INTRODUCTION

Jonathan Darby

Welcome to the latest edition of our Planning, Environment and Property newsletter. We hope that you have all been keeping well during the period since our last edition. The plan over the next few months is to bring you this newsletter on a fortnightly basis, with contributions that will range from case notes, discussion of legislative developments, and updates as to the group's activities. We hope that it will continue to be a useful resource and means of keeping in touch with friends and colleagues, both old and new.

This edition includes contributions from Richard Harwood QC (on art, planning, law and singing sharks); John Pugh-Smith (with two topical articles that recently featured in the Local Government Lawyer – on s.106 and Rectory Homes respectively); and Stephen Tromans QC and Adam Boukraa (on quarrying, contaminated land and bromate pollution). We hope that you enjoy the read.

Contents

Webinars

In other news, this month also sees the start of Series 2 of our successful webinar series '39 from 39', with the first episode being broadcast on 15 October 2020, with a focus upon the new Class E and associated reforms.

As well as the '39 from 39' series, there will also be a series of webinars with a regional focus to account for our inability to run our usual regional seminars in person. The first in that series being entitled "Central Issues for the Central Region", which will be broadcast from 2.30pm to 4.00pm on 20 October 2020. It will be presented by Stephen Tromans QC, John Pugh-Smith and Gethin Thomas and topics will include:

- Section 106 agreements (Norfolk Homes Ltd v North Norfolk District Council and another [2020] EWHC 2265 (QB))
- Five year supply (Peel Investments (North) Ltd v Secretary of State for Housing Communities And Local Government & Anor [2019] EWHC 2143)
- Update on key environmental issues in Birmingham (including the approved CAZ, and Route to Zero)
- Challenges to major infrastructure schemes (such as the recent cases concerning HS2, RIS2, and Heathrow Airport)
- Green Belt openness (The Eternal Wall of Answered Prayer national monument) (including a consideration of the recent permission granted for M42 Junction 6 improvement project)
- Change of use

Details of further regional and '39 from 39' webinars will be included in future editions of the newsletter and will also be available online at https://www.39essex.com/category/webinars/

Pilot Briefings

Readers will recall that in April 2020 we launched our "Quarantine Queries" initiative in order to offer assistance to clients during a time when they were mainly working at home. We are pleased to say that the initiative has been has been utilised by a large number of our clients, and is still being used to date. In light of the overwhelmingly positive feedback, we have decided to offer this service on a more permanent basis.

Moving forward, the service will be known as "Pilot Briefings", and will be available as of today. In order to utilise the service, we will require a short email detailing the issues at hand and the questions you would need addressing. On receipt, a 15 minute time slot will be arranged with a member of our established team, who will be able to discuss the legal query you have.

If you would like to book a "Pilot Briefing" with one of our Planning, Environment and Property experts, then please contact:

Andrew Poyser
andrew.poyser@39essex.com | 020 7832 1190
or
Elliott Hurrell
elliott.hurrell@39essex.com | 020 7634 9023

REALITY BITES: ART, PLANNING, LAW AND SINGING SHARKS

Richard Harwood QC

Art has collided with planning control and so far the planners have the upper hand. The winning entry of the 2020 Antepavilion Competition, an annual architecture competition sponsored by Antepavilion Limited, and The Architecture Foundation Limited is called *Sharks!* This is described as:

> *"S**harks! by Jaimie Shorten***
>
> ***The Headington Shark** (proper name Untitled 1986) made a famous case in planning decisions and precedent. The Appeal decision that allowed it to be (eventually) retained included this:*
>
> *"the shark is not in harmony with its surroundings, but then it is not intended to be in harmony with them"*

This proposal has several sharks on a raft.

The compositional arrangement of the sharks follows that of The Raft of the Medusa by Théodore Géricault (1791-1824).

They will sing Charles Trenet's La Mer, in harmony and in French, as a poignant reflection on the UK leaving the EU.

La mer,
Au ciel d'été,
Confond, ses blancs moutons
Avec les anges si purs.
La mer,
Bergère d'azur
Infinie…

Additionally, each of the six sharks will give a lecture on important themes in contemporary architecture and urbanism."

Reflecting the need to discuss contemporary architecture without eating the audience, the sharks would not be real, but were constructed of fibre glass and polystyrene, containing smoke machines, lasers and loudspeakers. They were to float in the Regent's Canal, London adjacent to wharves which have a long history of art display and installation. The wharves also have a long history of planning enforcement disputes, with a 2016 enforcement notice against installations at roof level still not complied with and an appeal underway against another enforcement notice concerning the winning entries in the 2019 Antepavilion competition.The brief for the 2020 competition included "proposals that referenced Hackney Council's ongoing campaign to demolish the previous Antepavilions that have been built at Hoxton Docks". The exercise would appear to have been a deliberate wind-up. Unsurprisingly the prospect of the sharks arriving in north London appealed to the media, but not to Hackney Council who are the local planning authority.

