

# 39 from 39 Series 2: Episode 2 – Important Issues in Planning Law

19<sup>th</sup> November 2020  
Starting shortly....

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# Introduction and welcome Stephen Tromans QC

- Use Q&A facility
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  - Newsletters
  - Webinars
  - Podcasts
  - Vlogs
- PEP Winter Festival coming soon w/c 7 December



# PLANNING ACT 2008 & CHALLENGES TO NATIONAL POLICY STATEMENTS



# ROLE OF NPS

- Proposed in 2007 White Paper: Planning for a Sustainable Future
- Impact of lack of clear statements of national policy, particularly on the national need for infrastructure
- New NSIP scheme to be based on NPSs which would end need for debate about need for specific type of infrastructure

" integrate the Government's objectives for infrastructure capacity and development with its wider economic, environmental and social policy objectives, including climate change goals and targets, in order to deliver sustainable development."

# NATIONAL INFRA WEBSITE

They give reasons for the policy set out in the statement, and must include an explanation of how the policy takes account of government policy relating to the mitigation of, and adaptation to, climate change. They comprise the government's objectives for the development of nationally significant infrastructure in a particular sector and state, including:

- How this will contribute to sustainable development.
- How these objectives have been integrated with other government policies.
- How actual and projected capacity and demand have been taken into account.
- Consideration of relevant issues in relation to safety or technology.
- Circumstances where it would be particularly important to address the adverse impacts of development.
- Specific locations, where appropriate, in order to provide a clear framework for investment and planning decisions.

They also include any other policies or circumstances that ministers consider should be taken into account in decisions on infrastructure development.

# FRAMEWORK FOR NPS

- Sections 5, 7 & 9 of PLANNING ACT 2008
- S5(1) enables the Secretary of State to designate a NPS setting out national policy on one or more descriptions of development
- S5(3) sustainability appraisal of the policy and normally SEA.
- S7 publicity and consultation requirements laid
- S9 NPS must undergo Parliamentary scrutiny

# SCOPE & CONTENTS OF NPS

- S 5(5)(a) NPS may "*set out, in relation to a specified description of development, the amount, type or size of development of that description which is appropriate nationally or for a specified area.*"
- S 5(5)(c) enables policy in a NPS to determine "*the relative weight to be given to specific criteria.*"



# SCOPE & CONTENTS OF NPS

## cont

- S 5(7) requires a NPS to *"give reasons for the policy set out in the statement."* - the "supporting rationale for the policies" (see Spurrier [118] to [120])
- S 5(8) requires reasons to include *"an explanation of how the policy set out in the statement takes account of Government policy relating to the mitigation of, and adaptation to, climate change."*

- S10(2) requires the Secretary of State to exercise his functions under ss.5 or 6 *"with the objective of contributing to the achievement of sustainable development."*
- S10(3) the Secretary of State must (in particular) have regard to the desirability of *inter alia "mitigating, and adapting to, climate change."*

# REVIEW

- S 6 PLANNING ACT 2008
- S6(1) obliges the Secretary of State to review a NPS “*whenever he thinks it appropriate to do so*”.
- S6(3):-“*In deciding when to review a national policy statement the Secretary of State must consider whether—*
  - (a) since the time when the statement was first published or (if later) last reviewed, there has been a significant change in any circumstances on the basis of which any of the policy set out in the statement was decided,*
  - (b) the change was not anticipated at that time, and*
  - (c) if the change had been anticipated at that time, any of the policy set out in the statement would have been materially different.*”
- S 6(4) same three criteria for reviews of part of a NPS.

