it requires the access roads to be dedicated as public highway or is concerned only with the standard of construction of the access roads
- The "commercial reality": if no requirement to dedicate land, Developer could seek a financial contribution from adjoining landowners to use roads by way of licence
- SC had to consider whether the long established Court of Appeal case of *Hall v Shoreham* [1964] 1 W.L.R. 240 should be overruled
- *Hall v Shoreham*: a condition requiring dedication without payment of compensation is unreasonable and void

Planning conditions

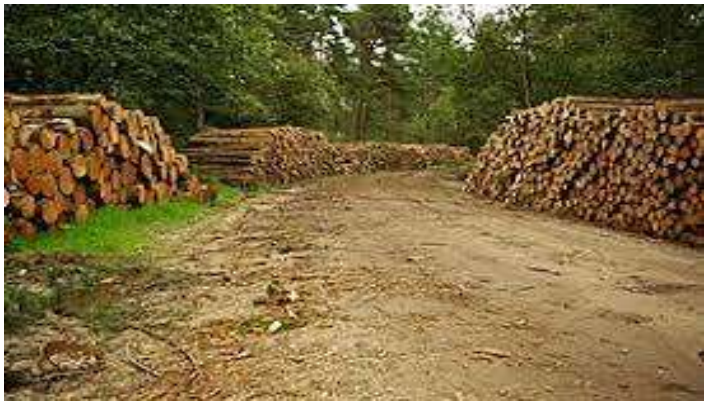
- SC unanimously affirmed *Hall v Shoreham* and also considered the role of planning obligations
- There is a "fundamental conceptual difference between a unilaterally imposed planning condition and a planning obligation: the developer can be subjected to a planning obligation only by its voluntary act…"
- Per Lord Hodge:

  "I would hold that a planning condition which purports to require a landowner to dedicate roads on its development site as public highways would be unlawful. I reach this conclusion without regret as to hold otherwise would be to undermine a foundational rule of the planning system on which people have relied for decades and create uncertainty where there should be certainty."

Planning conditions

- On issue (2): condition 39 "does not purport to require the dedication of the access roads as a public highway. Instead, it addresses the quality and timing of the construction of those roads and other access facilities."
- SC applied guidance in *Trump International Golf Club Scotland Ltd v Scottish Ministers* [2015] UKSC 74; [2016] 1 WLR 85 and *Lambeth London Borough Council v Secretary of State for Housing, Communities and Local Government* [2019] UKSC 33; [2019] 1 WLR 4317
- Reached conclusion based on wording of the condition, its context and the "wider context of the legal framework of planning law, including the landmark case of *Hall v Shoreham"* and the practice of securing dedication by way of a s106"

Interaction between planning and other statutory regimes



- See *Arnold White Estates Ltd v The Forestry Commission* [2022] EWCA Civ 1304
- Notice issued by the Forestry Commission under section 24 of the Forestry Act 1967 for breach of restocking conditions on a felling licence.
- Licence relied upon to fell trees but no restocking took place
- No appeal against s24 notice
- Appellant argued that subsequent grant of PP overrode restocking condition
- C of A had to determine the effect on that notice if PP subsequently granted for a development whose construction would make it impossible to comply with restocking condition

