Northern Region Webinar
Planning and Environmental Law

2nd December 2020

Starting shortly….

Stephen Tromans QC

John Pugh-Smith

Christiaan Zwart

Introduction and welcome
Stephen Tromans QC

- Use Q&A facility
- Other 39 Essex Resources
  - Newsletters
  - Webinars
  - Podcasts
  - Vlogs

Content

- **Stephen Tromans QC**: *"Environmental Recovery in the Northern Regions"*
- **Christiaan Zwart**: *"Financing Infrastructure Today and Tomorrow: CIL & cIL"*
- **John Pugh-Smith**: *"Nuts and Bolts Cases: the 2020 Toolbox"*

Environmental Recovery in the Northern Regions

- The Ten Point Plan for a Green Industrial Revolution (18 November 2020)
- Levelling Up Agenda
- North hit harder economically and in health

Main thrust of the Plan

- Green industry: offshore wind, nuclear, hydrogen, carbon capture, use and storage
- Green finance
- Tree planting
- Growth in natural protection and re-wilding

Offshore Wind

- Likely focus on NE
- New technologies (floating turbines)
- Investment in ports and manufacturing
- Necessary infrastructure
- Offshore Transmission Network Review

Hydrogen

- Green, Blue or Grey?
- 5GW of low carbon hydrogen production capacity by 2030
- Hubs where renewable energy, CCUS and hydrogen congregate
- Possibility of hydrogen production at EDF nuclear power stations
- 2021 Hydrogen Strategy
- Tees Valley Hydrogen Transport Hub

