

**Welcome to Landmark Chambers’
‘Planning Law Update for Local Authorities:
Planning challenges’ webinar**

The recording may be accessed [here](#).

Your speakers today are...



Heather Sargent (Chair)



Alistair Mills

Topic:
The Interpretation
of Planning Policy



Luke Wilcox

Topic:
Planning
decision-making
involving heritage



Kimberley Ziya

Topic:
Bringing and
defending High
Court
challenges

Bringing and defending High Court challenges



Kimberley Ziya

Outline

- Routes to the High Court
- Time limits
- Costs
- Remedies
- A few recent decisions

Routes to the High Court

- Traditional judicial review
 - e.g. challenge to grant of PP
- Statutory challenge
 - s.288, 1990 Act e.g. against s.78 appeal
 - s.289, 1990 Act – against enforcement appeals
 - s.113, 2004 Act e.g. against adopted Local Plan
 - s.287, 1990 Act e.g. against simplified planning zone scheme
- Application for an injunction e.g. Chelmsford CC v Leisure Parks Real Estate (Holdings) Ltd [2021] EWHC 613



Essential reading

- CPR54; PD54E
- Admin Court Judicial Review Guide:
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/913526/HMCTS_Admin_Court_JRG_2020_Final_Web.pdf
- Listing policy, p125



Time limits

- JR → 6 weeks (CPR 54.5(1))
 - BUT judicial discretion: see R (Croyde Area Residents Association) v North Devon DC [2021] EWHC 646
- Statutory reviews → **strict** time limits
 - See individual provisions
 - Many also 6 weeks



Costs

- General discretion (CPR Part 44)
- Reasonableness
- Permission stage
 - Mount Cook [2003] EWCA Civ 1346
- On settlement
 - M v Croydon LBC [2016] EWCA Civ 415
- JRCCOs → ss.88-89, CJA 2015
- Aarhus Convention claims → CPR 45.41-44
 - CPRE v SSCLG [2019] EWCA Civ 1230
 - Venn v SSCLG [2014] EWCA Civ 1539



Remedies

- Six remedies – s.31(1) & (4), SCA 1981; CPR Part 54
 - Mandatory order
 - Quashing order
 - Prohibiting order
 - Declaration
 - Declaration of incompatibility
 - Injunction
 - Damages
- At the discretion of the court
- s.31(2A) & (2B), SCA 1981



Recent decisions

- JR brought by an LPA: R (Hampshire CC) v Blackbushe Airport Ltd [2021] EWCA Civ 398
- Irrationality and margin of appreciation: Crest Nicholson Operations Ltd v West Berkshire DC [2021] EWHC 289
- Broadcasting of remote hearings: R (Finch) v Surrey CC [2021] EWHC 170
- Variation of conditions (s.73, 1990 Act): R (Parkview Homes Ltd) v Chichester DC [2021] EWHC 59



Planning decision-making involving heritage



Luke Wilcox

Heritage concepts: significance

- Critical concept – this is the thing that is actually protected!
- NPPF glossary:

“The value of a heritage asset to this and future generations because of its heritage interest. The interest may be archaeological, architectural, artistic or historic. Significance derives not only from a heritage asset’s physical presence, but also from its setting.”

Heritage concepts: significance

- Need to consider:
 - Nature of significance: what is the asset sensitive to?
 - Extent of significance: how adaptable is the asset? How viable is its retention or reuse?
 - Level of significance
 - Cumulative impacts?

Heritage concepts: setting

- Protection of certain assets extends to setting as well as physical fabric
- NPPF definition:

“The surroundings in which a heritage asset is experienced. Its extent is not fixed and may change as the asset and its surroundings evolve. Elements of a setting may make a positive or negative contribution to the significance of an asset, may affect the ability to appreciate that significance or may be neutral.”