Interaction between planning and other statutory regimes

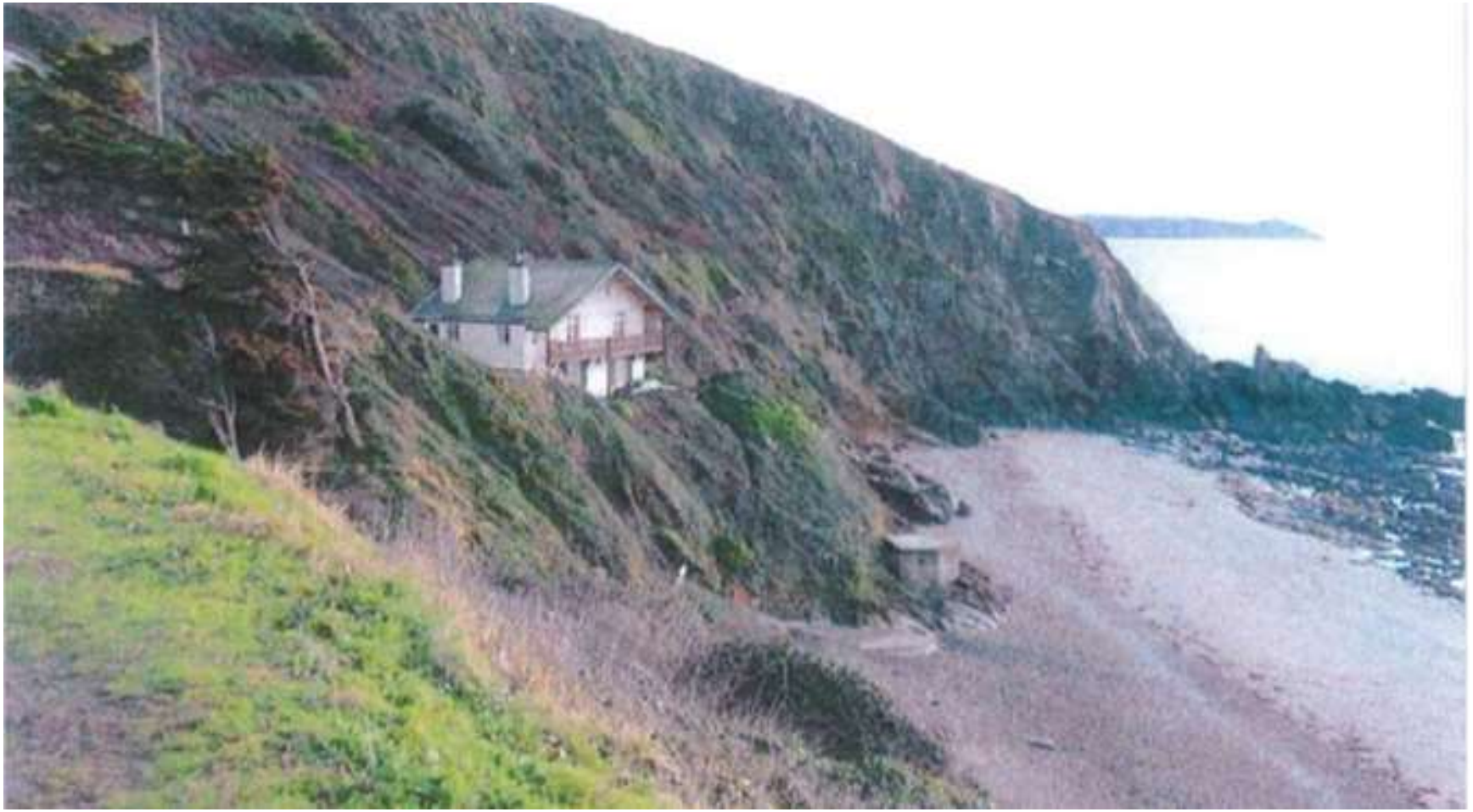
- No objection from trees officer to grant of outline PP for construction of access road as the majority of trees now felled (pursuant to felling licence)
- Claim dismissed as out of time: C of A rejected argument that the decision under challenge was the decision not to withdraw the s24 notice. The grounds of challenge arose when s24 notice issued or when notice maintained after grant of PP
- Beware seeking to extend JR period through correspondence / challenge to "confirmatory" decision!
- Claim also failed on the merits. The planning regime does not automatically trump other related statutory regimes…

Interaction between planning and other statutory regimes

See dicta of Sir Keith Lindblom at para 71:

"The land use planning system and the legislation for forestry comprise separate but co-ordinated statutory schemes. They are among several regulatory regimes which can bear on the progress of development on a site. They do not belong to a legislative hierarchy in which the planning system ranks above, and takes precedence over, the legislation for forestry. Parliament has addressed the interaction between them where it has seen the need to do so, in particular in sections 9(4)(d) and 15 of the 1967 Act. Far from subordinating the statutory regime for felling licences to that for planning permission, the enactment of that regime, which explicitly acknowledges the planning legislation, demonstrates the synergy between them."