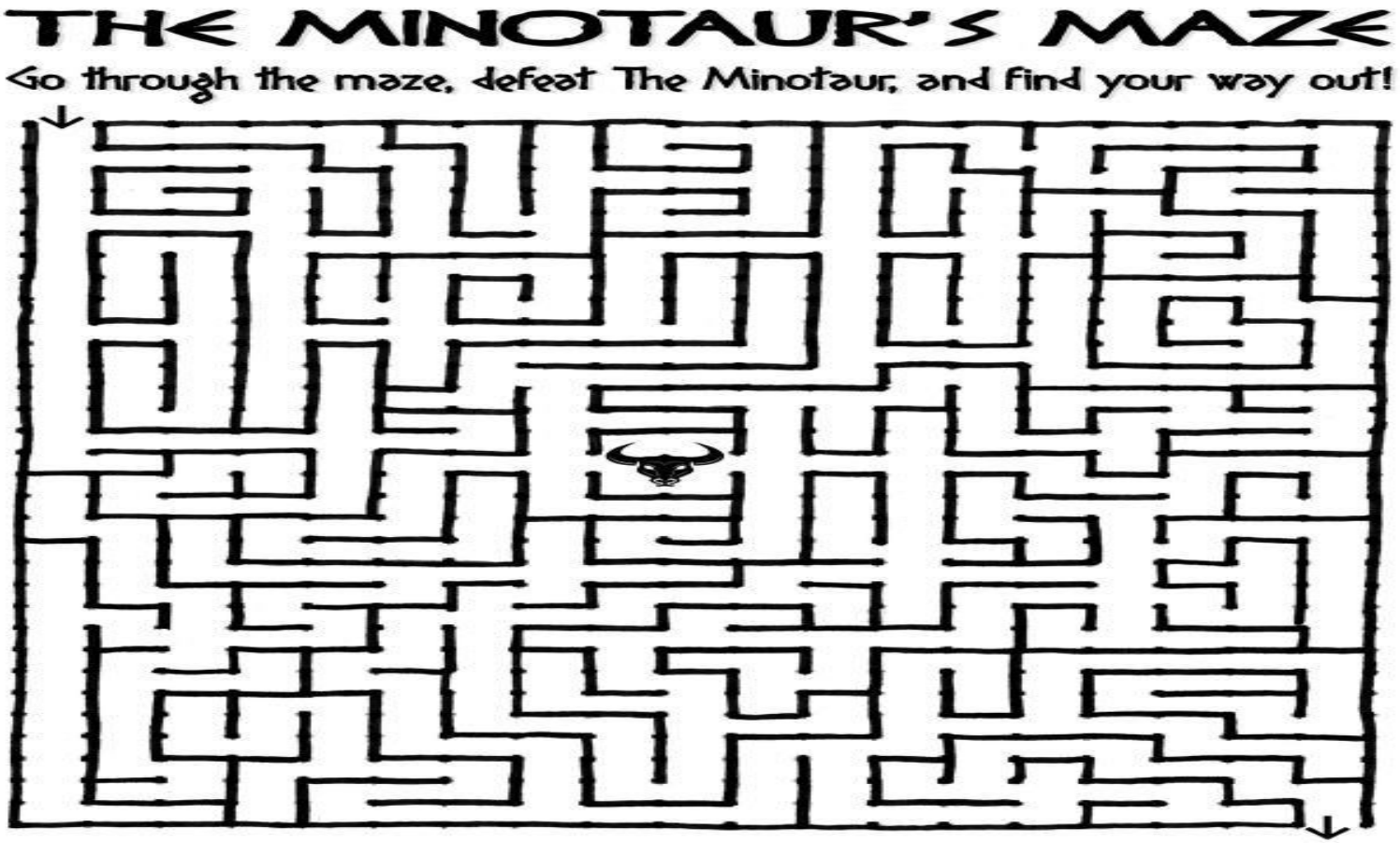
Nuclear

- At least one more large scale reactor
- Small factory produced modular reactors
- Advanced modular reactors – heat to produce hydrogen and synthetic fuels
- Four industrial clusters/”Super Places” bringing together AMRs and CCUS
- Research, regulation, supply chains
- Spherical Tokamak for Energy Production – fusion energy

Strategy fatigue???

- National Infrastructure
- Energy White Paper
- Energy/Nuclear NPS
- Hydrogen
- Industrial Decarbonisation
- Net Zero
- Trees
- Nature

CIL Today. Why so Complex?



Taxing Development Hope Value

- Two routes to ‘taxing’ development hope value
- Section 70(2)(c) TCPA 1990:
- “Any other material considerations”

  e.g. once upon a time - only Planning Obligations
- CIL Reg. 122 regulates section 106
- Planning judgements in Reg. 122(2)(a)-(c)
- Since 2010, now also TCPA section 70(2)(b):

  “any local finance consideration”
- Subsection (4)(b): = SoS funds & “CIL”
- So, Parliament has made *finance* material to planning
- **But** need to keep (2)(b) and (c) separate (Reg 122/3).
- Assess *weight* of ‘lfc’ CIL estimate? A new skill?
- CIL Regulations - regulate CIL - expressly
- Ch.Auth. have few discretions under Regs. & *apply* it
- CIL = a local revenue raising mechanism for “infrastructure”

CIL: Core Genesis & Purpose

- Back to basics: CIL is a levy or tax on 'net new' "development"
- Part 11, Planning Act 2008 (not TCPA 1990 nor one of the "Planning Acts")
- S. 205(1) SoSCLG – a reminder of complexity from 'joint' authorship:

  *"The Secretary of State may **with the consent of the Treasury** make regulations providing for the imposition of a charge to be known as Community Infrastructure Levy (CIL).*

- Therefore – approach CIL Regs interpretation as a Tax (see the *Orbital* case).
- Section 205(2) purpose:

  "In making the regulations the Secretary of State shall aim to ensure that the overall purpose of CIL is to ensure that costs incurred in supporting the development of an area can be funded (wholly or partly) by owners or developers of land in a way that does not make development of the area economically unviable."

