

# Planning and Environment Update

Winchester and Oxford 2020

**Richard Harwood QC**

**Rose Grogan**

**Victoria Hutton**

# S106 Agreements and 5yHLS 2 Recent Cases

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# Section 106 Agreements

Norfolk Homes Ltd v North Norfolk DC [2020] EWHC 2265

- Judgment from Holgate J
- 2012 grant of PP subject to a s106 for 45% affordable housing
- 2013 s73 application granted to vary two of the conditions
- 2015 further s73 permission to amend conditions
- Neither 2013 nor 2015 permissions were subject to s106
- Development began in 2018. Common ground this could only be under 2015 permission.
- LPA argued that 2012 106 agreement applied

# Section 106 Agreements

## Norfolk Homes Ltd v North Norfolk DC [2020] EWHC 2265

- Judge held:
  - Language of 2012 agreement was unambiguous and clear. True construction meant that it only applied to the 2012 permission and not the 2015 permission.
  - No gap or defect in the agreement that warranted implying a term to ensure it rmission.

# 5yhls

## Peel Investments (North) Ltd v SSHCLG [2020] EWCA Civ 1175

- The LPA adopted its 2004-2016 UDP in 2006 which included a 'green wedge' policy ('EN2').
- SoS saved EN2 in 2009
- LPA refused development on the basis it was contrary to EN2.
- Appellant argued at appeal that EN2 was out of date
- Inspector found that it was not out of date and should be given substantial weight.
- SoS agreed, having considered the new 2018 NPPF

# 5yhls

## Peel Investments (North) Ltd v SSHCLG [2020] EWCA Civ 1175

- The Court of Appeal held that there was nothing in para.11(d) NPPF or its predecessor (para 14) which rendered policies ‘out of date’ merely because of the expiry of the plan period.
- Statement of Lord Carnwarth in *Hopkins Homes* that ‘in the absence of relevant up-to-date development plan policies, the balance is tilted...’ was an *obiter* remark and did not lay down any principle.
- A plan without strategic policies is not automatically out of date.

# CHANGES OF USE AND PD RIGHTS

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# The Use Classes Order 1987

- Development defined in s55 TCPA 1990
- Development requires planning permission – s57 TCPA 1990
- But, changes of use within use classes are not development – s55(2)(f) TCPA 1990
- NB the use has to have been implemented/subsisting – *Kiwk Save*
- Can be limited by condition or s106.
- Not part of the PD regime – Article 4 does not



# The Amendments

- As of 1 September 2020 – fundamental changes in England (not Wales)
- Class E
- Class F1
- Class F2
- Transitional provisions apply to the GDPO until 31 July 2021.

judgment awarded on legal challenge.

USE	OLD USE CLASS	NEW USE CLASS
Shop less than or equal to 280sqm mostly selling essential goods (including food) and at least 1km from a similar shop	A1	F2
Shop (other than the above)	A1	E
Financial and professional services	A2	E
Café or restaurant	A3	E
Pub or drinking establishment	A4	Sui Generis
Takeaway	A5	Sui Generis
Office (other than A2)	B1a	E
R&D of products or processes	B1b	E
Industrial process which can be carried out in a residential area without causing detriment to the amenity of the area	B1c	E
Industrial	B2	B2 (unless it can be carried out in any residential area without detriment to the amenity of that area by reason of noise, vibration, smell, fumes, smoke, soot, ash, dust or grit. If not, class E)
Storage or Distribution	B8	B8
Clinics, health centres, crèches, day nurseries, day centres	D1	E
Schools, non residential education and training centres, museums, public libraries, public halls, exhibition halls, places of worship, law courts	D1	F1
Cinemas, concert halls, bingo halls and dance halls	D2	Sui generis
Gyms, indoor recreations not involving motorised vehicles or firearms	D2	E
Hall or meeting place for the principal use of the local community	D2	F2
Indoor or outdoor pools, skating rinks and outdoor sports or recreations not involving motorised vehicles or firearms	D2	F2

# The Consequences

- Significant de-regulation
- Number of knotty issues and knock-on effects
  - NPPF
  - Local Plans
  - Article 4 directions
  - Fluidity between E and F2