Armstrong



Armstrong

Background

- PP granted for construction of a single dwelling
- S73 app made to substitute the approved plans referenced in a planning condition which would alter the architectural style of the dwelling
- Cornwall Council refused app on basis amendment was too extensive for s.73
- Inspector dismissed appeal on the same basis
- Question for High Court on statutory appeal: Had the Inspector lawfully concluded that the application would give rise to a fundamental variation to the PP such that the application fell outside the scope of s.73, in circumstances where the proposed variation of the condition would not give rise to any conflict with the description of the development in the operative part of that PP?

Armstrong

Outcome – Court (James Strachan KC sitting as a Deputy) allowed the appeal:

- Nothing in the language of s.73 restricts it to “minor material amendments” or “non-fundamental variation” (contrary to the PPG)
- There was no need, justification or underlying purpose for reading into s.73 such restrictions (s.73 can be contrasted with s.96A which makes express reference to “non-material” changes)
- As long as the variation to the conditions does not conflict with the operative part of the PP, there is no limitation on the scope of the change. Rather, it falls to be determined on its planning merits

Reid

- Important case on whether the removal/alteration of conditions would conflict with the description of development in the operative part of a PP
- Original grant of planning permission for “holiday accommodation”. Included various conditions including that the site be used for holiday accommodation only (condition 19)
- Absent condition 19, the site could have been used for residential accommodation (ie as a dwelling house) under the UCO without the need for a fresh PP
- Section 73 app to remove condition 19.
- On appeal Inspector found that if condition 19 removed it would allow the holiday accommodation to be used in an unrestricted way, which would conflict with the original description of the development as “holiday accommodation”

