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Winter 2024



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Planning Case Law Update



39 Essex Chambers
#39Events



Planning Case Law

- The courts have been busy as usual:

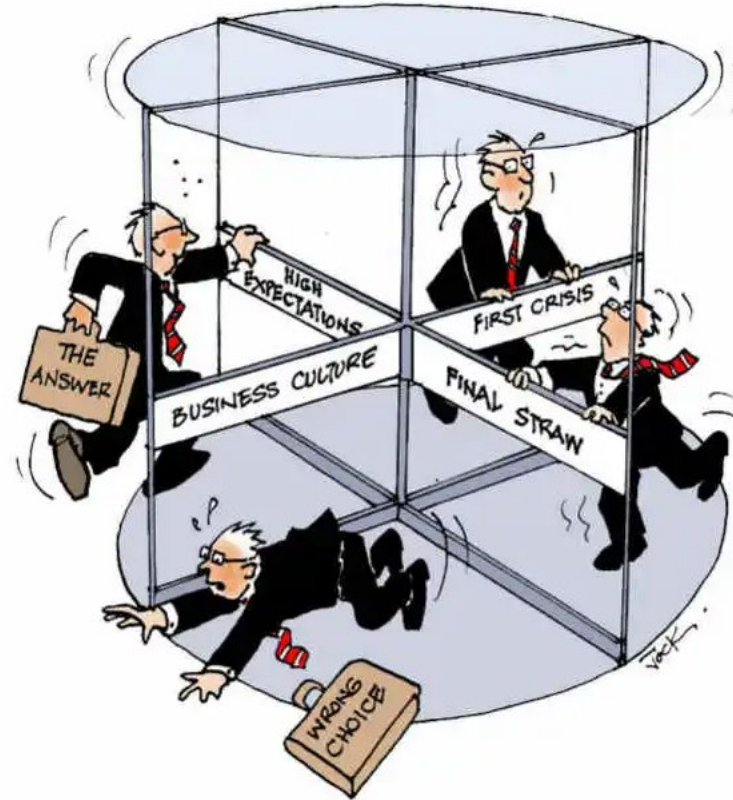
DSJ:

- Policy
- The *Hillside* saga
- Service in Planning Challenges

EG:

- Advice to Committee
- Successful Challenges

Policy Context



THE REVOLVING DOOR

Credit: TMX Lean Solutions Pty Ltd

Policy

- Three big cases recently:
 - *Marks and Spencer v SSLUHC* [2024] EWHC 452 (Admin)
 - *R. (on the application of Rights Community Action Ltd) v SSLUHC* [2024] EWHC 359 (Admin)
 - *Mead Realisations Ltd v SSLUHC* [2024] EWHC 279 (Admin)

M&S Oxford Street



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Proposal



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Marks & Sparks? 1

- So, long-running battle over the future of M&S on Oxford St?
 - Refurbish or rebuild?
 - Inquiry
 - including objections on heritage grounds/Save Britain's Heritage were a Rule 6 Party
 - Net Zero – Embodied Carbon impacts from the rebuild
 - Inspector recommends approval
 - SoS overrules and refuses permission -
 - S. 288 Challenge

M&S 2

- Lieven J
- 6 grounds of challenge by M&S
 - Para 152 NPPF – no strong presumption
 - Alternatives
 - Balance of benefits v heritage impacts
 - Harm to vitality and viability of Oxford St
 - Embodied carbon
 - Heritage impacts
- Grounds 1-5 were successful

M&S 3

- Ground 1 – Para 152 (now, para 157):

“152. The planning system should support the transition to a low carbon future in a changing climate, taking full account of flood risk and coastal change. It should help to: shape places in ways that contribute to radical reductions in greenhouse gas emissions, minimise vulnerability and improve resilience; encourage the reuse of existing resources, including the conversion of existing buildings; and support renewable and low carbon energy and associated infrastructure.”

- Court held that SoS had wrongly agreed this was a “presumption”
- Error flowed into the other grounds

M&S 4

- Lieven J:

“55. In DL24 the SoS relied on a meaning of the NPPF which is simply not open to him. There is in paragraph 152 some encouragement for the reuse of buildings, but nothing that comes close to a presumption. Mr Shadarevian’s argument that paragraph 152 is seeking to achieve a radical reduction in carbon, and thus a presumption of retailing buildings can be inferred, ignores the rest of the paragraph which refers to a number of other very general policy aspirations. There is nothing in the paragraph that supports the application of a policy presumption for one part of the paragraph alone.

56. The SoS has not applied the policy, he has rewritten it. This then leads to him applying a test, or policy hurdle, through the rest of the DL which is based on his misinterpretation of the policy.”