- Statutory definitions – wide definitions & different definitions of familiar terms:
  - S.216(2) "infrastructure" – inclusive & wide – see pictures
  - s.208 & s.209(1) "development" is wide too (not the TCPA meaning) – premature commencement easily done now
  - (in the CIL Regs.) "commencement".
- Same words – 'development' - but different meanings = recipe for confusion.
- Daughter CIL Regulations 2010 (now September 2019 & Scheduled equations)
  - Part 2 definitions & discrete purpose for certain Regs.
  - Very fact sensitive equations (like other tax regimes) & difficult to generalise. But at heart, always only the "net new" falls to be taxed.

VOA Appeals & Cases

- VOA appeals: small scale, fact sensitive, written reps. From June 2013, web published & *redacted*.
- (Unsurprisingly) few CIL High Court cases as time discourages.
- Early cases:
  - *R (oao Fox Strategic Land & Property Ltd) v Chorley Borough Council* [2014] EWHC 1179 (Admin): hopeless (long) *Wednesbury* challenge to charging schedule process & adoption
  - *R(oao Hourhope Ltd) v Shropshire Council* [2015] EWHC 518 (Admin): "in lawful use"
  - *R v Orbital Shopping Park v Swindon BC* [2016] EWHC 448(Admin): 2 planning permissions (internal mezzanine & external works) – permissible to *avoid* the CIL tax by splitting applications
- More recently, others: strict approach to CIL notices (*Hillingdon* [2018] EWHC 845; *Shropshire* [2019] EWHC 16) & liability trigger (R(oao *Oval) v Bath & North East Somerset* [2020] EWHC 457 (Admin): grant of outline planning permission confined to initial decision notice).
- Also *Giordano* [2018] EWHC 3417: scope of lawful use part of chargeable amount equation & PD rights

‘CIL’ Tomorrow: Planning for the Future

- White Papers: Planning & (Brexit) Freeports (all kinds)
- 08/2020 Planning White Paper:
  - “fundamental reform”
- From “Golden thread” to “3 Pillars” –
  - Planning for development
  - Planning for beautiful & sustainable place
  - Planning for infrastructure & connected places
- Pillar 3: a nationally-set value based flat rate charge (“the Infrastructure Levy”) to “capture *a greater share* of the uplift in land value that comes with development”
- More expensive to develop? Likely.
- Freeports Government Response, Chapter 5 ties to Planning & inc. PD & Chapter 6 related Regeneration of surrounding area inc. commercial & housing development.

“consolidated Infrastructure Levy”

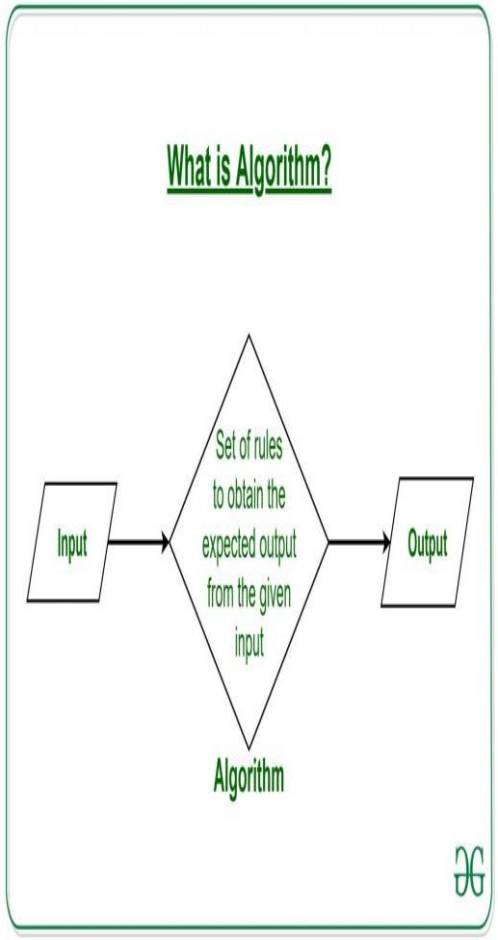
- Context inc: 2018/2019: £7bn s.106 *negotiated* inc. £4.7bn A/H or 30,000 homes
- But: Negotiations = delay & “unevenness”
- Reform? A refined:

  “consolidated Infrastructure Levy”
- Tomorrow’s cIL scope:
  - “Sweep away months of negotiations”
  - “Expanded scope” to cover affordable housing
  - Remove exemptions so as to “capture changes of use through permitted development”
  - More on-site affordable housing
  - Local authority flexibility for cIL use
- Faster certain means to capture more hope value?