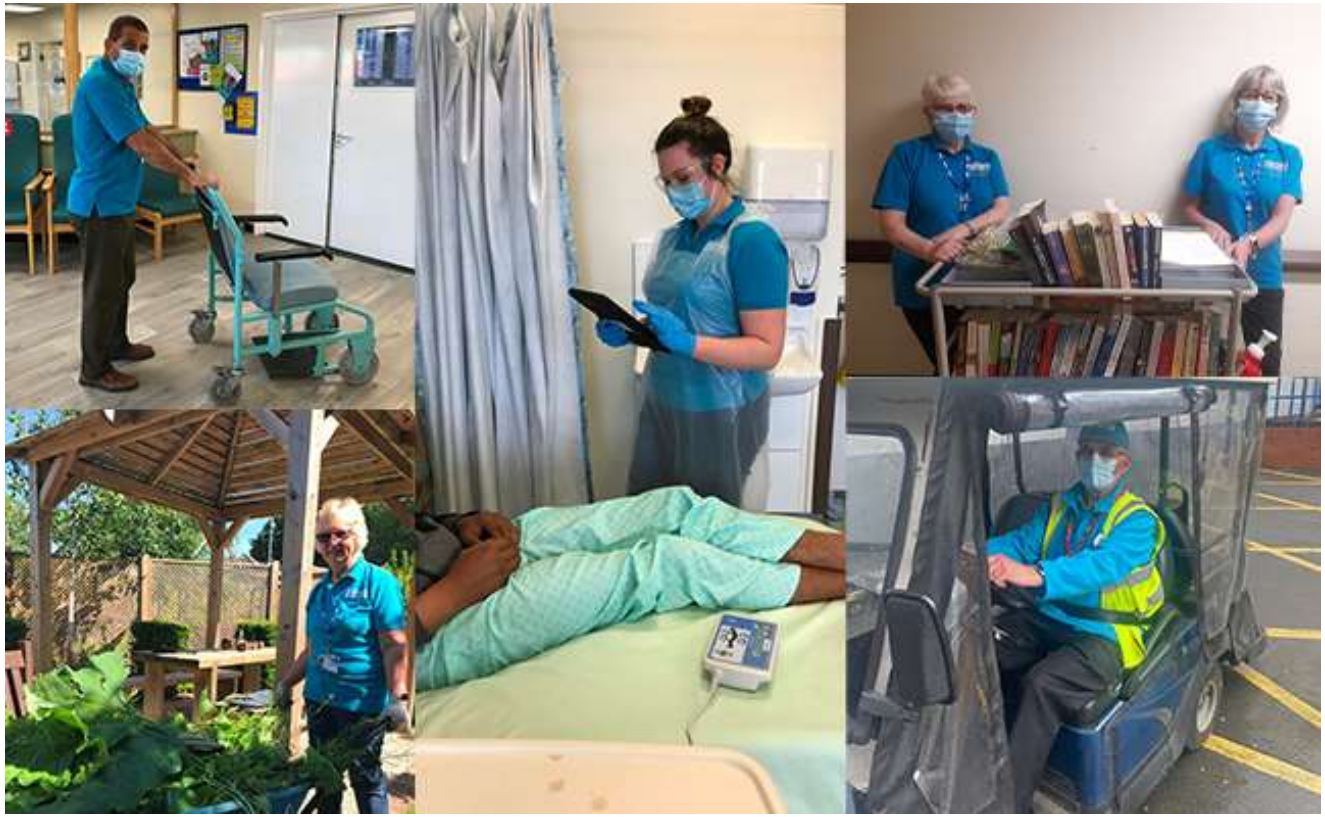
Reid

Appeal allowed (Farbey J):

- When a condition is removed, the operative part of the PP remains intact, albeit in an unconditioned way
- Here nothing in the description of the development that was inconsistent with the development permitted by the UCO (i.e use as a dwelling house)
- A decision-maker could rationally adhere to the existing description of the development permitted while at the same time deciding to remove the conditions denying the benefit of the UCO

University Hospitals

- Can s.106 contributions be used to fund the provision of NHS services?



University Hospitals

Background

- NHS Trust asked LPA for s.106 contribution of c.£914,000 from an urban extension project (2,750 dwellings and associated development)
- Contribution requested to fund health care services by the Trust to mitigate *"the harmful effects of additional demands upon its services from that proportion of the people moving to the site who would be new to the Trust's area"*
- Trust paid for its services by Clinical Commissioning Groups via a block contract lasting for one year – so a fixed sum paid for the year regardless of amount of services provided
- Trust therefore concerned that for the first financial year after the proposed development began, any treatment it would provide for a "new resident" would not be accounted for under the block contract
- The LPA granted outline PP for the project but without the s.106 payment – it did not accept there was a funding gap. Rather, the Trust could mitigate harm by switching from block contract to "payment by results" or by population growth being taken into account in negotiations with CCGs for block contract for next financial year

University Hospitals

Outcome (Holgate J)

- Court agreed with the LPA that whether there was a "funding gap" (and therefore the Trust's funding arrangements) was a material consideration. Further, the LPA had reached a rational conclusion that the Trust had not provided sufficient information to establish the alleged funding gap and accordingly the contribution would have failed the "necessity" test in CIL Reg 122