Heritage concepts: setting

- Historic England PN3: the Setting of Heritage Assets
 - Setting related to, but not the same as:
 - Curtilage
 - Area character
 - Area context
 - Landscape

Heritage concepts: setting

- Setting often visual and connected to views ... but non-visual aspects can be part of a setting as well.
- Smells can harm a setting! *R (Palmer) v Herefordshire CC* [2017] 1 WLR 411

Heritage concepts: harm

- Three categories of harm:
 - Substantial
 - Less than substantial
 - None
- No other categories of harm - in particular, no such thing as de minimis in this context: minimal harm counts as less than substantial:
 - *R (James Hall & Co Ltd) v Bradford MDC* [2019] EWHC 2899 (Admin)

Heritage concepts: harm

- Category determines the applicable policy test for development control
- Both the level of harm and the approach adopted to assessing that level are matters of fact and planning judgment:
City & Country Bramshill Ltd v SSHCLG [2021] EWCA Civ 320
- Extent of harm within the broad categories is relevant to weight

Heritage concepts: “substantial” harm

- Harm is substantial where the proposal “*would have such a serious impact on the significance of the asset that its significance was either vitiated altogether or very much reduced*”
 - *Bedford BC v SSCLG* [2013] EWHC 2847 (Admin) per Jay J at para 25.

Statutory obligations

- Planning (Listed Buildings and Conservation Areas) Act 1990
- S. 66: requires special regard to the desirability of preserving Listed Buildings or their settings or any features of special architectural or historic interest which they possess
- S. 72: requires special attention to be paid to the desirability of preserving or enhancing the character or appearance of conservation areas
- In practice, reflected in the relevant NPPF tests:
Mordue v SSCLG [2016] 1 WLR 2682

The development plan

- Invariably contains heritage policies
- Will almost always reflect the statutory duties and the NPPF
- Tip: even where statute, DP and NPPF all posit the same test, worth mentioning all three in the report to committee

The NPPF

- Section 16
- Overarching policy objective: para 184:

These assets are an irreplaceable resource, and should be conserved in a manner appropriate to their significance, so that they can be enjoyed for their contribution to the quality of life of existing and future generations

The NPPF

- Two classes of heritage asset for NPPF purposes:
 - Designated assets: A World Heritage Site, Scheduled Monument, Listed Building, Protected Wreck Site, Registered Park and Garden, Registered Battlefield or Conservation Area
 - Non-designated assets: everything else!

The NPPF

- Starting point: para 190 - what's the significance of the asset? For the LPA to identify and assess ... but applicant must provide info on significance (para 189)
- Para 192 – must take account of:
 - the desirability of sustaining and enhancing the significance of heritage assets and putting them to viable uses consistent with their conservation;
 - the positive contribution that conservation of heritage assets can make to sustainable communities including their economic vitality; and
 - the desirability of new development making a positive contribution to local character and distinctiveness.

The NPPF

- Para 193 – must give great weight to conservation of designated heritage assets, irrespective of classification of harm
- Para 194: substantial harm to Grade II Listed assets should be exceptional. Substantial harm to Grade I or II* assets should be wholly exceptional
- Para 195: where harm substantial, PP should be refused unless harm necessary to achieve substantial public benefits that outweigh the harm, or a 4 part test for re-using otherwise unusable assets is met
- Para 196: where harm less than substantial, weigh harm against the public benefits – not a flat balance though

The NPPF

- Para 197: for non-designated assets, straightforward balance between benefits and harms
- Para 200: look favourably on proposals that preserve elements of setting that make positive contributions to an asset's significance.
- Para 201: in CAs, apply the para 195/196 balances, as appropriate, where there is the loss of an element that makes a positive contribution to the CA's significance

Conducting the balancing exercise

- No prescribed method
- *City & Country Bramshill* per Lindblom LJ (para 76):

Identifying and assessing any "benefits" to weigh against harm to a heritage asset are also matters for the decision-maker. ... What amounts to a relevant "public benefit" in a particular case is, again, a matter for the decision-maker. So is the weight to be given to such benefits as material considerations.

Conducting the balancing exercise

- *City & Country Bramshill* per Lindblom LJ (para 78):

Cases will vary. There might, for example, be benefits to the heritage asset itself exceeding any adverse effects to it, so that there would be no "harm" of the kind envisaged in paragraph 196. There might be benefits to other heritage assets that would not prevent "harm" being sustained by the heritage asset in question but are enough to outweigh that "harm" when the balance is struck. And there might be planning benefits of a quite different kind, which have no implications for any heritage asset but are weighty enough to outbalance the harm to the heritage asset the decision-maker is dealing with.