“Pillar Three”: Planning for Infrastructure

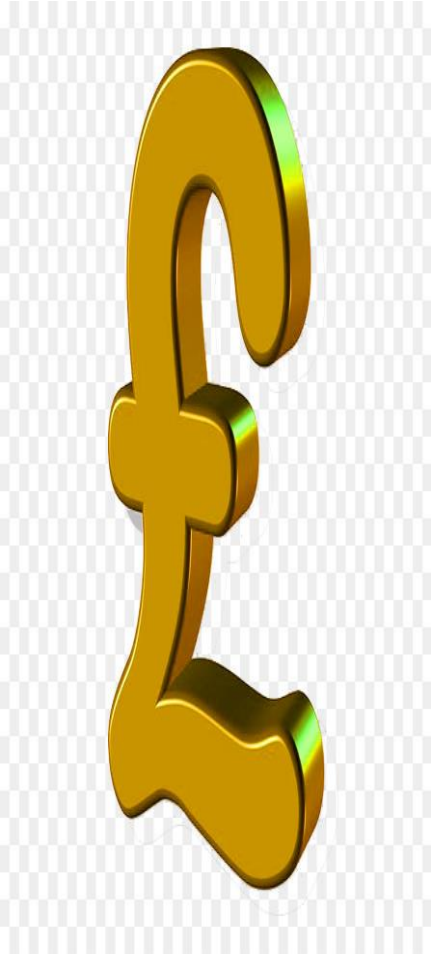
- ‘CIL’ here to stay in age of algorithm
- CIL benefits:
  - “flat rate”;
  - “non-negotiable tariff”;

  BUT:
  - payment point (“commencement”) inflexible to market conditions
  - LA’s “slow to spend” CIL on early delivery
- So: “A consolidated “Infrastructure Levy”
  - Proposal 19: *mesh* section 106 & CIL
  - Proposal 20: *expand* levy base to PD & “use”
  - Proposal 21: inc. *A/H* in cIL
- Treasury continues to see revenue utility of CIL



“Proposal 19” - Content

- Likely cIL equation shape & content?
- Flat rate, value-based charge, nationally set:
  - single rate or
  - area-specific rate
- Charged on “*final* value of development” with rate as at *date of grant* of permission;
- Levied at point of *occupation*;
- Minimum *threshold* to prevent lack of viability;
- Levy only *above*-threshold development *part*
- As now, LAs can “borrow against IL” to *forward* fund infrastructure inc. strategic (MCIL);



cIL Mechanics?

- Northern CIL coverage patchy: e.g:
  - CIL in Cheshire, Preston, Sheffield, Leeds, Newcastle and North Tyneside, Hambleton and Ryedale;
  - Else only emerging CIL or s.106 elsewhere.
- Alternative cIL Mechanics cut through patchiness:
  - cIL threshold set locally to only charge above threshold;
  - Likely?
  - "as planning obligations would be consolidated into the single Infrastructure Levy", "significantly greater uptake" of cIL anticipated (not kidding);
- Or: capitalise land value to ensure landowners contribute
- Post-Brexit & Virus pro-levelling up by Government:
  - taxing builds & refining Infrastructure equation to remove SE bias?

Tomorrow's cIL?

- What might 'cIL' look like in practice?
- CIL Regs. likely recast as "cIL" Regs. inc:
  - Reformed triggers: commence; first permit; liability;
  - Reformed scope: development inc. "use" alone;
  - With s106 "removed", cIL can be used for A/H;
  - Mandatory in-kind delivery on-site?
  - In-kind delivery a proxy for provider's discount?
  - Market price/provider sale difference offset "from final cash liability" to cIL & so incentivises on-site;
  - Form & tenure specified?
- TCPA, s. 70 definitions refine "local finance consideration" as "IL"?
- Section 106 removed? Likely only finance pts:
  - Section 106(1)(d); (2)(c), (12)(a) (sums to be paid)

Build, build, build? Borrow, borrow, borrow?