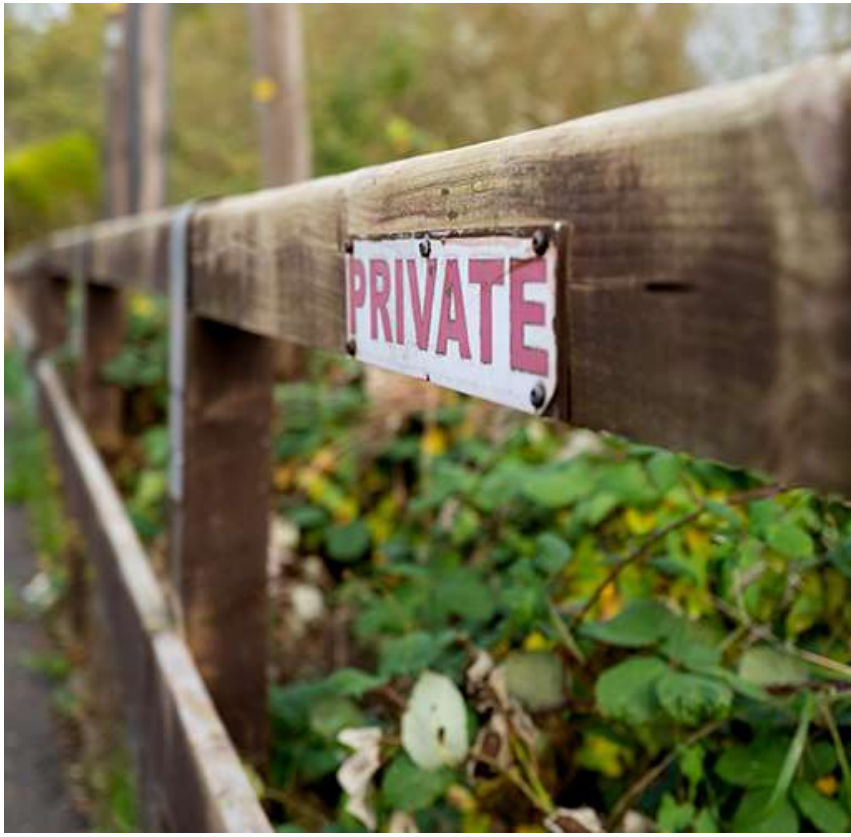
University Hospitals

- Court went on to consider whether it would ever be lawful for s.106 contributions to fund NHS services
- Did not say it would never be lawful but expressed scepticism (even if a funding gap is properly evidenced and the three CIL Reg 122 tests satisfied)
- If need for contribution arises from a *"systemic problem in the way national funding is distributed…this may raise the question in other cases whether it is appropriate to require individual development sites across the country to make s.106 contributions to address that problem"*

Day

Issues

- (1) When a local authority sells land which is subject to a statutory trust for public recreational purposes without complying with the relevant statutory requirements, does that trust continue or end? In either case, what are the legal implications for the authority and the buyer?
- (2) Are the existence of any (former) statutory trust and public recreation rights material considerations that need to be taken into account in granting planning permission?