The Council considered that the installation of the sharks would be a material change of use of part of the canal and so amount to development under the Town and Country Planning Act 1990, s 55. It would therefore need planning permission which it did not have and this would be a breach of planning control. The installation was said to harm the setting of a listed building, Haggerston Bridge, harm the character of the Regents Canal conservation area, obstruct navigation, impede public access along the towpath, disturb local residents (who might not want to listen to architectural lectures) and concern was also expressed about the lasers.

Section 187B of the Town and Country Planning Act 1990 enables the Court to grant an injunction against a breach of planning control:

"1) Where a local planning authority consider it necessary or expedient for any actual or apprehended breach of planning control to be restrained by injunction, they may apply to the court for an injunction, whether or not they have exercised or are proposing to exercise any of their other powers under this Part.

2) On an application under subsection (1) the court may grant such an injunction as the court thinks appropriate for the purpose of restraining the breach."

Acting with an alacrity not shown by the mayor in Jaws, Hackney applied, without notice, for an interim injunction against the installation of the sharks or any other art in the canal or the wharves. This was granted on 20th August and immediately attracted press attention.

The case came back in front of Mr Justice Murray for an inter partes hearing with judgment being handed down on 18th September: *London Borough of Hackney v Shiva Limited* [2020] EWHC 2489 (QB). What was at stake was a continuation of the interim injunction. Murray J held that there was a serious issue to be tried: having regard to *Thames Heliports Plc v London Borough of Tower Hamlets* (1996) 74 P&CR 164, the floating sharks could be a material change of use of that part of the canal. I note that whether they were a material change of use would be a matter for the final hearing to determine: the Court must find an actual or apprehended breach of planning control,

see *Trott v Broadland District Council* [2011] EWCA Civ 301 at para 23 per Sullivan LJ; *Davenport v Westminster City Council* [2010] EWHC 2016 (QB) at para 93 to 96 per Eady J.

The second question was the balance of convenience. The Court considered that in the context of the claimed harms and interim injunction should be continued. This seemed to be on the assumption that the Council would give a cross-undertaking to pay damages for loss caused to the defendants if the injunction was ultimately found to be unjustified (see para 80). Requiring a cross-undertaking would be unusual for an interim injunction which was concerned with law enforcement, such as this.

The sharks which were then bobbing around on the canal were required to be removed. The Court did though cut down the scope of the injunction which had been a general prohibition from installing art works on that part of the canal or wharves, stationing pontoons or carrying out any works.

The case will return for a final hearing, possibly to be known as Jaws: The Revenge.

Richard Harwood QC is the author of ***Planning Enforcement*** *(3rd Edition, 2020) and a member of Professional Advisors to the International Art Market*

SECTION 106S AND THE 'TECHNICAL TRAPS' SUBMISSION – THE FINAL CHAPTER?

John Pugh-Smith

In my initial article "Section 106s and the 'technical traps' submission,[1] I drew attention to the potentially worrying implications on the interpretation of such deeds, of Mrs Justice Thornton's judgment in *Norfolk Homes Limited v North Norfolk District Council & Norfolk County Council* [2020] EWHC 504 (QB) in early March 2020. There, she dismissed NHL's initial application for summary judgment for a declaration that their residential development was not bound by obligations contained in a Section 106 agreement upon the basis that NNDC had sufficiently arguable submissions, based around the *Lambeth* case,[2] to warrant a full hearing. Now, following that substantive hearing on 21st July 2020 final judgment has been handed down by Mr Justice Holgate [2020] EWHC 2265 (QB) a month later conclusively in favour of NHL.

The reason why this case is important, as a matter of planning jurisprudence, is that NNDC had sought to distinguish principles of contractual interpretation from the interpretation of planning documents. It had boldly submitted that *"it is inapt to apply pure principles of contractual interpretation to section 106 agreements, given the public nature of those agreements; the fact that they run with the land and the fact that they often intend to secure mitigations for the impact of development which are necessary to make the development acceptable. In those circumstances it is not apposite for the document to be construed by reference only to the contracting parties' intentions and according to the facts and circumstances at the time of the contract. Rather, the approach adopted by the Supreme Court in Lambeth as regards planning conditions should be applied."*

1 https://www.localgovernmentlawyer.co.uk/litigation-and-enforcement/311-litigation-features/43562-section-106s-and-the-technical-traps-submission

2 *Lambeth LBC v SSCLG* [2019] UKSC 33

Through his judgment, delivered in distinctly trenchant terms, Mr Justice Holgate has restored the level of reassurance required for these current unsettled times.