- Concluding thoughts: Reform? Yes. Fundamental? Financially, yes.
- Freeports' development by end 2021? "Testbed for some of the wider [planning] reforms": a regeneration CIL or cIL bonanza? PD?
- cIL is here to stay: buy in at the right price & sell out at the right price.

Nuts & Bolts Cases for 2020

The Toolbox Ten

1. *DB Symmetry Ltd v Swindon BC* [2020] EWCA Civ 1331 - interpretation of planning conditions and their lawfulness imposing public rights of way
2. *Norfolk Homes Ltd v North Norfolk DC* [2020] EWHC 2265 (QB) – interpretation of s.106 agreements (and in a s.73 context)
3. *Peel Investments (North) Ltd v Secretary of State for Communities and Local Government* [2020] EWCA Civ 1175 – five year supply: interpretation of para 11d NPPF (when a policy is "out-of-date")
4. *R (Samuel Smith Old Brewery) v North Yorkshire CC* [2020] UKSC 3 – Green Belt policy (meaning of "openness") and material considerations
5. *R (Liverpool Open & Green Spaces CiC) v Liverpool City Council & Ors* [2020] EWCA Civ 861 - final guidance on application of "openness" test (albeit in green wedge context)

The Toolbox Ten …

6. *R (Lochairlort Investments Ltd) v Mendip DC & Norton St Philip PC* [2020] EWCA Civ – Need for NDPs and/or their Examiners to give reasons for a more restrictive development policy than national GB
7. *Dill v Secretary of State for Housing, Communities and Local Government* [2020] UKSC 20 – meaning of a listed "building"
8. *Rectory Homes v SSHCLG* [2020] EWHC 2098 (Admin) - interpretation of policy meaning of "dwelling" in C2 context
9. Hillside Parks Ltd v Snowdonia Nation*al Park Authority* [2020] EWCA Civ 1440 – modern planning permissions requiring holistic implementation
10. *R (Hawkhurst PC) v Tonbridge Wells BC* [2020] EWHC 3019 (Admin) – discussion of highway impacts in context of NPPF paras. 108 & 109 advice

Case 1: *DB Symmetry*

Two issues:

(1) Lawfulness of conditions purporting to require the public to have a right of way over roads constructed as part of a development

(2) Interpretation of planning conditions

Issue (1):

- Confirmation of the principle in *Hall & Co Ltd v Shoreham by Sea Urban DC* [1964] 1 WLR 240
- A condition will be unlawful in so far as it requires a developer to dedicate land which he owns as public highway without compensation
- Principle includes any requirement that the public have a right of way over such land

DB Symmetry

Issue (2): Principles for interpretating planning conditions [59]-[71]

- What a reasonable reader would understand the words to mean when reading the condition in the context of the other conditions and the consent as a whole
- No absolute bar on the implication of words, but caution in doing so
- No special set of rules apply to planning conditions, as compared to other legal documents
- Permission to be interpreted in context, with include the applicable legal framework (reasonable reader must be equipped with some knowledge of planning law and practice)
- Where there is a choice between two realistic interpretations, the court will prefer an interpretation which results in the permission being valid

Case 2: *Norfolk Homes*

Background

- LPA granted PP in 2012 for erection of 85 dwellings subject to a s.106 agreement requiring 45% affordable housing
- S.73 application granted in 2015 which resulted in a new PP. Not contingent on any further s.106 obligation
- The s.106 agreement from 2012 referred expressly to the 2012 PP (and no other PP)

Issue

- Whether the s.106 agreement from 2012 should be interpreted as applying in circumstances where the developer had chosen to implement the 2015 PP rather than the 2012 PP