# GDPO – New PD Rights

- Number of new rights brought in over past few months:
  - Class AA to Part 1 of Schedule 2 – enlargement of a dwellinghouse by the construction of new storeys
  - Class AA to Part 20 of Schedule 2 – construction of up to 2 new storeys of flats on buildings in commercial or mixed use
  - Class AB to Part 20 of Schedule 2 – construction of new flats on top of terraced (including semi-detached) buildings in commercial or mixed (including residential) use
  - Class AC to Part 20 of Schedule 2 – construction of new flats on top of terraced dwellinghouses
  - Class AD to Part 20 of Schedule 2 – construction of new dwellinghouses

# GDPO – New PD Rights

- Class ZA of Part 20 to Schedule 2
  - Demolition of single detached building in existence on 12 March 2020 which was in use for office, research and development or industrial processes or as a free-standing purpose-built block of flats and its replacement by an individual block of flats or a single dwellinghouse within the footprint of the old building

# GDPO – New PD Rights

- All subject to Prior Approval on a myriad of issues
- All limited in their application
- Other regimes may practically prevent usefulness – i.e. Building Regulations

# Green Belt & Environmental Update

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# Green Belt

- Local Update
- Case Law on openness



# Local Update

- **Oxford: building on green belt land.**
  - High Court challenge filed by Cherwell Development Watch Alliance challenging Cherwell District Council's Local Plan (Part 1)
  - Development of over 4,400 houses all on Green Belt land.
  
- **South Hampshire: attempts to create new green belt land in countryside north of Bournemouth and Southampton.**

# Case Law

- R (Samuel Smith Old Brewery) v NYCC [2020] UKSC 3
  - Quarry Extension Permission
  - Question of whether change to landscape = impact on openness.
  - SC did not agree with CA.
  - On facts, quarry extension could still preserve the openness of the Green Belt as a matter of planning judgment not law.

# Case Law

- Hook v SSHCLG 3 April 2020 [2020] EWCA Civ 486
  - Challenge to Inspector finding that alterations to buildings “inappropriate development”
  - Green Belt terms are concepts of planning policy not law.
  - Threshold for inappropriate development one of planning judgment.
  - Will differ from development to development.

# Case Law

- **Local Green Space Policies**

- R (Liverpool Open & Green Spaces CiC) v Liverpool City Council & Others [2020] EWCA Civ 861: Green Wedge development.
- R (Lochairlort Investments Ltd) v Mendip DC & Norton St Philip PC [2020] EWCA Civ 1259. Local green space policy more restrictive than national GB policy.

# Environmental Update

- Air Quality Update
- Climate Emergency
- Recent cases

# Air Quality Update

## Context

- UK Government obligation to meet legal limits for pollutants (in particular NO<sub>2</sub>) in the “shortest possible time”.
- UK Air Quality plan subject to series of challenges in the courts.
- Local Authorities responsible for putting in place measures (with varying degrees of discretion) to achieve compliance for NO<sub>2</sub>.
- Resulted in proposals for Clean Air Zones and other measures.
- Lockdown/Coronavirus has delayed implementation (and also provided brief but short term drop in pollution levels). Environment Bill also stalled.

# Oxford Air Quality

- Monitoring data published in July 2020 showed that NO<sub>2</sub> increased by average of 7.9% between 2018-2019.
- City centre areas remain in breach of limit values.
- Whole of Oxford is an Air Quality Management Area.
- March 2020 Oxford CC published proposals for Zero Emission Zone in City Centre.
- Oxford CC also published first pollution reduction target that goes further than EU limit values (30 micrograms instead of 40 micrograms).
- Bid to become first all-electric bus city in Britain. Trialling all-electric refuse collection vehicles.
- Implementation postponed due to coronavirus.

# Climate Emergency

- As at 6 October 2020, 74% of District, County, Unitary & Metropolitan Councils have declared a Climate Emergency (+ 8 Combined Authorities/City Regions).
- Includes Winchester, Oxford, Oxfordshire, Southampton and Portsmouth.
- Winchester also declared ambition to achieve “net zero” and published Carbon Neutrality Action Plan.
- Any impact on planning?