The Facts

In August 2011 NHL had submitted an outline application (with all matters reserved apart from means of access) to NNDC for the erection of up to 85 dwellings, access, public open space and associated infrastructure. NNDC resolved to grant planning permission subject to the prior execution of a s106 agreement between the then landowner, NNDC and Norfolk County Council ("NCC") to secure the provision of 45 per cent affordable housing together with a number of financial contributions. On 22nd June 2012 the section 106 obligation was executed ("the Agreement"), following which NNDC issued the decision notice ("the 2012 Permission"). In September 2013 NNDC granted a s.73 permission for the purpose of varying two of the conditions on the 2012 permission ("the 2013 Permission"); and in September 2015 NNDC granted another s.73 permission , in order to remove two conditions of the 2012 Permission and substitute a new condition requiring construction details for reducing energy demand to be submitted for approval ("the 2015 Permission"). The grant of the 2013 and the 2015 Permissions was not made contingent upon the prior execution of any further s.106 obligation, in particular, one imposing the same requirements as those contained in the Agreement. In September 2018 NNDC issued a CLOPUD decision notice under s.192 of the TCPA 1990 refusing a certificate that the 2015 Permission could lawfully be implemented without triggering the landowner's obligations under the Agreement. NHL did not appeal NNDC's refusal because they recognised that it had been "made outside the limited terms of section 192 of the Act, and there would be no jurisdiction to determine the appeal". Accordingly, NHL brought the present proceedings under CPR Part 8 seeking

(i) a declaration that the continuing residential development of the land in question pursuant to the 2015 Permission was not subject to any of the owner's obligations contained in the Agreement,; and

(ii) an order requiring NNDC to remove any reference to the Agreement from the local land charges register within 28 days of the Court's judgment.

The Judgment

Finding wholly in NHL's favour, the principal point in issue was whether the affordable housing obligations in the Agreement were expressly tied to the implementation of the 2012 Permission, as readily apparent from the definitions of 'Application', 'Development' and 'Planning Permission', whereas the development being implemented was under a separate and independent planning permission, granted through section 73 of the TCPA 1990, as to which the parties chose not to include the increasingly standard clause to the effect that the s.106 obligations were to remain binding. On NNDC's behalf it was submitted that the Supreme Court decision in *Lambeth* had made clear that a planning document, which includes a s.106 agreement, must be interpreted according to the natural and ordinary meaning of the words in their surrounding context, which includes the planning context. Accordingly, the 2012 Agreement was to be construed as applying to the 2012 Permission as varied. Failing that, these words were to be implied. The available evidence, namely NNDC's approval of reserved matters and the payments made under the Agreement were consistent with the Council's understanding that the Agreement continued to apply to the varied planning permissions.

Robustly dismissing that submission Mr Justice Holgate helpfully re-states the, hitherto, golden rules of construction of S106s, forged, after 20 years of consideration both by the House of Lords and the Supreme Court, and articulated most recently in *Arnold v Britton* [2015] AC 1619 and *Wood v Capita Insurance Services Limited* [2017] 2 WLR 1095. He also notes, citing *R (Robert Hitchins Ltd) v Worcestershire County Council & Worcester City Council* [2015] EWCA Civ 1060), that

essentially the same principles as those set out above are applicable to section 106 obligations, whether a bilateral agreement or a unilateral undertaking. He further records, having referred to *Trump*[3] that there is nothing in the *Lambeth* decision either which alters the standard principles of construction for public documents as set out above.

Turning, specifically, to the "technical traps" argument that had appealed to Mrs Justice Thornton as one of the District Council's seven "arguable" points, Mr Justice Holgate trenchantly dismissed this First Issue as follows:

> 89. *Lord Carnwath mentioned at [20] a reference in the decision of the Court of Appeal to a suggestion that s.73 posed a "technical trap" for a local authority, in that the approval of an application nominally for the variation or discharge of a condition required the grant of a fresh permission. However, that notion of a "technical trap" played no part at all in the reasoning of the Supreme Court. They certainly did not suggest that planning documents should be interpreted so as to avoid or overcome the possible effects of a planning authority falling into any supposed trap.*
>
> 90. *I do not accept in any event that s.73 creates a technical trap for planning authorities. It is plain from the language of the legislation that (1) although the original permission remains intact whatever the outcome of the application, (2) if the authority decides to impose different conditions from those originally imposed, or no conditions at all, then a fresh permission must be granted. It is also obvious that a s.106 obligation is a freestanding legal instrument, which does not form part of any s.70 permission or s.73 permission, even though it may impose obligations in relation to development carried out under such a permission.*
>
> 91. *The Supreme Court did not lay down any interpretative principle that planning documents, whether a s.106 agreement or a subsequent s.73 permission, should be read so as to prevent landowners and developers from avoiding or side-stepping obligations which they have previously entered into. Ms. Dehon did not point to any authority which supports any anti-avoidance principle or presumption in the construction of planning documents.*
>
> 92. *In my judgment the language of the 2012 agreement is unambiguous and clear. It does not suffer from poor drafting. To the contrary, it has been carefully drafted by lawyers well versed in the preparation of such documents.*

