"NOT QUITE *CALA HOMES*, BUT....":
7 CASES FROM 2010 THAT YOU MIGHT HAVE MISSED

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1. On the basis that it is rarely possible to do justice to a significant case in less than 4 minutes, I aim to tell you about 7 planning cases from 2010 so far in this 30-minute slot. In doing so, I do not intend to tell you what you already know. None of the 7 cases here has had anything like the publicity of the High Court's decision last week in ***Cala Homes (South) v Secretary of State for Communities and Local Government*** [2010] EWHC 2866 (Admin), but they have earned a place in this selection because they tell us something new or different, even surprising in some cases, about the law we practise.

2. I should stress that this is very much my own selection. No two lawyers would agree on the same 7 cases if asked to provide an edited shortlist of the most significant planning cases of 2010. However, given the time available, I should make clear that I have sought to prioritize cases that might be said to involve "pure" planning law issues, as opposed to issues arising, for example, in environmental or compulsory purchase law.

3. This note gives the background detail to the analysis.

CASE 1

***R. (on the application of English) v East Staffordshire BC* [2010] EWHC 2744 (Admin)**

ISSUE: *Procedural unfairness*
KEY PRINCIPLE: *The non-disclosure to the Planning Committee of commercially sensitive financial information submitted in support of an application for planning permission, and seen by officers, was not procedurally unfair.*

4. The applicant sought planning permission for a football centre and a hotel. The application documents included a financial report explaining how the funding gap for the project would be plugged, in part, by a proposal to develop 28 houses, for which permission was sought separately. The report was provided to officers of the local planning authority on the basis that it was confidential and should not be disclosed to a third party.

5. The local authority agreed with the applicant that the report was exempt from disclosure under Freedom of Information legislation. It went on to commission its own independent report on the extent to which the housing scheme would enable the development of the larger project. The review confirmed that the housing scheme might substantially plug the funding gap.

6. The planning committee granted permission without seeing either the applicant's report or the review commissioned by the local planning authority.

7. A claim for judicial review was brought alleging that the procedure adopted by the planning committee was unfair and its decision perverse: how could Members fairly and rationally have granted permission, it was asked, without seeing the original financial report?

8. The claim failed. Mr Justice Flaux held that such cases involve a "balancing exercise between the public's entitlement to information and the applicant's entitlement to maintain confidentiality" (para. 38). The court was satisfied that the "gist" of the financial report had been communicated to Members and objectors at the committee meeting: "they were provided with the conclusions but not the financial detail" (para. 28). Even if it were possible to criticize the committee's approach for not insisting that the confidential information was disclosed, this did not come close to perversity.

CASE 2

***R. (on the application of Midcounties Co-operative Ltd) v Wyre Forest DC* [2010] EWHC 2744 (Admin)**

ISSUE: *Planning conditions*

KEY PRINCIPLE: *The court took a highly pragmatic and generous approach when assessing whether a condition attached to a planning permission was sufficiently certain.*

9. Planning permission had been granted for a supermarket subject to a condition limiting the floor space to be used to "Nett retail sales up to 2919 sq metres". This was larger than the 2403 sq metres of floorspace which the applicant appeared to have sought in its application.

10. A challenge was brought alleging that the local planning authority had unlawfully given permission for more than was sought, and that the condition was bad for uncertainty.

11. The Court of Appeal dismissed the appeal brought against the decision of the High Court to uphold the planning permission. The High Court had resolved the discrepancy between the two figures (2403m^2 and 2919m^2) by concluding that 2403m^2 referred to the area used for the actual sale and display of goods, whereas the remaining 516m^2 referred to circulation

areas, lobbies and customer facilities. The Court of Appeal was satisfied that this enabled the condition to be interpreted sensibly such that it was not bad for uncertainty:

> "18. [...] It would be quite wrong to conclude that the apparent disparity between 2403 and 2919 was the consequence of a mistake or aberration where there exists a perfectly rational explanation for it. I certainly accept that condition 6 was badly, even obtusely drafted. To characterise the 2919 sq metres as "[n]ett retail sales up to 2919 sq metres" with no indication that in fact it includes more than the actual selling space is to the least extremely unhelpful. But it is plainly possible to ascribe a sensible meaning which can readily be ascertained (to adapt Lord Denning's language in *Fawcett Properties)*, and that is what the judge did..."