Norfolk Homes

Judgment

- Holgate J confirmed orthodox approach to interpretation of s.106 agreements. In other words, they are to be interpreted in accordance with the ordinary rules of contractual interpretation
- Here the wording of the s.106 agreement was clear. It meant what it said, so it only applied to the 2012 PP. Rejected LPA's argument that the *Lambeth* decision (on interpretation of conditions) meant that planning documents should be construed so as to avoid a LPA falling into an alleged "technical trap"
- The test for implying terms into the s.106 agreement such that it would bite on the 2015 PP not met. Not the case that implication of terms was required to give efficacy to the agreement, or that the implication was so obvious that it went without saying
- Therefore, no requirement to provide 45% affordable housing

Case 3: *Peel Investments*

Issues on appeal:

(1) Correct interpretation of "out-of-date" in para 11d NPPF

(2) Proper application of para 11d to policies in development plan which are time-expired and/or lack policy in respect of the strategic issue of housing supply

11. Plans and decisions should apply a presumption in favour of sustainable development.

For decision-taking this means:

[…]

d) where there are no relevant development plan policies, or the policies which are most important for determining the application are ***out-of-date****, granting permission unless […]*

Peel Investments

Issue (1): Interpretation of "out-of-date"

- Policies are "out-of-date" as per para 11d if they have been overtaken by things that have happened since the plan was adopted, either on the ground or through a change in national policy, or for some other reason, so that they are now out-of-date
- Whether a policy is "out-of-date" and, if so, what the consequences are, are matters are pure planning judgement (not dependent on issues of legal interpretation)
- Analysis in *Bloor Homes* of the presumption in favour of sustainable development in para 14 of 2012 NPPF applies in revised terms to para 11d of the 2018 NPPF

Peel Investments

Issue (2): Policies which are time-expired and/or lacking re the strategic issue of housing supply

- "Out-of-date" is different from "time-expired". Nothing in para 11d to suggest polices in a time-expired plan are out-of-date
- Obvious that many policies will survive beyond the plan period
- A plan without strategic housing policies it not automatically out-of-date for para 11d planning
- All depends on application of planning judgement to the particular facts

Case 4: *Samuel Smith*

The Main Issue: Meaning of "openness" in para 90 of the 2012 NPPF – does it necessarily include visual impact ?

*90. Certain other forms of development are also not inappropriate in Green Belt provided they preserve the **openness** of the Green Belt and do not conflict with the purposes of including land in Green Belt. These are:*

- *mineral extraction;*

(Equivalent now in para 146 NPPF 2018)

Application for six hectare extension to a quarry in Green Belt. Planning officer considered landscape impacts (but no express consideration of visual impacts), and found "openness" preserved. Lawful?

Samuel Smith (1)

Openness

- “Openness” was a broad concept. It referred back to underlying aim of GB policy: “to prevent urban sprawl by keeping land permanently open”
- Therefore not necessarily a statement about the visual qualities of the land, though in some cases that might be an aspect of the planning judgement involved
- Para 90 clear that some forms of development, including mineral extraction, could in principle be appropriate and compatible with the concept of openness
- Although a large quarry was not visually attractive while it lasted, the impact was temporary and subject to restoration

Samuel Smith (2)

Material considerations

- An issue is a (mandatory) material consideration, which a decision-maker will err in failing to consider, if:

  (1) It is expressly or impliedly identified as such by the statutory and/or policy framework

  (2) It is "so obviously material" that the decision-maker must consider it (this is effectively a rationality test)

- Visual impact in *Samuel Smith* did not fall within either category above. Therefore decision-maker could have elected to consider it, but not required to (a permissive material consideration)

Case 5: *Liverpool*

- Although issue in context of “Green Wedge” (39 dwellings) applicable GB principles re-stated
- Applying the policy imperative of preserving openness requires “realism and common sense” to keeping designated land free of development
- Includes consideration of visual as well physical or spatial impacts
- Current definitive statement of the law on “openness”?