# CHALLENGE & SUSPENSION

- S13 – Challenge by JR once designated
- S 11 – Suspension on s6 criteria “*may suspend the operation of all or any part of the national policy statement until a review*”

# NPS IN DECISION MAKING

- S 104 – SofS must inter alia have regard to relevant NPS and decision must accord except to the extent that one or more of subsections (4) to (8) applies.
- Exceptions include
  - Breach of any of UKs international obligations;
  - Breach of SofS duty or unlawful by Act
  - If satisfied that the adverse impact of the proposed development would outweigh its benefits.
- S105 – where no NPS has effect look to LIR as per 104 and I/R matters

# WEIGHT & OUT OF DATE

- *Cf s38(6) PCPA 2004/s70 TCPA 1990*
- *Cf 'weight' to 'out of date' LP Policy per NPPF pfsd*
- PA 08 Regime no provision to treat NPS as 'out of date' - see Thames Blue Green Economy; Scarisbrick and Spurrier itself

# CURRENT NPS

- NPS for Overarching Energy (EN-1) 2011
- NPS for Fossil Fuels (EN-2) 2011
- NPS for Renewable Energy (EN-3) 2011
- NPS for Oil and Gas Supply and Storage (EN-4) - 2011
- NPS for Electricity Networks (EN-5) - 2011
- NPS for Nuclear Power (EN-6) – 2011
- NPS for Geological Disposal - 2019
- NPS for Ports - 2012.
- NPS for National Networks - 2015.
- The Airport NPS - 2018
- NPS for Hazardous Waste - 2013
- NPS for Waste Water - 2012
- Draft NPS for Water Resources – [consultation ended Jan 2019]

# SPURRIER/PLAN B





- ANPS – Heathrow Northern Runway
- High Court dismissed JR of decision to designate
- Court of Appeal allowed on refined basis – in particular due to failure to address Paris Agreement /CC
- DfT conceded but HAL Ltd did not
- SC heard case in Oct 20 – jmt early next 21

# DRAX



- Gas Coal Power Station DCO
- SofS grant contrary to ExA recommendation – impact outweighed benefit
- EN-1 central to debate and how it ‘sits’ with Net Zero etc and EN - 2
- SofS granted DCO
- Challenge refused by Holgate J matter before CA

# DALE; MONBIOT& GLP



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BARRISTERS . ARBITRATORS . MEDIATORS

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**39** Essex  
CHAMBERS

- EN-1 to 6 review demand
- Govt said actively reviewing
- C challenging on basis of need more action now
- Govt's subsequent clearer promise
- C have maintained JR – propose s6 suspension (or part)
- Rolled up put back to Jan 2021

# TRANSPORT ACTION NETWORK



- Not challenge to NPS but RIS2 March 2020
- RIS sits alongside NPS not only NSIP highways schemes
- JR Permission granted July 2020 on single ground (re-app on refused grounds recently heard)

# WHAT NEXT???

- Energy White Paper....????
- EN1 – 6 : GOVT TO REVIEW...
- NPS – PORTS : GOVT TO REVIEW...
- RIS2 - ??
- NUCLEAR??
- ANPS...
- MORE JR....IMPACT OF NET ZERO & PARIS???



# *PD Rights in 2020*

Daniel Stedman Jones  
39 Essex Chambers  
19 November 2020



# Agenda

- Busy year for permitted development rights
  - ‘Planning Reforms’ in context of Covid
  - New PD Rights
  - Case Law – several important decisions
  - Including, this week, the decision of the Divisional Court challenging the above

# New PD Rights

March 2020 Covid changes – temporary change of use to take away  
3 recent statutory instruments which amend the GPDO 2015:

- SI 1: Planning (Permitted Development and Miscellaneous Amendments) (England) (Coronavirus) Regulations 2020 (SI 2020/632) – entry into force 1 August 2020 – **natural light requirement for dwellinghouse conversions and upward building on blocks of flats**
- SI 2: Town and Country Planning (General Permitted Development) (England) (Amendment) (No. 2) Order 2020 (SI 2020/755) – entry into force 31 August 2020 - **more provision for upward extension of buildings**
- SI 3: Town and Country Planning (General Permitted Development) (England) (Amendment) (No. 3) Order 2020 (SI 2020/756) – entry into force 31 August 2020 – **demolition of certain types of buildings to be replaced by new homes**

# *R (Rights: Community: Action) v SSHCLG*

- SIs 2 and 3 (and Use Classes Order 1987 Class E) subject to judicial review challenge, rolled-up hearing October 2020 – Judgment on 17 Nov 2020
- Challenge by “campaigners, lawyers, planners, scientists and others who seek to persuade the Government and other public bodies to pursue particular action in relation to climate change and other environmental issues.”
- Response to controversy over the quality of housing and development under previous PD changes