Moving to the Second Issue, whether additional words should be implied into the Agreement, the Judge notes that, unlike in *Trump*, this case concerns a s.106 obligation rather than the conditions in a permission; but that the breach of a s.106 obligation may give rise to injunctive relief, and thereby to criminal sanctions for any contempt of court. Furthermore, a s.106 obligation runs with the land and may affect the interests of parties who were not originally involved many years later, as well as the general public and other public authorities and agencies. Having reviewed the relevant authorities, concluding with *Marks and Spencer plc v BNP Paribas Securities Services* [2016] AC 742, Mr Justice Holgate then highlights Lord Neuberger's clarification of the two key points. First, the question whether a term should be implied is to be judged as at the date when the contract is made. Second, the tests that a term must be "so obvious as to go without saying" or "necessary for business efficacy" are important to avoid any suggestion that "reasonableness" is a sufficient ground for the implication of a term. The Judge then turns to discuss NNDC's implied wording which he observes that, despite his findings on the First Issue, would not contradict the express terms of the Agreement. However,

3 *Trump International Golf Club Limited v Scottish Ministers* [2016] 1 WLR 85

NNDC's arguments faced insuperable problems. First, it could not t be said that without the implied language suggested by NNDC the Agreement lacked "practical coherence", or coherence for giving effect to development plan polices and planning control. Secondly, and, in any event, he did not accept that the reasonableness criterion was satisfied for a number of reasons. Here, the judgment helpfully identifies the "unintended consequences" of the interpretative approach urged by NNDC. These can be summarised as follows:

a) Even if the parties to an agreement have expressed their obligations so as to apply solely to development under a contemporaneous permission, without any reference to a subsequent s.73 permission, they are to be treated as if they have agreed that the obligation should apply to development under all such consents.

b) It would be necessary for parties who agree that performance of a s.106 obligation should be conditional upon the carrying out of a particular permission solely, to exclude s.73 permissions expressly in order to avoid the implication of NNDC's type of additional wording. For example, there may be cases where it is in the interests of the planning authority to confine any covenants which they are to perform to the carrying out of one particular permission, or to reserve their position as to what requirements would be appropriate if a further planning permission were to be granted at a later date e.g. there might be a change of policy before the original grant of permission is due to expire. He adds: *"The illusory "technical trap" upon which NNDC has sought to rely in this case could actually become a real trap for other authorities, and indeed parties generally. As was stated in* ***Trump****, the Court should exercise great restraint and proceed cautiously"*.

c) When an original permission is granted for a large mixed use scheme, it is common practice to use very broad language in the "grant" section of the consent to describe the project and to confine its detailed description to a condition requiring the development to be carried out in accordance with a list of approved drawings. In that way the drawings may be modified quite substantially by a subsequent permission under s.73, and there may be large changes in, for example, quantum of floorspace, without infringing the *Finney* principle.[4] This undermines NNDC's argument that the proposed implied language is reasonable because a s.73 permission cannot involve substantial changes to the development permitted. Even if in the present case the 2013 and 2015 Permissions granted did not in fact involve substantial changes, it has not been shown that, viewing the position as at the time of the Agreement, the development authorised under the 2012 Permission could not have changed quite significantly by the use of the s.73 procedure. NNDC's implied terms would operate so as to apply the Agreement automatically to any subsequent s.73 permission, irrespective of the circumstances pertaining at the time of the subsequent planning application. The applicant would need to persuade the local planning authority to vary or discharge the s.106 obligation.

The Judge also highlights the other legal consequences, including the following:-

(i) Going back to the original decision on whether or not to grant planning permission, if the local authority were to be dissatisfied with the terms of the s.106 obligation offered by a developer, they could refuse permission and the developer would be able to test the reasonableness of that stance in a planning appeal;

4 *Finney v Welsh Ministers* [2019] EWCA Civ 1868 highlighting the "operative part" of a planning permission cannot be varied by a s.73 application – see further my article: "Section 73 and all that" https://1f2ca7mxjow42e65q49871m1-wpengine.netdna-ssl.com/wp-content/uploads/2020/07/PEPNewsletter_9July2020-002.pdf

(ii) If, however, a s.106 obligation is treated as applying to subsequent s.73 permissions, the landowner may seek to persuade the local authority to vary or discharge the s.106 obligation in relation to a particular s.73 application. But the local authority might decide that although there is no reason to refuse to grant the s.73 permission sought, the s.106 obligation should remain unaltered. In that event, s.78 would not give any right of appeal to enable the merits of that issue to be determined independently. The landowner would not be able to apply under s.106A to modify or discharge the s.106 obligation for a period of 5 years from the date on which it was entered into. If, however, the proposed terms are not implied and there is a dispute when a s.73 application is being determined by the local authority as to whether existing s.106 obligations should be re-applied (whether at all or in some amended form) and the application is refused for that reason, the issue can be tested on appeal;

(iii) As pointed out above, similar problems would apply to a local planning authority which has no good reason for refusing a s. 73 application, but which could justify seeking a variation in the terms of a s. 106 obligation only to find itself tied to an existing agreement by virtue of NNDC's implied terms. In these circumstances, it would be unreasonable for an authority to refuse to grant a s. 73 permission simply because the s.106 obligations treated by implication as applying to such a permission were no longer acceptable to the authority. The authority could not seek to "have it both ways". Flexibility to deal with changes of circumstance or evaluation may be just as important to a planning authority as to a landowner or developer;

(iv) The planning merits affecting what conditions if any should be imposed in the determination of a s.73 application are considered as at the date of that decision. The same approach should apply to the need for any s.106 obligation and its terms. There should be a contemporaneous decision on that point unless the parties have expressly agreed otherwise. That point should not go by default. It is a generally intrinsic feature of decision-making under the development control system;

(v) The merits of what should be imposed in a s.73 permission may be connected or intertwined with the issue of whether there should be a related s.106 obligation and, if so, on what terms.