Evidencing the balance

- In general, where a paragraph from NPPF section 16 is mentioned, the inference is that the whole of the section is properly taken into account:
Mordue
- Good practice to mention all factors and policies though – even post-*Mordue*, heritage is a key area of challenge, and better to be safe than sorry

Evidencing the balance: cautionary tales

- *R (Wyeth-Price) v Guildford BC* [2020] EWHC 3355 (Admin)
 - Report to committee failed to advise members on how to carry out the heritage balance, and failed to mention NPPF paras 193 or 194
- *R (Liverpool Open and Green Spaces Community Interest Co) v Liverpool CC* [2021] P&CR 10
 - RtC unlawful where failed to report objections from the LPA heritage conservation team

The Interpretation of Planning Policy



Alistair Mills

Overview

- Planning policy: who does what?
- General principles of interpretation
- Interpreting development plan policy
- Interpreting the NPPF
- Some practical tips

Who Does What?

- Officer Reports may have to decide what policy means
- Planning Inspectors may need to give a view on what policy requires
- The interpretation of policy is ultimately a matter for the Court: *Tesco Stores Ltd v Dundee CC* [2012] PTSR 983
- Views of the author of the policy can be relevant: *R (Watermead Parish Council) v Aylesbury Vale DC* [2018] PTSR 43; *East Staffordshire BC v SSCLG* [2018] PTSR 88
- Application of policy to the facts is matter for decision-maker
- Distinction between the two? *Wiltshire Council v SSHCLG* [2020] PTSR 1409

General Principles of Interpretation

- Avoid over-legalism: *Tesco v Dundee* – planning policy not like statute or contract
- Over-interpretation may be the wrong interpretation: *Braintree DC v SSCLG* [2018] 2 P&CR 9
- Avoid over-complication, and quasi-mathematical concepts; planning is a flexible process: *East Staffordshire v SSCLG*
- Policy exists to shape practical decision-making: *Canterbury CC v SSCLG* [2018] EWHC 1611 (Admin)
- Query relevance of legislative meaning: *Fordent Holdings Ltd v SSCLG* [2013] 2 P&CR; *Aston v SSCLG* [2014] 2 P&CR 10

Interpreting Development Plan Policy

- The object of the interpretation is the policy text; the Supporting Text / Reasoned Justification can be relevant to interpretation but is not policy: *R (Cherkley Campaign Ltd) v Mole Valley DC* [2014] EWCA Civ 567
- Was policy made by reference to national policy?
- Is policy seeking to achieve one of the Objectives or Strategic Aims?
- Engaging in “forensic archaeology” is discouraged: *Phides Estates (Overseas) Ltd v SSCLG* [2015] EWHC 827 – what does the policy say (without looking at the underlying evidence documents)
- Don’t forget the Glossary!

Interpreting the NPPF

- Because of *Tesco v Dundee*, there is a well-established body of case law on interpreting the NPPF:
 - <https://www.landmarkchambers.co.uk/resources/the-nppf-a-digest/nppf-digest-home/> (the 2018/19 versions)
 - <https://www.landmarkchambers.co.uk/resources/the-nppf-a-digest-of-decisions/nppf-home/> (the 2012 version)
 - *Interpreting the NPPF: The New National Planning Policy Framework* (Bath Publishing: 2018)

Interpreting the NPPF (2)

- Well-established principles for, eg
 - Presumption in favour of sustainable development (*Monkhill Ltd v SSHCLG* [2020] PTSR 416; *Gladman Developments Ltd v SSHCLG* [2021] EWCA Civ 104)
 - Retail *R (Asda Stores Ltd) v Leeds CC* [2021] EWCA Civ 32
 - Green Belt (*Redhill Aerodrome Ltd v SSCLG* [2015] PTSR 274)
 - Valued landscape (*CEG Land Promotions II Ltd v SSHCLG* [2019] PTSR 353)

Some Practical Tips

- Is it necessary to give a concluded view on the point of interpretation?
- What would your overall view be on the merits of the application if you reached a different view on the point of interpretation?
- What the wording of the policy; how does it fit with the apparent purpose of the policy?
- Could your interpretation be explained to a Judge?
- Does the PPG provide any guidance?
- Is your approach consistent with how the Council has previously interpreted the policy?

Q&A

We will now answer as many questions as possible.

Please feel free to continue sending any questions you may have via the Q&A section which can be found along the top or bottom of your screen.

Thank you for listening

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