## *Rights: Community: Action ctd*

- Grounds:
- Failure to carry out an environment assessment pursuant to the SEA Directive and the SEA Regs
- Failure to discharge the public sector equality duty (s.149 EA 2010)
- Failure to consider the weight of evidence against the reforms, including prior consultation responses and advice from the SS's own experts

## *Rights: Community: Action ctd.*

- Divisional Court of Lewis LJ and Holgate J
- Jgt begins with a topical reminder of limits of JR:

”The role of the court in judicial review is concerned with resolving questions of law. The court is not responsible for making political, social, or economic choices. Those decisions, and those choices, are ones that Parliament has entrusted to ministers and other public bodies.”

# Ground 1

- Court set out four criteria, derived from the Directive and the 2004 Regulations, which needed to be satisfied:
  - “(1) The plan or programme must be subject to preparation or adoption by an authority at national, regional, or local level, or be prepared by an authority for adoption, through a legislative procedure by Parliament or Government;
  - (2) The plan or programme must be required by legislative, regulatory or administrative provisions;
  - (3) The plan or programme must set the framework for future development consents of projects; and
  - (4) The plan or programme must be likely to have significant environmental effects.”
- 3 not satisfied, but if it were then screening would have been necessary to assess for 4.

# Grounds 2 and 3

- Ground 2 - C alleged a failure in relation to PSED under section 149 of the Equalities Act 2010 in respect of elderly and disabled
- Permission for ground was refused – court found that duty complied with at consultation stage, an assessment produced, issues put to minister – no basis for ground
- Ground 3 – C alleged a group of failures concerning consultation and failure to re-consult
- Court found no merit – consultation had taken place, reports and responses given proper consideration
- No basis for reconsultation – diff to 5G and Covid context important



# Case Law 2: New World Payphones

- In *New World Payphones v Westminster CC* [2020] PTSR 888 – Hickinbottom LJ considered Part 16 – telephone kiosk with advertising panel.
- Sch.2 Pt 16 Class A permits development "on behalf of an electronic communications code operator for the purpose of the operator's electronic communications network ... consisting of ... the installation, alteration or replacement of any electronic communications apparatus"
- However, the kiosk included an illuminated integrated back panel advert
- Prior approval necessary for siting, appearance

## (2) Prior Approval: *New World Payphones*

- Refused by LPA on visual amenity and street clutter grounds – also on grounds of lack of need.
- Granted on appeal by Inspector
- HC determined that it fell outside the class because kiosk had a dual purpose but that need was not relevant
- CA agreed, relying on *Keenan*
- But, at [49], Hickinbottom LJ, amongst other things, said this:
- “On an application to an authority for a determination as to whether its “prior approval” is required, then the authority is bound to consider and determine whether the development otherwise falls within the definitional scope of the particular class of permitted development.”
- Seems to cut against *Keenan/Marshall* – which is right?

# Case Law 3: Procedure

- Two Cases to highlight
- *Coventry Gliding Club* – Barn to resi under Class Q, Part 3 – failure to erect site notice under para W (8)
- *Gluck* – Challenge to refusal of PA – had a LPA and a developer agreed an extension of time – yes, amendment now made to Art. 7 c)

# Lessons

- Understand process
- Understand roles – inc. eg: submission reqs and article 4 directions
- Consider each part with great care on its own terms
- Take special care with prior approval decisions:
  - Language/interpretation
  - Exercising powers for seeking information
  - Procedure

THANK YOU

Daniel Stedman Jones

# A Quartet of Cases



Covenants  
Old permissions  
Conditions and highways  
Conditions, intensification and pollution

# Common theme

- Problems of building out development



**Fly in the Ointment**

A 'fly in the ointment' is a small event, circumstance, or factor that spoils an entire endeavor...

"Dennis had a full business plan and he was sure his idea would work. The one fly in the ointment was money: He didn't have any."