12. That dealt with the challenge on the ground of uncertainty, but would the condition still not, on its face, allow up to 2919m^2 of selling space? Yes, that was possible on the basis of the planning permission itself, but in this case, the matter had been addressed by a section 106 agreement which restricted the use of the development for the "sale and display of goods including the checkouts and the customer counters" to no more than 2401m^2. Accordingly, the retailer would not be operating a larger retail floorspace than it had sought in the planning application.

CASE 3

***R. (on the application of Great Trippetts Estate Ltd) v Chichester DC* [2010] EWHC 1677 (Admin)**

ISSUE: *Harm to the Area of Outstanding Natural Beauty ("AONB")*

KEY PRINCIPLE: *Even if a development in an AONB could not be seen by the public, that did not mean, in and of itself, that it was not harmful to the intrinsic character of the countryside. Nevertheless, the fact that the public could not see it was an important factor to consider when deciding whether to permit the development.*

13. The landowner built, without planning permission, a manège for training polo ponies and a tennis court in an AONB. The local authority refused planning permission and then issued enforcement notices. On appeal, the inspector upheld the notices and the refusal of permission, concluding as follows (emphasis added):

> "However, **even if the manège was entirely screened from view, that would not overcome the harmful effect of this substantial development on the character of the AONB**. The purpose of landscaping is not to conceal a harmful development; this is an argument that could be used too often, leading to cumulative erosion of the landscape quality of the AONB.

14. The High Court allowed the landowner's appeals against the inspector's decisions so far as they related to the manège. Collins J held as follows:

> "24. Visual harm is of course an important part of harm to an Area of Outstanding Natural Beauty. After all, the natural beauty lies in what is there, that is to say natural countryside. But its beauty may not be adversely affected if the development in question is such that it is not

possible to see that there is any significant or harmful change to the natural appearance of the area in question. Thus, as it seems to me, the visual affect of any development is an important aspect to be taken into account in deciding whether there is indeed a failure to conserve or maintain the integrity of the AONB. **But certainly the existence of the development in the terms that the Inspector has indicated is equally a factor that is material in deciding whether there is indeed in the particular circumstances harm.** Mr Forsdick [Counsel for the Defendant] submits that, on a fair reading... the Inspector is simply indicating that in this case the screening would not in her view mean that the harmful affect was overcome because of the nature of the development itself.

15. Collins J did not agree that it was possible to read the Inspector's conclusions in that limited way:

> "25. [...] She is making the point that entire screening, once you have what is regarded as a development that is harmful in an AONB, cannot mean that that development can be acceptable. That, of course, would have a very important and general application which in my view is not justified. I do not think that it is possible to say that the Inspector was simply limiting her observations to the nature of the development in that case. [...]
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> 26. Although, as I have said, **I entirely accept that the absence of, if I may put it this way, viewable harm does not of itself necessarily mean that the development should be accepted, it is, though, an important consideration when deciding whether it should**..."

16. Collins J went on to hold that this "important consideration" became even more important when it came to considering the need for the development. By failing properly to recognise the need for the manège, the Inspector had fallen into further error which meant that her conclusions in respect of that part of the development could not stand. Her conclusions in respect of the tennis court were not similarly infected.

CASE 4

***Tile Wise Ltd v. South Somerset DC* [2010] EWHC 1618 (Admin)**

ISSUE: *Advertising control*

KEY PRINCIPLE: *The display of an advertisement on a vehicle is not exempt from control if advertising was the principal use of the vehicle at the time of display.*

17. The appellant was a tile supplier who had commercial vehicles to make deliveries to homes and to transport staff between its showrooms. When a vehicle was not needed, it would be parked on the road near to a showroom with a board advertising the business. The local authority prosecuted the appellant for displaying advertisements on 4 vehicles many times over a 3-month period.

