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Case Law Update

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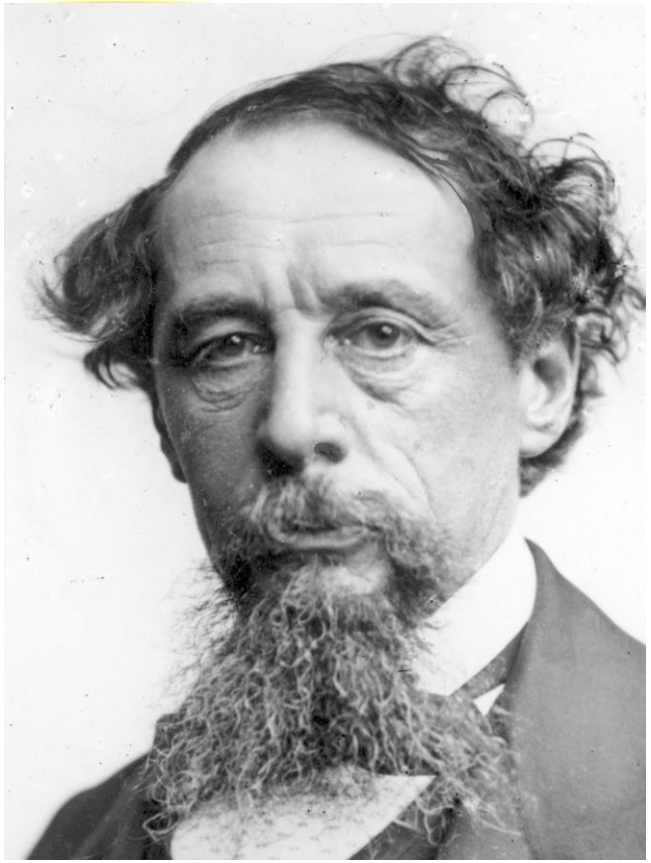
The Classics

A reminder of a few of the bedrocks of planning case law:

- The court will not trespass into matters of planning judgement – ***Tesco v SOSE*** [1995] 1 WLR 759.
- JR is not about reviewing planning merits – ***Newsmith*** [2001] EWHC Admin 74
- Policy is to be interpreted objectively and in its proper context – ***Tesco v Dundee*** [2012] P.T.S.R. 983
- Interpretation of planning permissions is objective with words given their natural and ordinary meaning – ***Lambeth*** [2019] UKSC 33

Housing Land Supply



- ***Tewkesbury BC v SSCLG*** [2021] EWHC 2782 (Admin)
- Issue: whether past over-supply of housing should be taken into account in calculating LPA's 5 year supply.

Answer?

- NPPF is silent on whether over-supply could be taken into account.
- In the absence of national policy, there was no text that required interpretation by the Court.
- Not for the Court to fill in gaps in the NPPF.
- In such cases, it was a matter of planning judgement for the decision taker to determine on a case by case basis.

Significance:

- Court will not intervene unless there is a policy to be interpreted. It does not make policy.
- Gives considerable latitude to LPAs/Inspectors re: gaps in policy or where broad policy concepts are at play.
- Yet another example of the Court's reluctance to get involved with matters of planning judgement.

Tewkesbury in action:

Land at Blainscough Hall, Chorley (App ref: 3275691).

- LPA claimed that housing requirement was across the Plan period, not an annual requirement.
- Inspector rejected that argument: housing requirement was not a target but a minimum figure.
- Local plan expressed requirement as an annual figure and a plan period figure.
- As a matter of policy and planning judgement, past over supply should not be rolled forward.

Bonus case!

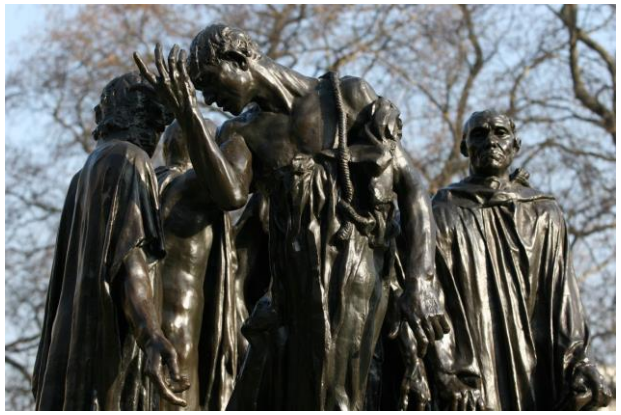
- ***East Riding v SSLUHC*** [2021] EWHC 3271 (Admin)
- LPA attempted to use a hybrid 5YS calculation: Local Plan requirement for year 1 & Standard Method for Y2-5. This meant the LPA had > 5YS.
- Inspector rejected this approach.
- Court held that Inspector's approach was lawful.
- Binary choice between Local Plan figure and Standard Method. Hybrid approach not supported by NPPF.