He adds: *"Parties to a s.106 agreement (or a developer offering a unilateral undertaking) may choose to agree explicitly that the performance of the obligations created applies not only to the planning permission then being granted but also to any subsequent s.73 permission (or for that matter more broadly still). But if parties reach such an agreement, or a developer offers such an undertaking, they will have had the opportunity to take advice on the statutory framework and the legal implications of the promises they make. Applying the standard principles for the implication of language in legal documents, NNDC has not demonstrated why parties who have entered into an agreement without such explicit language should nevertheless be treated as having tied their hands in the same way in relation to the unknown content and circumstances of future s. 73 applications."*

Concluding Remarks

NNDC is not known to give up the fight, easily, and, as evidenced by *R (Champion) v North Norfolk District Council & Anor* [2015] UKSC 52[5] can even receive the ultimate a judicial endorsement. Indeed, in the interest of expediency, unexpected outcomes can happen these days as, perhaps,

5 *On the discretion of the courts not to quash planning decisions where there had been some defects in the decision-making process when dealing with a challenge based on procedural error*

in *Lambeth*.[6] Nevertheless, it is to be hoped that in a post- Pandemic world at least well-established principles of construction and interpretation of S106s will not now become one casualty of such expediency. Otherwise, some of the certainties, as we currently know them, will be forever changed and not necessarily for the better in the public interest.

John Pugh-Smith ***FSA FCIArb*** *practises as a barrister from 39 Essex Chambers. He is also a member of the RICS President's appointment panel. He has acted as an arbitrator, independent expert and dispute facilitator on a variety of references concerning the interpretation of section 106 and development agreements.*

THE POTENTIAL TO AVOID FURTHER MUDDLE AND MISUNDERSTANDING – EXTRA-CARE SCHEMES AFTER THE *RECTORY HOMES* DECISION

John Pugh-Smith

The need to provide an adequate supply of specialist accommodation for older people is becoming increasingly important given our aging population. This was recently recognised by Helen Whately MP, The Minister of State for Care, during the current Pandemic, when she enthusiastically stated: *"Retirement and Extra Care housing developments across the country - whatever their size, or whether private or not-for-profit – are playing a vital role in protecting the most vulnerable in our country."*

Extra Care schemes bring very considerable benefits to the wider community, and, to the residents themselves; for, in effect, they are capable of meeting both the housing and care needs of older people in specialist accommodation providing a more benign alternative to the traditional care home, or, that older person continuing to reside in a house that is no longer suitable, with all the attendant concerns that all too frequently arise. However, these schemes require considerable "up front" costs before they can be beneficially sold or let due to the desire of those moving into these types of facility to view them in an "as built" form – i.e. to see all of the communal facilities and to meet with the management and care teams. Moreover, local planning authorities (LPAs) have tended not to require affordable housing provision due to the wider benefits and viability sensitivities unless, on rare occasions, it has been a specific requirement within emerging development plan policy. In consequence, there has been a blurring as to whether Extra-Care Schemes should be categorised as Class C2 or Class 3 because so much has turned on the specific scheme.

Whilst the Government resisted the opportunity to clarify the distinction between use Classes C2 and C3 in the recent revisions to the Use Classes Order, deeming it unnecessary, arguably, the recent case of *Rectory Homes Limited v Secretary of State for Housing Communities and Local Government & South Oxfordshire District Council* [2020] EWHC 2098 (Admin) has reached that same pragmatic conclusion in the context of what constitutes a "dwelling-house" for the purposes of whether the scheme attracting affordable housing contributions under adopted development plan policy.

The Facts

Rectory Homes had sought planning permission for 'the erection of a *'Housing with Care' development (Use Class C2) for 78 open market extra care Dwellings and a communal residents*

6 See my previous articles footnoted above. In the author's view on ***Lambeth***: *" ..., the scope of the single judgment by Lord Carnwath was specifically upon the question of interpreting planning permissions by the use of implied conditions i.e. implying words into a public document such as a planning permission. Furthermore, it was one of those cases which was highly fact-specific. Indeed, Lambeth's decision notice had undoubtedly been poorly drafted. It is also notable that the decision of the Supreme Court did not overtly overturn established case law or otherwise break new ground, as had seemingly arisen from* ***Trump*** *and only rejected the approach taken by the lower courts in respect to the interpretation of the actual wording used in the decision notice in question. Accordingly, it determined that a reasonable reader would have read the section 73 consent as being a simple variation of the original permission and, implicitly, subject to the conditions attached to that permission".*

centre' in Thame, South Oxfordshire. Both the applicant and South Oxfordshire District Council had agreed that the proposed use fell within Use Class C2, but they differed as to whether an affordable housing contribution was required because of that C2 classification. Both the South Oxfordshire adopted Core Strategy and the Thame Neighbourhood Plan required developments resulting in a net gain of 3 or more 'dwellings' to contribute 40 per cent affordable housing. The Council had refused Rectory's application for failure to provide affordable housing, had unsuccessfully appealed both this refusal and now challenged the Inspector's decision to reject the appeal. The primary question to be determined by the Court was whether the proposed C2 units were 'dwellings' for the purpose of the specific South Oxfordshire District Council development plan policy. CSH3.