Day

Background

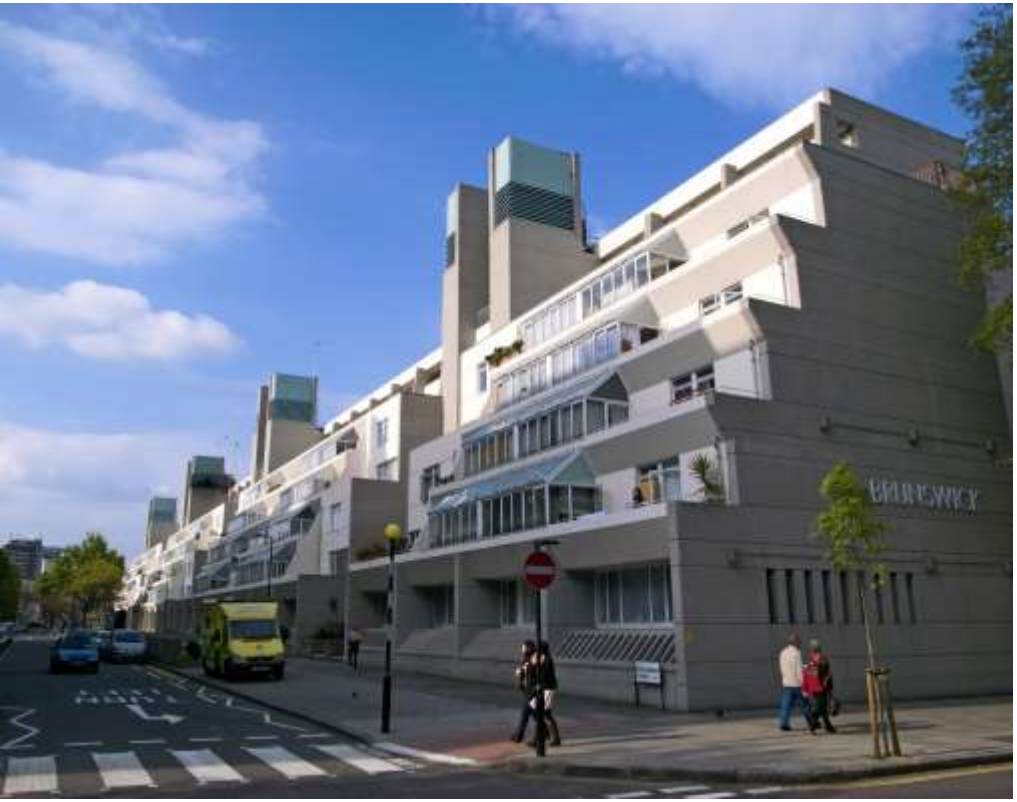
- Council sold land to developer
- The parties agreed that, prior to the sale, the land was subject to a statutory trust for the benefit of residents of the area (s.10 Open Spaces Act 1906)
- The Council was not aware of the statutory trust prior to the sale and so failed to comply with the requirements for its disposal in s.123(2A) LGA 1972 (advertisement of the land for two consecutive weeks in a local newspaper and the subsequent consideration of any objections)
- Following the sale, the Council granted PP for the developer to build 15 houses on the site
- Claimant challenged the PP – he argued the statutory trust not extinguished had to be taken into account

Day

Judgment (Lady Rose – unanimous) – appeal allowed

- Land only freed from statutory trust if consultation requirements in s.123(2A) LGA complied with (clear Parliamentary intention to that effect)
- Section 128(2) LGA means sale not invalidated by failure to comply with consultation requirements, but does not mean trust extinguished. As with village greens, public's rights can co-exist alongside private rights
- Therefore at time PP granted land remained subject to statutory trust. This was a material consideration the Council failed to consider. PP therefore quashed.

Lazari Properties



- Permission decision only (Lane J)
- Section 288 appeal against Inspector's refusal to grant a CLEUD
- Brunswick Centre – 560 flats above shopping centre and basement with cinema, service area and car parking

Lazari Properties

Background

- Use of Brunswick Centre controlled by condition in PP: *"Up to a maximum of 40 percent of the retail floorspace, equating to 3386m2 (excluding the supermarket and eye-catcher), is permitted to be used within Use Classes A2 and A3 of the Town and Country Planning (Use Classes) Order 1987, or in any provision equivalent to that Class in any statutory instrument revoking and re-enacting that Order"*
- Old use classes A2 and A3 now fall within new use class E. Owner therefore made CLEUD app to establish whether previous restrictions applied or whether whole retail floorspace could be used for uses within class E
- CLEUD app described app as *"Application to certify that the existing use of the Brunswick Shopping Centre within Class E and without compliance with Condition 3 of Planning Permission [X] is lawful"*

Lazari Properties

Judgment

- Agreed with Inspector that app invalid. Reference to the whole of the centre (which included many uses clearly not within class E) was not a sufficiently precise description of the existing use
- Inspector had found condition 3 designed to safeguard retail function of the centre and so only makes sense if read to continue to refer to old use classes A2 and A3. Judge found it arguable that this was an incorrect interpretation of condition 3 (i.e. arguable the references to A2 and A3 should now be read as references to class E).
- Watch this space for substantive judgment…

Ibrar

Correct procedure for challenging the dismissal of an appeal against an enforcement notice (Eyre J):

- Bar exceptional circumstances, an appeal under s.289 provided an adequate alternative remedy for challenging the dismissal of an appeal against an enforcement notice (NB 28 day time limit)
- However, the court recognised that judicial review was theoretically available and would be appropriate in exceptional cases

Questions