M&S 5

- Ground 5 – Embodied Carbon
- Error of fact – statement of a lack of dispute on issue of embodied carbon
- Error of policy interpretation – confusion of whether London Plan Policy S1 2C applied to operational carbon or embodied carbon – SoS “thoroughly confused”
- The judge described the SoS’s approach as an “impossible submission” and “transparently wrong interpretation”
- Ground 6 – heritage was a matter of “principal importance” and though SoS approach “somewhat surprising” SoS upheld
- So watch this space!

NPPF v PPG?



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Mead Realisations 1

- Important case on Flood Risk and sequential test
- Interplay of NPPF and PPG
- 4 grounds
 - Interpretation of NPPF para 162
 - Whether PPG (para 028) can change policy
 - Interpretation of PPG para 028
 - Need for the development
- Challenge failed before Holgate J
- Court gave guidance on policy

Mead Realisations 2

- Para 162 NPPF:

“162. The aim of the sequential test is to steer new development to areas with the lowest risk of flooding from any source. Development should not be allocated or permitted if there are reasonably available sites appropriate for the proposed development in areas with a lower risk of flooding. The strategic flood risk assessment will provide the basis for applying this test. The sequential approach should be used in areas known to be at risk now or in the future from any form of flooding.”

Mead Realisations 3

- PPG 028 states materially:

“What is a “reasonably available” site?”

‘Reasonably available sites’ are those in a suitable location for the type of development with a reasonable prospect that the site is available to be developed at the point in time envisaged for the development.

These could include a series of smaller sites and/or part of a larger site if these would be capable of accommodating the proposed development. Such lower-risk sites do not need to be owned by the applicant to be considered ‘reasonably available’[.]”

Mead Realisations 4

- Holgate J gave some important guidance on the PPG:

”59. However, Lord Carnwath added at [24] to [26] that the scope of the NPPF should not be overstated. In the determination of planning applications it is no more than “guidance” and as such, one of the “other material considerations” to which the decision-maker must have regard (s.70(2) of the TCPA 1990). It does not displace the primacy given by s.38(6) of the Planning and Compulsory Purchase Act 2004 to the statutory development plan. The weight to be given to conflict or compliance with the NPPF is a matter of judgment for the decision-maker, a decision with which the court may only intervene on public law grounds (*Gladman Developments Limited v Secretary of State for Communities and Local Government* [2021] PTSR 1450 at [33(3)]).”

Mead Realisations 5

“70. As a matter of policy, PPG is intended to support the NPPF. Ordinarily, therefore, it is to be expected that the interpretation and application of PPG will be compatible with the NPPF. However, I see no legal justification for the suggestion that the Secretary of State cannot adopt PPG which amends, or is inconsistent with, the NPPF.”

- Holgate J – unimpressed with arguments about importance of consultation:
 - Accountability of SoS to Parliament
 - SoS role coordinating and overseeing planning system
 - Precedents of policy changes made without consultation – eg: WMS + PPG Updates

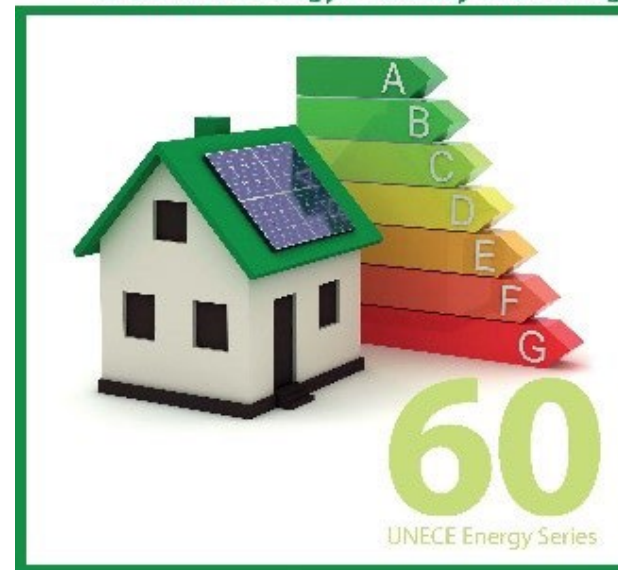
Mead Realisations 5

- Also, court interpreted Flood Risk policy
- “Flexibility and realism” is implicit in the sequential approach envisaged – [93]-[94] and [98]
- Matter of judgment in application of the policy
- Specific need would be one of the range of considerations that may be relevant to particular app
- General need, however, would not – part of overall Planning Balance
- Holgate J: “It follows that para. 028 of the PPG does not conflict with para. 162 of the NPPF. The PPG performs the legitimate role of elucidating the open-textured policy in the NPPF.”