The Decision

In his judgment, Mr Justice Holgate comments that the word "dwelling" properly describes, firstly, the physical nature of a building or property as well as, secondly, the way in which it is used. He remarks that *'it has become well established that the terms 'dwelling' or 'dwelling houses' in planning legislation refer to a unit of residential accommodation which provides the facilities needed for day-to-day private domestic existence',* and that the term dwelling *'can include an extra care dwelling, in the sense of a private home with the facilities needed for 'independent living' but where care is provided to someone in need of care'.*

He concludes that units of accommodation that allow for independent living comprise 'dwellings' but their 'use' can still be within Class C2 if (a) care is provided for an occupant in each dwelling and, critically, (b) the occupant is in need of care. Accordingly, as the South Oxfordshire adopted Core Strategy policy CSH3 required a contribution towards affordable housing where the *'dwellings'* provided the scope for *'independent living'* but without reference expressly or by implication to the Use Classes Order there was no legal reason why Rectory's scheme should not be subject to this requirement just because it had been classified as Class C2.

Discussion

While there is an apprehension amongst developers that this decision could prompt LPAs to undertake a rapid review of their relevant local plan policies to determine whether they should now be seeking contributions to affordable housing from older persons housing developments, or, to amend their affordable housing policy so that it specifically refers to "dwellings" (whether C2 or C3) this "knee jerk" reaction should be avoided; for such a policy review must, carefully, consider the wider public interest effects as well as the unintended consequences of such a change. Otherwise, the wholesale pursuit of affordable housing contributions from all schemes that comprise 'dwellings' will inevitably lead to an increased reliance on viability assessments, particularly for "senior living" schemes to rebut any policy requirement, and result in further risk at the point of land acquisition for specialist retirement developers, with potential cost and uncertainty in the planning process, giving rise to significant questions over the likely economic viability of schemes. In turn, this has the real potential to disincentivise delivery of these much needed forms of specialist accommodation in circumstances where providers are already at a disadvantage against more traditional residential developers due to those "up front" costs inherent in this type of scheme mentioned already. Moreover, often the types of sites that are most suitable for this specialist form of housing are centrally located urban brownfield sites where the commercial competition is from non-residential interests, in which case affordable housing policies should not apply. In short, the message that needs to be appreciated by Central and Local Government is that the older persons housing provider cannot always operate on a level playing field in the land market.

Nevertheless, the Rectory Homes outcome underlines the need for this sector of the housing industry to participate in the local plans process

and present evidence of the consequences of requiring affordable housing contributions from this specialist form of residential development.

Secondly, and particularly those new entrants to this market, such developers should consider carefully the precise wording of local plan policies when considering potential sites to establish whether affordable housing policies might apply to their scheme. It is also vital that providers participate in the local plans process and present evidence of the consequences of requiring affordable housing contributions from this specialist form of residential development.

Thirdly, it is crucial that developers carefully think through the nature of their particular "offer" and its outworkings. Indeed, it is one of the sad ironies of the *Rectory Homes* case, that before the decision letter on their Thame appeal, (21st October 2019), another development promoted on behalf of Retirement Villages, at Lower Shiplake had received a favourable decision a week earlier but its promotional usefulness had not been sufficiently appreciated nor adequately drawn to the attention of the Thame Inspector prior to his adverse decision. Both appeals had concerned the application of policy CSH3 to similar schemes in terms of their physical layout. However, the delivery of the care packages, secured by section 106 agreements, had been different There was also a fundamental difference in terms of the indivisibility of the Communal Facilities at Shiplake when compared with Thame, and, also in the greater extent of the facilities provided at Shiplake.

While the Thame Inspector had referred to the Shiplake decision and stated that he had taken it into account, unfortunately, Rectory Homes had not advanced a reasoned submission as to why that approach was the correct one. Indeed, as Mr Justice Holgate remarks, when rejecting a reasons challenge on this matter: *"… without any further information, such as the s.106 obligation in that case. Neither side sent any submissions on the decision. The Inspector was not given any assistance as to how it might, or might not, affect the issues in the present case."* The Judge also notes that the Shiplake Inspector took the approach that a single building on the site constituted the whole development and should not be "disaggregated" or "dissected" into its constituent parts when applying policy CSH3. Although the Thame Inspector took a different approach, as a matter of law he was entitled so to do and thereby received the resulting judicial endorsement.