2004. Significant increases to 100 local authorities. 



# Recent Cases

- Challenges to major infrastructure projects:

- Heathrow: *R (Plan B Earth & others) v Secretary of State for Transport* [2020] EWCA Civ 214 on appeal to Supreme Court. Issue of whether adoption of Airports NPS unlawful given UK commitment to Paris Agreement.
- *Packham v Secretary of State for Transport* [2020] EWCA Civ 1004. Challenge to HS2 implementation. *Plan B Earth* distinguished.

# Recent Cases

- Habitats Screening: following *People over Wind* a number of domestic cases have grappled with the principle that mitigation cannot be taken into account at screening stage:
  - *Canterbury City Council v Secretary of State for Housing, Communities and Local Government* [2019] EWHC 1211;
  - *R (on the application of Wingfield) v Canterbury City Council* [2019] EWHC 1975

# Nitrates in the Solent

# Habitats problems

Issue of nitrate and phosphorous input from agriculture and wastewater causing eutrophication – green algae

- Solent Maritime Special Area of Conservation
- Solent and Isle of Wight Lagoons SAC
- Chichester and Langstone Harbours Special Protection Area and Ramsar
- Solent and Dorset Coast SPA
- Portsmouth Harbour SPA and Ramsar



# Habitats Regulations 2017

- European designated sites
- Need for appropriate assessment if likely significant effect (alone or in combination) on the site
- Only permit if 'will not adversely affect the integrity' of the site
- Judgment beyond reasonable scientific doubt (*Waddenzee* C-127/02)
- If fail this test, then Imperative Reasons of Overriding Public Importance (IROPI)

# Issues

- Identification of an existing problem – albeit only Solent Marine SAC condition assessment
- In principle, if there is a problem, then the smallest increase is seen as objectionable - Wisborough Road, Southsea appeal 3227030 (September 2019) – extra room in HMO refused
- Natural England's ADVICE ON ACHIEVING NUTRIENT NEUTRALITY FOR NEW DEVELOPMENT IN THE SOLENT REGION  
<https://www.push.gov.uk/wp-content/uploads/2020/06/Natural-England%E2%80%99s-latest-guidance-on-achieving-nutrient-neutrality-for-new-housing-development-June-2020.pdf>

# Studies and approaches

- Natural England's ADVICE ON ACHIEVING NUTRIENT NEUTRALITY FOR NEW DEVELOPMENT IN THE SOLENT REGION  
<https://www.push.gov.uk/wp-content/uploads/2020/06/Natural-England%E2%80%99s-latest-guidance-on-achieving-nutrient-neutrality-for-new-housing-development-June-2020.pdf>
- Budd's Farm WWTW study  
<https://www.portsmouth.gov.uk/wp-content/uploads/2020/08/Review-of-the-need-for-nutrient-neutral-development-in-the-Budds-Farm-Waste-Water-Treatment-Works-catchment-June-2020.pdf>

# Current solutions

- Nitrogen neutrality on development sites
- Nitrogen calculator  
<https://www.push.gov.uk/2020/06/11/natural-england-published-nutrient-calculator-and-updated-guidance-on-achieving-nutrient-neutral-housing-development/>
- Limit water use or discharge to WWTW
- Upgrade WWTW
- Set aside agricultural land (payments to facilitate this)
- But, shouldn't existing users pay?