18. Schedule 1 of the Town and Country Planning (Control of Advertisements) (England) Regulations 2007 lists classes of advertisement which are exempt from control. Class B Column 1 of Schedule 1 exempts "an advertisement displayed on or in a vehicle normally

employed as a moving vehicle", provided that it was "not used principally for the display of advertisements" (Class B Column 2).

19. The Crown Court concluded that the question of the 'principal use of the vehicle' had to determined at the time of the display itself, so that if, at any point in time, it was used for the display of advertisements, it did not benefit from the Class B exemption. The question for the Divisional Court by way of case stated was "whether the Class B exemption is granted in respect of a state of affairs in general or only in respect of a specific advertisement on any specific occasion" (para. 8).

20. The Divisional Court put considerable emphasis on the reference to "advertisement", singular, in column 1, while column 2 referred to "advertisements" in the plural. Pitchford LJ held:

> "14. [...] It can be safely assumed, in my view, since these two words are so closely juxtaposed, that the draftsman meant what he wrote. For reasons to which I shall come, it is clear that each class of exemption, by description in column 1, is aimed towards a specific advertisement which must, it seems to me, refer to the advertisement alleged by the enforcement authority to constitute the breach. On the contrary, the use of the plural in class B column 2 opens up column 2 from a consideration of the single advertisement under consideration to advertisements in general displayed on the vehicle. If this was not intentional, it is my view that the condition would read "the vehicle was not being principally used for the advertisement" or similar. **In my view, it is tolerably clear that the mischief the draftsman had in mind was a vehicle whose principal purpose was advertising, such as a vehicle employed for the purpose of being a moving advertising hoarding, rather than a vehicle employed principally as a commercial vehicle conveying passengers or making deliveries and such like**."

21. On this basis, Pitchford LJ concluded that the word "advertisement" (singular) in column 1 "relates to the moment that the advertisement is being displayed by the vehicle and to the use to which the vehicle is then being put" (para. 26). Accordingly:

> "27. [...] **In my judgment, column 1 is concerned with the specific occasion on which the advertisement is being displayed and the use to which the vehicle is being put on that occasion. In the case, for example, of a commercial vehicle, if at any time it is not being normally employed as a moving vehicle it will not be exempt.** Even if it is being normally employed as a moving vehicle, its advertisement will not be exempt if the vehicle is principally used for the display of advertisements. I do not accept the argument that this construction of column 1 will render liable advertisements on commercial vehicles ordinarily parked up. Parking of a vehicle is an ordinary incidence of the normal employment of a moving vehicle. It will be exempt unless it is established it is principally used as a display of advertisements, in which case, the column 1 exemption will be dis-applied by the column 2 qualification."

CASE 5

***R. (on the application of Copeland) v Tower Hamlets LBC* [2010] EWHC 1845 (Admin)**

ISSUE: *Material planning considerations*
KEY PRINCIPLE: *What is material for planning purposes may properly extend not only to amenity considerations, but also to social and economic matters.*

22. Planning permission had been granted for the change of use of premises to a hot food takeaway. There was a secondary school immediately close nearby. A local resident who lived opposite the premises had objected to the grant of planning permission on the basis that it was contrary to a healthy living programme promoted by the school. He had referred the planning authority to planning policy adopted by a different London authority that sought to restrict the development of takeaway in the vicinity of schools. He had also relied on the emphasis placed by the Government on healthy eating, including the following extract from the inter-departmental strategy *'Healthy Weight, Healthy Lives: A Cross Government Strategy for England'* (January 2008):

> "One of the challenges that we face in promoting health eating is the availability of foods high in fat, salt and sugar in local neighbourhoods, including the prevalence of fast food restaurants and takeaways in some communities. Local authorities can use existing planning powers to control more carefully the number and location of fast food outlets in their local areas. The Government will promote these powers to local authorities and PCTs to highlight the impact that they can have on promoting healthy weight, for instance **through managing the proliferation of fast food outlets, particularly in proximity to parks and schools**."