Nevertheless, most Extra-Care schemes provide a range of facilities that are normally provided in one building and it would be impossible to implement the scheme without building the communal facilities as a significant element of the 'common parts'. Following the approach by seasoned developers, provided that they are extensive, physically integrated, and, coupled with a requirement for the residents to use them then, even if the apartments still have individual front doors, the combination of integrated common parts and one main entrance will emphasise and confirm the existence of a single entity. Accordingly, the Shiplake Inspector's approach is still capable of being endorsed by fellow inspectors as well as broad minded LPAs, and all in the classification of Class C2.

Concluding Remarks

If Central Government wishes to continue to promote the benefits of retirement housing delivery, then MHLCG will need to resolve the C2/C3 use classification issue, provide clearer guidance on thresholds and how "First Homes" apply to retirement housing schemes. Such clarifications could be swiftly and pragmatically achieved through modest changes to the National Planning Practice Guidance now and, if further national policy is required, in the NPPF when it comes to be rewritten. Given the current MHCLG intentions to make changes to the current planning process via simple Ministerial Statements, such may even be the more straightforward and effective way of establishing an exemption from affordable housing for all forms of specialist retirement housing.

At Local Government level, now is the time for LPAs to consider, as new local plans emerge, whether it is good planning to expect the same contributions from "retirement housing", in all its forms, and then run the risk of such essential accommodation not coming forward with needs not addressed and benefits not realised. All forms of retirement housing give rise to significant social and economic benefits to local communities, not least in the form of savings to the NHS and freeing up under-occupied local family houses.

Finally, whether these required yet modest changes of approach are perceived to be a quiet or a loud revolution for the older people's housing provision, when set against those being promoted by the Planning White Paper, they are essential steps to securing the future health and well-being of a sector whose members form a rapidly growing element of specialist housing need. Without such swift changes the current muddle and misunderstandings are likely to remain yet another sad legacy of 2020.

John Pugh-Smith *is a barrister practising from 39 Essex Chambers. He is both a member and a legal planning adviser to RHG.UK, one of the leading representative bodies on behalf of the retirement housing sector. He has been helped in the preparation of this article by discussions with his fellow RHG.UK members: Karen Mutton, Legal Director, Planning & Infrastructure Consenting, Eversheds Sutherland (International) LLP, Chris Thompson, Managing Director, Beechcroft Developments Ltd, Alex Child, Director, The Planning Bureau Ltd, Gary Day, Land & Planning Director for McCarthy & Stone Ltd and John Montgomery, Tanner & Tilley Development Consultants and Planning Consultant to RHG.UK.*

QUARRYING, CONTAMINATED LAND AND BROMATE POLLUTION: MINERAL RIGHTS

Stephen Tromans QC and Adam Boukraa

In an interesting sequel to a well-known contaminated land case, or perhaps rather a chapter in an ongoing saga, Hertfordshire County Council has – contrary to the advice of its planning officers – refused an application for planning permission to develop a sand and gravel quarry on the former Hatfield Aerodrome site: see ENDS Report 29 September 2020.

The site was identified for quarrying in the Council's minerals local plan, and proposals by developer, Brett Aggregates, had been under consideration for some time. While the decision notice has not yet been published, it seems that the key issue was the potential impact on a plume of bromate pollution.

The former aerodrome is a few kilometres from the St Leonard's Court housing estate. St Leonard's Court was built on land previously used for a chemicals factory, the source for an approximately 20 kilometre plume of bromate in the surrounding groundwater. The land was declared contaminated in 2002, leading to long-running disputes around remediation involving two companies, Crest Nicholson and Redland Minerals. These included an appeal to the Secretary of State, an inquiry before a planning inspector and unsuccessful attempts to judicially review the Secretary of State's decision following the inspector's recommendations (see *R. (on the application of Crest Nicholson Residential Ltd) v Secretary of State for the Environment, Food and Rural* [2010] EWHC 561 (Admin) and *R. (on the application of Redland Minerals Ltd) v Secretary of State for the Environment, Food and Rural Affairs* [2010] EWHC 913 (Admin)). Despite remediation

having been ongoing for some years, the plume of bromate remains, illustrating the intractable nature of groundwater pollution.

While Brett's application for the Hatfield site had led to significant local concerns, the Council's planning officers were satisfied that steps could be taken to avoid contamination from the bromate plume spreading: see ENDS Report 22 November 2019. The Environment Agency had also concluded that the risks could be managed, including through a water monitoring and management plan, a condition supported by the statutory water undertaker for the area, Affinity Water.

Nonetheless, strong objections remained, including from Welwyn Hatfield Borough Council, the local MP and residents' groups. As reported in the local media, residents were particularly concerned about the source of the contamination being bromate, a known carcinogen, and about the possibility of it spreading into the quarrying site and the water supply.

In addition to the bromate issue, the Council is reported to have considered that the development's impact on the green belt, air quality and traffic, as well as the cumulative effects of quarrying in the area, outweighed its benefits. An appeal to the Planning Inspectorate may be in the pipeline: Brett has commented that it will be examining the Council's reasons and considering its options over the coming weeks.