Case 6: *Lochairlot*

- NDP policy making
- Local Green Space policy in Norton St Philip NDP restricting development "*only if it enhances the original use and reasons for designation of the space*"
- As policy more restrictive than national GB policy it required a reasoned justification
- None provided in NDP making process nor in the Examiner's report
- Despite being given the presumption of expertise, although NDP role different from Planning Inspectors, this combined omission fatal.

Case 7: *Dill*

Issues:

(1) Whether a statutory listed building listing was determinative of the relevant item being a “building”

(2) The criteria to be applied in determined whether an item appearing in its own right on the statutory list was a “building”

Context: Two lead urns resting on limestone piers which had been Grade II listed in 1986. Removed and sold by owner who had been unaware of the listing

Dill

Issue 1:

- No reason that on appeal against a listed building enforcement notice, the matter of whether the item was a “building” could not be raised
- Just like in a planning enforcement appeal, the Inspector is well placed to consider this issue, which may involve difficult questions of factual judgment
- If the argument was successful, such that the item was found not to be a building, the SoS had the power to deal with the matter by removing the item from the list

Issue 2:

- Application of the test in *Skerritts of Nottingham Ltd v SSETR* [2000] 2 PLR 102
- Also called for guidance re free-standing structures

Case 8: *Rectory Homes*

Issue: Whether Class C2 "extra care" scheme should make s.106 affordable housing contribution in accordance with South Oxfordshire DC's Core Strategy policy CSH3 covering all "dwellings"

… that the use of the word "dwellings" in the affordable housing policy, CSH3, of the SODC's Core Strategy could only refer to a dwelling in the C3 Use Class. Because it was agreed between the parties that the entirety of the proposed development fell within the C2 Use Class, the Claimant contended that it had to follow that no part of the development could fall within the C3 Use Class and so could not amount to a "dwelling" under policy CSH3 triggering a requirement to provide affordable housing (likewise policy H8 of the TNP)."

Ten “principles of interpretation”

See paras 43 – 45:

1. Policies interpreted objectively in accordance with language used, read in its proper context
2. Not to be interpreted as if statutory or contractual provisions
3. Intended to guide or shape practical decision-making
4. Applied and understood by planning professionals and by the public to whom they are primarily addressed
5. Decision-makers entitled to expect policies to be as “*clearly and simply stated as it can be*” and *“however well or badly it may be expressed, the courts to provide a straightforward interpretation of such policy”*
6. Reading a policy in accordance with the language used and its proper context means reading the plan as a whole, or at least the relevant parts of it (*Phides Estates*)

Ten “principles of interpretation”

7. The supporting text of a Plan is an aid to the interpretation of its policies… BUT supporting text does not form part of the policy and cannot override it (*R (Cherkley Campaign*)

8. Where development plan policies intended to implement national guidance, that guidance forms part of the relevant context to which regard may be had when interpreting those policies (*Tesco*)

9. The public is in principle entitled to rely on the public document as it stands, without having to investigate its provenance and evolution” (*R (TW Logistics)),* i.e. avoid “forensic archaeology”

10. If particular difficulty, extrinsic material may be examined (*Phides*)

The outcomes

"63. Where the units in an extra care scheme physically amount to dwellings, it really does not matter what alternative language a developer chooses to describe them. They still remain dwellings. **" The Scheme Design point"**

...

65. In summary, there is no reason why a C2 development or scheme may not provide residential accommodation in the form of dwellings. That possibility is not precluded by the operation of the C3 Use Class and its interaction with the C2 Use Class. Thus, the language of the Order does not support the Claimant's argument that the extra care accommodation proposed could <u>not</u> represent dwellings and therefore could not trigger the application of policy CSH3."