23. Prior to considering the planning application, the planning committee had been sent a note of advice by a planning officer stating that the application had to be determined in accordance with the development plan and any extant national planning policy or local planning guidance. It was stated that the authority did not have a policy that specifically prohibited a hot food takeaway from locating next to a school. Moreover, whilst it was legitimate to seek to discourage children from eating unhealthily, "it is not a material planning consideration that can have weight in determining this application against Council policy" he wrote.

24. Responding to a challenge to the decision to grant planning permission, Cranston J held:

> "22. Promoting social objectives may be a material consideration in the planning context. Planning controls in order to promote social objectives are considerations which can relate to physical land use. Whether a social objective is relevant in a particular case turns on the circumstances. As long as the promotion of the social goal is lawfully within the planning sphere it matters not that it falls elsewhere as well.
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> 23 In ***Stringer v Ministry of Housing and Local Government [1971] WLR 1281, [1971] 1 All ER 65***, Cooke J said:
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> > "It may be conceded at once that the material considerations to which the Minister is entitled and bound to have regard in deciding the appeal must be considerations of a planning nature. **I find it impossible, however, to accept the view that such considerations are limited to matters relating to amenity.** So far as I am aware, there is no authority for such a proposition and it seems to me wrong in principle. In principle, it seems to me that

any consideration which relates to the use and development of land is capable of being a planning consideration."

25. Cranston J then cited PPS1 as an example of how social objectives may legitimately be pursued within the planning context, given its references to promoting well-being and enabling social, environmental and economic objectives to be achieved together.

26. On the facts of this case, it was held that the local authority had acted unlawfully by failing to have regard as a material consideration to the proximity of the school to the premises in granting planning permission for a hot food takeaway. The planning officer had given an unambiguous direction to the planning committee that they should not consider this factor, which could have influenced their decision.

CASE 6

Roberts Hitchins Ltd v Secretary of State for Communities and Local Government [2010] EWHC 1157 (Admin)

ISSUE: *Affordable housing in the downturn*

KEY PRINCIPLE: *It was not unlawful to refuse planning permission for a residential scheme on the basis that a scheme with a higher proportion of affordable housing might be viable in the future.*

27. The developer applied to develop up to 750 dwellings on the proposed site X. It had already secured permission on appeal for 320 dwellings on a second site, Y, in respect of which the Secretary of State had accepted that it would not be viable to allocate more than 20% of the housing as affordable.

28. The developer had originally suggested that 30% of the housing on site X should be affordable, but later reduced this to 13% with provision to increase to a maximum of 20% if certain grants were forthcoming. The developer submitted that its earlier proposal of 30% was not longer viable given the economic difficulties caused by the credit crunch.

29. In its putative reasons for refusal, the local planning authority concluded that it would have refused permission, had it determined the application in time, because the proportion of affordable housing offered was too low. On appeal, the Inspector recommended to the Secretary of State that permission should be refused, observing:

"219. Nothing in PPS3 or elsewhere in national or regional policy guidance concerning site viability suggests that viability considerations attributable to the general economic situation (as opposed to specific characteristics of the sites themselves...) should be used to justify significant reduction in the proportion of affordable housing to be delivered by a site above the threshold.

220. In the current case, the Appellant's own evidence shows that the development of [site X] is scheduled to take place over many years. The effect of omitting forward projections is therefore to exclude entirely any future benefit to the balance sheet of an upturn in the housing market and in receipts. Over such a period of time it is possible, not only that receipts would be improved by an upturn, but that the need for affordable housing might itself increase. The Appellant seeks to lengthen to 10 years (and if that is not accepted, to 5 years) the period within which application may be made for the determination of reserved matters. This would enable a delay to the start of development on [site X] (whatever may occur on [site Y]) and thus would lengthen the overall period of development on this extensive site, **increasing the probability that development would coincide with an upturn in the housing market. Over such a long period it is likely that viability data would change significantly in comparison with the current circumstances**."