[www.idioms.online](http://www.idioms.online)

*Case 1:*  
*Alexander Devine Children's  
Cancer Trust v Housing Solutions  
Ltd*  
[2020] UKSC 45



**Berkshire's Children's Hospice Service**





# Restrictive covenants

- Private law property right. Can be used to protect positive obligations (e.g. overage). Section 84 of the Law of Property Act 1925 provides a regime for the discharge or modification of restrictive covenants

# ‘Contrary to public interest’

Section 84(1)(aa): “the continued existence thereof would impede some reasonable user of the land for public or private purposes or, as the case may be, would unless modified so impede such user”

Section 84(1A)(b), by impeding some reasonable user, that restriction “is contrary to the public interest”

When considering section 84(1A), the Upper Tribunal must, under section 84(1B), “*take into account the development plan and any declared or ascertainable pattern for the grant or refusal of planning permissions in the relevant areas*”

# The facts

- Green Belt land. 1972 conveyance with covenant which protected an overage obligation (expired) prohibiting building and restricting use to open space for parking.
- 2013 – developer applies for planning permission to build affordable housing units on the land (linked to application to build housing units for commercial sale)

# The facts

- 2014 – planning permission for the development conditional on provision of affordable housing. Even though inappropriate for Green Belt and contrary to the development plan, special circumstances justified grant of permission
- Section 106 agreement – has to transfer the units to an affordable housing provider
- Developer aware of RC and could have chosen to lay out its development so as to honour the covenant

# The facts

- Developer continues to completion despite objections from dominant owner.
- Developer applies to Upper Tribunal for discharge
- [2016] UKUT 515 (LC): held that restrictive covenants should be modified under s.84 to permit the occupation and use of the land. Developer ordered to pay £150,000 as compensation.
- Court of Appeal allows appeal [2018] EWCA Civ 2679 (Sales LJ judgment).

# Alexander Devine Children's Cancer Trust: Court of Appeal

- Goes to Supreme Court – Lord Burrows gives only judgment



# Contrary to the public interest

- Focus more narrowly on the impeding of the reasonable user of the land
- Ask whether that impediment, by continuation of the restrictive covenant, is contrary to the public interest
- Question of conduct of the applicant is irrelevant at this stage
- Conduct relevant when it comes to discretion: had UT made such an error?

# “Cynical breach”

- Deliberately committing a breach of the restrictive covenant with a view to making profit from so doing
- Two factors not addressed by UT:
  - 1) Could have submitted an alternative plan
  - 2) Created the state of affairs (i.e. the waste of housing units) in the first place by way of a deliberate breach



# Just deserts?

“The result—the likely demolition of the affordable houses—sounds a warning to those who think that covenants, and those that enjoy their benefit, are just interfering busy bodies who are standing in the way of progress. It also makes it clear that “proprietary” obligations are exactly that and not to be disregarded when they are inconvenient.”

Martin Dixon, ‘A smorgasbord’, [2019] 1 The Conveyancer and Property Lawyer 1-3

# The effect of planning

“43. *The grant of planning permission does not generally have any impact upon private property rights. It is a decision taken regarding what development of a particular site can be regarded as acceptable in planning terms, with reference to the public interest.*” (Sales LJ, Court of Appeal)

“13. *... it is unlikely that the local planning authority would have viewed it as its role to use its planning powers to ensure compliance with those covenants. Its concern was to ensure that the requisite number of affordable housing units should be provided ...*” (Sales LJ, Court of Appeal)

# The narrow ‘public interest’ test

- *In re Collins’ Application* (1975) 30 P & CR 527, 531: “*In my view for an application to succeed on the ground of public interest it must be shown that that interest is so important and immediate as to justify the serious interference with private rights and the sanctity of contract .*”
- Lord Burrows did not disturb this analysis

# Raises broader issue

- Relationship between private rights and public interest
- See also *Lawrence v. Fen Tigers* [2014] UKSC 13 and *AC Fearn v. Board of Trustees of the Tate Gallery* [2020] EWCA Civ 104



# Read more

- [Article of David Sawtell](#)
- <https://www.39essex.com/land-use-conflict-supreme-court-rules-on-the-discharge-of-restrictive-covenants-alexander-devine-childrens-cancer-trust-v-housing-solutions-ltd-2020-uksc-45/>

*Case 2:*  
*D B Symmetry Limited v. Swindon BC*  
[2020] EWCA Civ 1331

- Scope of planning conditions
- Can a condition require land to be dedicated as a highway?
- Part of the New Eastern Villages – major development to NE of Swindon. Connectivity to A420 a key issue

# The permission

- Application documents identified the access roads as highways for interconnection with the rest of the NEV
- Condition 39:

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.