" The Contributions Point "

The outcomes

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" The Contribution Point "

Case 9: *Hillside Parks*

Background:

- Planning Permission originally granted in 1967 for 401 houses based on a master plan to current parties' predecessors
- High Court in 1987 had concluded that the 1967 Consent had been lawfully granted
- Various departures to master plan granted by SNPA from 1996 until 2011 but in 2017 had asked Hillside to cease all works as implementation of 1967 master plan had been rendered impossible by development under later permissions

Issues:

(1) Whether the effect of the 167 Consent was *res judicata* because of 1987 High Court determination

(2) Site could still be developed because of (a) SNPA's variations and (b) the *Lucas* exception authorising one single scheme (*F Lucas & Sons Ltd v. Dorking and Horley RDC* (1964))

Hillside Parks

Outcomes:

- Correctness of the 1987 decision did not trump due to :
  - The current circumstances in which H's commercial interests had to be balanced against public interest of permitting development within the National Park.
  - The subsequent and "significant" legal developments in which permissions should now be construed as a whole (*Sage*), and, that lawful development had to be carried out "fully in accordance with any final permission under which it is done" (*Singh*)
- Application of the *Lucas* exception doubted as (a) highly exceptional on facts; (b) not endorsed by an appellate court; (c) any modern planning permission for the development of a large housing estate had requirements concerning highways, landscaping (even employment and educational uses) which were all part of the overall scheme. "*I doubt very much whether a developer could lawfully pick and choose different parts of the development to be implemented"* (Singh LJ)

Case 10: *Hawkhurst*

Background

- TWBC granting PP for McCarthy & Stone retirement scheme for a site next to village conservation area and within High Weald AONB close to major A-road crossing junction recognised by KCC as experiencing significant delays especially during peaks
- KCC advises TWBC that scheme would have no material and certainly no severe impact on local highway network, in isolation or in combination, provided mitigation payments made
- Subsequent major residential scheme for local golf club submitted which proposed a new bypass for the junction in its TA
- Challenge includes a failure to consider cumulative highways impacts of other developments including golf club TA

Hawkhurst

Judgment

- As there were no definitions within NPPF, paras. 108 & 109, the test of “severe” residual cumulative impacts was a matter for the decision-maker's judgment, exercised in accordance with ordinary administrative law principles.
- Determining whether a proposed development would have such impacts on the traffic network would usually require some technical information; but the type of document required to make that assessment was also a matter of judgment.
- Here, the TA had provided technical information on the impact of the development on the transport network: the fact that a transport assessment, which was a more in-depth document, had been produced for the golf club development did not mean that one was required for the proposed development.
- The real question was whether the lighter-touch transport statement had been sufficient for TWBC to make its decision: it had. Given the very low levels of traffic that were to be generated, which were not disputed, the local authority's decision could not be described as irrational

Supplementary Contributions by way of Other Reading and Listening

- **Newsletter**: https://1f2ca7mxjow42e65q49871m1-wpengine.netdna-ssl.com/wp-content/uploads/2020/10/PEPNewsletter_8October2020.pdf (JPS article discussions of *Norfolk Homes* and *Rectory Homes* cases)
- **Podcast**: https://www.39essex.com/that-technical-traps-submission-john-pugh-smith/
- **Newsletter**: https://1f2ca7mxjow42e65q49871m1-wpengine.netdna-ssl.com/wp-content/uploads/2020/10/PEPNewsletter_8October2020.pdf (JPS article discussion of the three Higher Court cases on Green Belt openness: *Samuel Smith, Hook* and *Liverpool Open Spaces* and their practical implications)
- **Podcast:** https://www.39essex.com/openness-in-a-year-of-lockdowns/
- **Webinar**: https://1f2ca7mxjow42e65q49871m1-wpengine.netdna-ssl.com/wp-content/uploads/2020/11/PEP-episode-2-slides-merged-FINAL.pdf (Hillside case discussion by ST – His Newsletter article to follow)

Questions?

Thank you for attending

- Series of webinars presented by 39 Essex Chambers on property, construction and related areas –webinars and podcasts

- https://www.39essex.com/category/webinars/
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Thank you for listening!

Stephen Tromans QC
stephen.tromans@39essex.com

Christiaan Zwart
christiaan.zwart@39essex.com

John Pugh-Smith
john.pugh-smith@39essex.com