30. The Secretary of State accepted the Inspector's recommendation to refuse permission.

31. The developer challenged the appeal decision on several grounds, but most notably that the inspector had erred in law by "disregarding its arguments that the general economic situation following the credit crunch made a greater proportion of affordable housing than the scheme proposed unviable" (para. 17). The same essential point was repeated in a different guise in several of the other grounds.

32. Nicol J rejected this argument:

"21. I do not agree that there was any legal error on the Inspector's part in this regard. Of course there is uncertainty about trying to predict what would happen to costs or prices in the future. That was particularly so in relation to a project which was not expected to be completed until 2024 and where the developer was asking for up to 10 years to resolve reserved matters. However, a major factor which influenced the Inspector (as, in my judgment, it was entitled to do) was the special significance of this site. As the Inspector noted at the very beginning of her analysis of the arguments about affordable housing at paragraph 206, 'the appeal site represents the principal opportunity to achieve affordable housing in the District under the adopted plan.' At the end of this section of the report at paragraph 225 she commented that if permission was given for this development it would leave 'the overall need [for affordable housing] to a large extent unsatisfied, and with no opportunity to recoup affordable housing from another allocated site.' **Given the importance of the site, and given the extended period over which the proposed development would take place, in my judgment the Inspector was not obliged to recommend approval in the absence of firm evidence as to when economic recovery would take place and its extent. I consider that she was entitled to decide that the application should be refused because of the possibility that development with a higher proportion of affordable housing might be viable in the future.** This is not a case of allowing speculation to prevail over an absence of evidence. Rather it is a case of treating inevitable uncertainty as a material consideration whose weight had to be judged and assessed by the primary decision-maker."

CASE 7

R. (on the application of Harris) v Haringey LBC [2010] EWCA Civ 703

ISSUE: *Race relations*

KEY PRINCIPLE: *When deciding whether to grant planning permission for the development of a site in an area made up predominantly of ethnic minority communities, the requirements of section 71 of the Race Relations Act 1976 must be an integral part of the decision-making process.*

33. Planning permission had been granted for a redevelopment scheme which would involve the total demolition of an indoor market and associated housing. Some two-thirds of the market traders were Latin American or Spanish-speaking and most of the homes and business units were occupied by members of black and ethnicity minority communities.

34. In deciding to grant planning permission, the local authority had made reference *inter alia* to the objections made by traders and to policies in its local plan which sought to promote the welfare of ethnic minority communities. However, nowhere did it mention its duty under section 71(1) of the Race Relations Act 1971 to determine planning applications having due regard to the need:

> "(a) to eliminate unlawful racial discrimination; and
>
> (b) to promote equality of opportunity and good relations between persons of different racial groups."

35. A challenge was brought on the basis that the local authority had failed to comply with this duty in granting permission. The local authority argued that because the development would bring new opportunities to an area with large ethnic minority communities, the duty had been discharged.

36. The Court of Appeal was not satisfied that the local authority had shown the requisite "due regard... to the need to promote equality of opportunity and good relations between persons of different racial groups". Of particular concern to the court was the evidence showing that the redevelopment would have a disproportionate impact on the black and ethnic communities, with many in those communities losing both their homes and jobs. Pill LJ held (emphasis added):

> "40. Not only is there no reference to section 71 in the report to committee, or in the deliberations of the committee, but the required 'due regard' for the need to "promote equality of opportunity and good relations between persons of different racial groups" is not demonstrated in the decision making process. "Due regard" need not require the promotion of equality of opportunity but, on the material available to the council in this case, it did require an analysis of that material with the specific statutory considerations in mind. It does not, of course, follow that considerations raised by section 71(1) will be decisive in a particular case. The weight to be given to the requirements of the section is for the decision maker but it is necessary to have due regard to the needs specified in section 71(1). There was no analysis of the material before the council in the context of the duty.

41. I would allow the appeal and quash the permission.

42. I reach that conclusion with some regret because of the general desire in the Borough for regeneration of this area[...] The issues which arose on this planning application were, however, such that **it was necessary for the requirements of section 71 to form in substance an integral part of the decision making process and I am unable to hold that they did**."

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19 November 2010