# Proceedings

- Subsequent developer, Symmetry, claimed the access roads did not have to be highways and so they could charge for access to the rest of the NEV
- Certificate of Lawfulness of Proposed Use or Development granted on appeal that the roads could be private only
- Quashed by Andrews J [2019] EWHC 1677 (Admin) agreeing required highways to be dedicated (without requirement for adoption or transfer to the highway authority)
- SoS did not appeal, but Symmetry's appeal allowed by Court of Appeal. Permission to appeal submitted to Supreme Court



# Court of Appeal

- ‘Most natural’ meaning is that condition 39 requires highways to be dedicated. But condition would then be unlawful as Court bound by *Hall v Shoreham on Sea* (1964) that planning condition cannot require highways to be dedicated (as could compulsory purchase and pay compensation instead)
- Apply validation principle – a ‘realistic’ lawful interpretation is preferred

# Court of Appeal

- Symmetry's interpretation was realistic: condition required building, not dedication
- No reference to dedication or public rights in condition
- Not clear which parts of roads to be dedicated
- PP to be construed as not derogating from private rights, including forbidding access to roads
- Established mechanisms for dedication – section 38 Highways Act and section 106 obligation – had not been used

# Case 3:

## *Hillside Parks Ltd v Snowdonia National Park Authority [2020] EWCA Civ 1440*

- Issue estoppel
- Effect of master plan



# Facts

- Planning permission for 400 dwellings in 1967. Subject to Master Plan showing proposed siting and roads. Varied over the years.
- Trial before Drake J in 1985: declaration that development had been begun and could be lawfully completed
- 2017: LPA argued development could no longer be completed lawfully

# Issues

- Issue estoppel (*Thrasyvoulou v. Secretary of State*, 1987). Held that both facts and law had moved on since 1985 Drake J's judgment
- No longer physically possible to build out in accordance with Master Plan
- Developer relied on *F Lucas & Sons Ltd v. Dorking and Horley RDC* (1964) where Wynn J had held that 1952 permission authorised "partial development"

# Discussion

- *Lucas* regarded as “exceptional” case turning on own facts
- More modern approach of *Singh v. Secretary of State* (2010) – schemes likely to have integral approach: highways, landscaping, other uses. No ability to “pick and choose”
- No view expressed on enforcement position

# Further discussion

- Note by Stephen Tromans QC in next PEP Newsletter (online this week)

# Case 4:

## *Smith v. Castle Point Borough Council* [2020] EWCA Civ 1420

- Intensification
- Contamination



# Facts

- Planning permission for 5 metre concrete boundary along scrap yard
- Permission for use as scrapyard granted in 2002. No condition restricting height of storage. Waste management licence restricted height of waste to 5m

# Issues

- Adjoining owner of land for mixed use development said permission on wall implicitly allowed intensification of use
- Also argued land was contaminated and submitted contamination assessment

# Contamination and Pollution Control

- Held that neither local or national guidance on contamination was aimed at this type of scenario. No further assessment of contamination had been required.
- Reaffirmed position on assuming pollution control systems will work, and that the officer had justifiably referred to ability to complain to Environment Agency.

# Intensification

- Distinguished *Penwith DC v. SoS* (1977) where extension of factory would facilitate intensification, justifying hours condition
- Here, wholly unclear how “implication” of intensification could arise. No basis on which a condition limiting the original permission to be imposed.

# Further reading

- Article by Daniel Stedman Jones and Ton van der Klugt (counsel for successful respondent)
- [https://1f2ca7mxjow42e65q49871m1-wpengine.netdna-ssl.com/wp-content/uploads/2020/11/PEPNewsletter\\_5November2020.pdf](https://1f2ca7mxjow42e65q49871m1-wpengine.netdna-ssl.com/wp-content/uploads/2020/11/PEPNewsletter_5November2020.pdf)

# 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!

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