# Heritage

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# Historic Environment

- *Dill v Secretary of State for Communities and Local Government*
- *Kay v Secretary of State for Housing, Communities and Local Government*



# Dill - background

- Pair of 18<sup>th</sup> century lead urns, attributed to John van Nost (circa 1700), and limestone piers (circa 1720s)
- Originally at Wrest Park
- Moved 4 times before ending up at Idlicote House (Grade II) in 1973.
- Listed as Grade II in 1986



# Idlicote House



# The right to challenge

- ‘the rule of law that individuals affected by legal measures should have a fair opportunity to challenge these measures and to vindicate their right in court proceedings’ *Boddington v DPP* [1999] 2 AC 143 – subject to the particular statute
- Planning legislation puts the ability to challenge enforcement notices into the appeal process
- Including whether something is a building
- Here – within LBEN appeal ground (c) not a contravention, as if not a building then not a building on the list so not a listed building so no contravention
- Could also be a defence to criminal proceedings for unlawful works
- Principle also applies as defence to criminal proceedings for stop notice, breach of condition notice, temporary stop notice
- Also by-laws and secondary legislation (eg Coronavirus regulations)

# Examples of the right to challenge

- A defence to criminal proceedings for unlawful works to a listed building
- Principle also applies as defence to criminal proceedings for stop notice, breach of condition notice, temporary stop notice
- Inspectors holding conditions on earlier planning permissions to be unlawful:  
*Newbury DC v SoS* [1981] A.C. 578;  
*Earthline* [2003] J.P.L. 715

# What is a listed building?

- Planning (Listed Buildings and Conservation Areas) Act 1990, s 1(5):

“In this Act “*listed building*” means a building which is for the time being included in a list compiled or approved by the Secretary of State under this section; and for the purposes of this Act—

(a) any object or structure fixed to the building;

(b) any object or structure within the curtilage of the building which, although not fixed to the building, forms part of the land and has done so since before 1st July 1948,

shall ... be treated as part of the building.

# Building

- Includes structure or erection – s 91 LBA, s 336 T CPA
- *Skerritts (No 2)* [2000] J.P.L. 1025 approach – size, permanence and degree of attachment
- Concept of building operations (planning) or works of demolition (listed building)
- Planning – *Skerritts* marquee, *Hall Hunter* [2007] J.P.L. 1023 poly tunnels, *Save Woolley Valley* [2013] Env. L.R. 8 mobile poultry units
- Listed building – been debated on some statues



# The extended definition

- Object or structure – so not necessarily a building in its own right
- Fixed to the listed building
- Or ‘part of the land’
- Apply property law tests – purpose and degree of annexation: *Berkley v Poulett* [1977] 1 E.G.L.R. 86; *Holland v Hodgson* (1871-72) L.R. 7 C.P. 328
- Listed building cases – *Corthorn* (1966) 17 P. & C.R. 210; *Kennedy* [1996] 1 P.L.R. 97

# Assessing heritage harm and benefits

- *Kay v Secretary of State for Housing, Communities and Local Government* [2020] EWHC 2292 (Admin)
  - Planning and listed building application for extension and alterations to grade II Great Mitton Hall
  - Insp – some beneficial, some harmful, no public benefit to weigh against the harm
  - Granted partial consents



# The Challenge

- Claim that Inspector should have taken into account the beneficial heritage works as public benefits
- NPPF para 196 'Where a development proposal will lead to less than substantial harm to the significance of a designated heritage asset, this harm should be weighed against the public benefits of the proposal including, where appropriate, securing its optimum viable use.'
- A need to consult before issuing partial consents



# Kay – heritage harms and benefits

- Dove J, follows Sir Duncan Ouseley in *Safe Rottingdean Limited v Brighton and Hove City Council* [2019] EWHC 2632 who said:
- “Paragraph 196 contemplates the position where there is some but less than substantial harm to a heritage asset, whether listed building or conservation area. It does not look at the overall balance of advantage or disadvantage to the heritage asset at that stage. ... Such public heritage benefits are clearly among those to be weighed against the less than substantial harm. [NPPF] emphatically is not dependent on a view that the less than substantial harm is a net overall less than substantial harm.”

# Kay

- Found overall conclusion reached that harm
- Error by the Inspector not to consider the beneficial works as public benefits
- Such heritage benefits might justify other harm
- Consider whether inter-relationships, eg on same elevation



# Partial permissions

- Can be granted, see *R(Holborn Studios) v London Borough of Hackney* [2017] EWHC 2823 (Admin) and *Johnson v Secretary of State* [2007] EWHC 1839 (Admin)
- No consultation required here
- No prejudice
- With a series of works to the same building, split decision is a possibility

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