Energy Standards

UNECE

Promoting Energy Efficiency
Standards and Technologies
to Enhance Energy Efficiency in Buildings



*Credit: United Nations Economic
Commission for Europe*



Rights Community Action 1

- Challenge to the local plan examiner’s “recommendation” that a Village Area Action Plan in West Oxfordshire was unsound.
- Inspector had relied on 2015 Pickles WMS on energy standards in homes.
- Challenge brought on 3 grounds.
 - Interpretation
 - Consistency
 - Fairness
- Lieven J upheld the challenge on Ground 1 – interpretation of policy.

Rights Community Action 2

- The WMS had sought to limit LPAs' ability to set energy standards above those contained in Building Regs subject to amending legislation
- That legislation was never introduced and the policy was superseded by subsequent policy/events
- Lieven J endorsed C's submission that:
 - ” Therefore the WMS cannot be interpreted to proscribe local plan policies that exceed the Building Regulations, because the premise of the policy no longer exists.”
- An updating construction was necessary – para [75]

Hillside Fallout



Source: *The Best National Parks To Visit In The UK. Conde Nast 2020*

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Hillside

- Reminder – Supreme Court in 2022 – reaffirmed the *Pilkington* principle
- Implementation of later planning permission which departed in a material way from the original scheme would make it physically impossible and hence unlawful to carry out any further development under the original permission
- Courts have begun to consider the fallout from the decision. Two recent decisions considering aspects:
 - R (Dennis) v Southwark LBC [2024] EWHC 57 (Admin)
 - R (Fiske) v Test Valley BC [2023] EWCA Civ 1495
 - Southwood v Buckinghamshire Council [2024] EWHC 71 (Admin)

Dennis

- C challenged the decision to grant a s.96A app for amendment of a phased outline PP in Southwark.
- Issue was whether a phase of the PP was severable and so outside the principles of *Pilkington/Hillside*.
- Officers concluded that the phase was severable and the "drop in" application would not prevent the remainder of the PP from being developed under it.
- S. 96A proposed to add word "severable". LPA resolved to grant permission subject to s. 96A.
- Issue for the court was whether the amendment was material.

Dennis 2

- Holgate J - *Hillside* held that *Pilkington* applied absent a clear indication in PP – matter of construction of PP.
- BUT – “mere” phasing was insufficient to displace *Pilkington* – para [103].
- It did not matter whether an outline or full planning permission, it was an issue of interpretation of the PP – did it create separate PPs?
- Severability may lead to unforeseen consequences – practitioners need to beware and “think carefully” [104]
- Holgate J: “it is important that any decision to grant a severed planning permission be expressed unequivocally”

Fiske

- C challenged the grant of PP for a solar park development.
- Claim on the basis of the incompatibility of 2017 and 2021 PPs.
- 3 grounds of appeal but all distilled into one main issue – was the incompatibility a “mandatory” material consideration?
- Planning system allows for multiple PPs on a site and nothing wrong with that – per *Pilkington*
- For the developer to decide upon and to resolve if necessary any incompatibility when deciding how to proceed.

Service: s. 288



Source: *Courts and Tribunals Judiciary*

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Finally, a Warning!

- Time for service in statutory s. 288 challenges.
 - **Telford & Wrekin Council v SSLUHC & Anor [2023] EWHC 2439 (Admin)**
 - **Home Farm Land Ltd v SSLUHC & Anor [2023] EWHC 2566 (Admin)**
- *Telford & Wrekin* – Court has emphasized that claims must be filed *and served* within six weeks – harsh but not unworkable.
- *Home Farm* – Filing not achieved by putting in the “drop box” in reception – must be filed in the ACO – court action is what is important.

Thank you

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Officers' Advice



Watton v Cornwall Council

Watton v Cornwall Council [2023] EWHC 2436 (Admin)

- Crematorium planning permission quashed
- Challenge to the **content** and **reasoning** of Officer’s Report to planning committee – seriously misleading.
- Report in a “hopeless tangle” [111]

R. (on the application of Simmonds) v Blaby DC

R. (on the application of Simmonds) v Blaby DC [2023] EWHC 2217 (KB)

- Advice from Democratic Officer to vice-chair of the town council committee
- Vice-chair reasonably relied on the advice and was misled by it
- Material error in decision-making process rendered it unfair
- Committee not properly advised on the relevance of the condition of the milking shed – minor in context, but material error.

R (Pratt) v Exeter CC

R (Pratt) v Exeter CC [2024] EWHC 185 (Admin)

- *Tameside* duty
- Have regard to wider considerations



Don't be blinkered...

Successful challenges



Rye v Secretary of State for Levelling up, Housing and Communities

Rye v Secretary of State for Levelling up, Housing and Communities [2024] EWHC 358 (Admin)

- Material error of fact



R (Laing) v Cornwall

R (on the application of Barbara Laing) v Cornwall Council [2024] EWHC 120
(Admin)

- Ecological appraisals



Thanks for listening

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Hang in there, it's nearly lunchtime...

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