Whatever happens next, the story to date demonstrates the particular problems caused by groundwater pollution, and the broad and long-running impact such contamination can have. The bromate entered the groundwater around the land at St Leonard's Court in the 1980s and was identified in 2002. Its effect on nearby sites, as well as on developments such as that proposed by Brett, looks likely to continue for some time. The case perhaps also highlights a new angle on liability for contaminated land, namely the possible impact on owners of mineral rights. Any claim in tort by a mineral rights owner against a party causing contamination would raise some very interesting legal issues.

CONTRIBUTORS

Richard Harwood OBE QC

richard.harwood@39essex.com

Richard specialises in planning, environment, public and art law, appearing in numerous leading cases including SAVE Britain's Heritage, Thames Tideway Tunnel, Chiswick Curve, *Dill v SoS* and Holborn Studios. Recent cases include housing, retail, minerals, environmental permitting, nuisance, development consent orders, and development plans. He is a case editor of the Journal of Planning and Environment Law and the author of Planning Permission, Planning Enforcement (3rd Edition pending) and Historic Environment Law and co-author of Planning Policy. He is also a member of the Bar Library, Belfast. To view full CV click here.

Stephen Tromans QC

stephen.tromans@39essex.com

Stephen is recognised as a leading practitioner in environmental, energy and planning law. His clients include major utilities and industrial companies in the UK and elsewhere, banks, insurers, Government departments and agencies, local authorities, NGOs and individuals. He has been involved in some of the leading cases in matters such as environmental impact assessment, habitats, nuisance, and waste, in key projects such as proposals for new nuclear powerstations, and in high-profile incidents such as the Buncefield explosion and the Trafigura case. To view full CV click here.

John Pugh-Smith

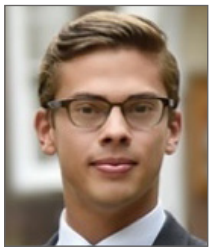
john.pugh-smith@39essex.com

John is a recognised specialist in the field of planning law with related environmental, local government, parliamentary and property work for both the private and public sectors. He is also an experienced mediator and arbitrator and is on the panel of the RICS President's appointments. He is a committee member of the Bar Council's Alternative Dispute Resolution Panel, an advisor to the All Party Parliamentary Group on ADR, one of the Design Council's Built Environment Experts and a member of its Highways England Design Review Panel. He has been and remains extensively involved in various initiatives to use ADR on to resolve a range of public sector issues. To view full CV click here.

Jonathan Darby

jon.darby@39essex.com

Jon is ranked by Chambers & Partners as a leading junior for planning law and is listed as one of the top planning juniors in the Planning Magazine's annual survey. Frequently instructed as both sole and junior counsel, Jon advises developers, consultants, local authorities, objectors, third party interest groups and private clients on all aspects of the planning process, including planning enforcement (both inquiries and criminal proceedings), planning appeals (inquiries, hearings and written representations), development plan examinations, injunctions, and criminal prosecutions under the Environmental Protection Act 1990. Jon is currently instructed by the Department for Transport as part of the legal team advising on a wide variety of aspects of the HS2 project and has previously undertaken secondments to local authorities, where he advised on a range of planning and environmental matters including highways, compulsory purchase and rights of way. Jon also provides advice and representation in nuisance claims (public and private), boundary disputes and Land Registration Tribunal matters. To view full CV click here.



Adam Boukraa

adam.boukraa@39essex.com

Adam has a broad public law practice and a particular interest in environmental work. He acted for Southern Water in a dispute with the Environment Agency on changes to water abstraction licences, culminating in an inquiry in March 2018 (led by Justine Thornton QC). More recently, he has advised another water company on the preparation of its water resources management plan (with Stephen Tromans QC). Adam writes regularly on environmental issues: he is a contributor to the Journal of Environmental Law and assisted with updating the leading text on contaminated land. He also has experience of planning matters, including successfully representing the appellant in a challenge to an enforcement notice. To view full CV click here.

Chief Executive and Director of Clerking: Lindsay Scott
Senior Clerks: Alastair Davidson and Michael Kaplan
Deputy Senior Clerk: Andrew Poyser

clerks@39essex.com • DX: London/Chancery Lane 298 • 39essex.com

LONDON
81 Chancery Lane,
London WC2A 1DD
Tel: +44 (0)20 7832 1111
Fax: +44 (0)20 7353 3978

MANCHESTER
82 King Street,
Manchester M2 4WQ
Tel: +44 (0)16 1870 0333
Fax: +44 (0)20 7353 3978

SINGAPORE
28 Maxwell Road #04-03 & #04-04
Maxwell Chambers Suites
Singapore 069120
Tel: +65 6320 9272

KUALA LUMPUR
#02-9, Bangunan Sulaiman,
Jalan Sultan Hishamuddin
50000 Kuala Lumpur, Malaysia
Tel: +(60)32 271 1085