London Historic Parks and Gardens Trust v Minister of State for Housing
[2022] EWHC 829 (Admin)

Holocaust Memorial and Learning Centre

- All parties support the installation in a central London location.
- 23 large bronze fins creating 22 routes into a learning centre to be constructed below ground
- Inspector approved scheme in Victoria Tower Gardens.
- Selection of this site the main issue.

Victoria Tower Gardens



- GII* Buxton Memorial Fountain
- GI Burghers of Calais Statue
- GII* Emmeline Pankhurst Memorial

Grounds of Claim

1. Approach to heritage assets

2. Approach to alternative sites

N.B. - there were other grounds but these are of wider significance.

Heritage

Legal framework was common ground:

1. Duty in s.66 LBA.
2. Significance not only from asset but also setting. Setting not a heritage asset. Great weight to asset's conservation. More important the asset, greater the weight to conservation (NPPF §199, 200).
3. Harm is either substantial or less than substantial (NPPF §200 -202).

Heritage

5. Substantial harm to GII should be exceptional. Substantial harm to GII* should be wholly exceptional and refused unless necessary to achieve substantial public benefits that outweigh that harm (NPPF §200 – 201).

6. Less than substantial should be weighed against the public benefits (NPPF§202).

7. Harm is a matter of judgement. Must give considerable importance and weight to harm.

Heritage Claim

What is the threshold for substantial harm?

- *"very much if not all of the significance is drained away or that the asset's significance is vitiated altogether or very much reduced" – Bedford BC v SoS* [2012] EWHC 4344.

OR……

- *"seriously affects a key element of (the asset's) special architectural or historic interest"* - PPG

Heritage Claim

- Substantial means what it says.
- There is no test of “draining away”.
- Question of harm is a matter of judgement.
- Inspector considered the arguments and concluded that there was a “*serious degree of harm*”.

PRINCIPLES

- Interpret policy objectively as it is written.
- If policy (or guidance) doesn’t impose specific approach to an issue, then it is a matter of judgement.

Alternatives

- Where clear planning objections to development then may be necessary to consider whether there is a more appropriate alternative site elsewhere.
- When the development is bound to have significant adverse effects and where the major argument advanced in support of the application is that the need for the development outweighs the planning disadvantages inherent in it (*Trusthouse Forte v Secretary of State for the Environment* (1987) 53 P & CR 293at 299-300).

Alternatives

PRINCIPLE

- No burden on objectors to present detailed alternative schemes. If a scheme causes serious harm, it is for the applicant to show no alternative.

QUASH

- Because of s.8 LCC Act, hadn't considered deliverability of the application scheme.

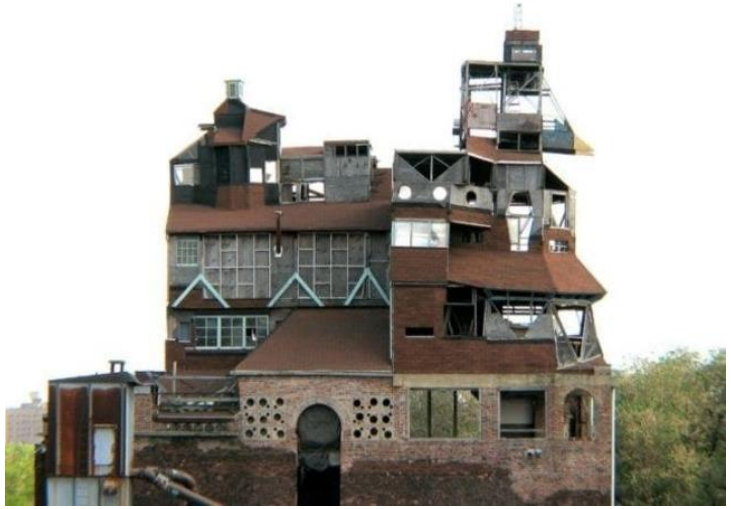
CAB Housing v SSLUHC [2022] EWHC 208 (Admin) N.B. – Appeal outstanding

Who is bigger: Mr Biggar or Master Biggar?

Master Bigger because he's a little Biggar.

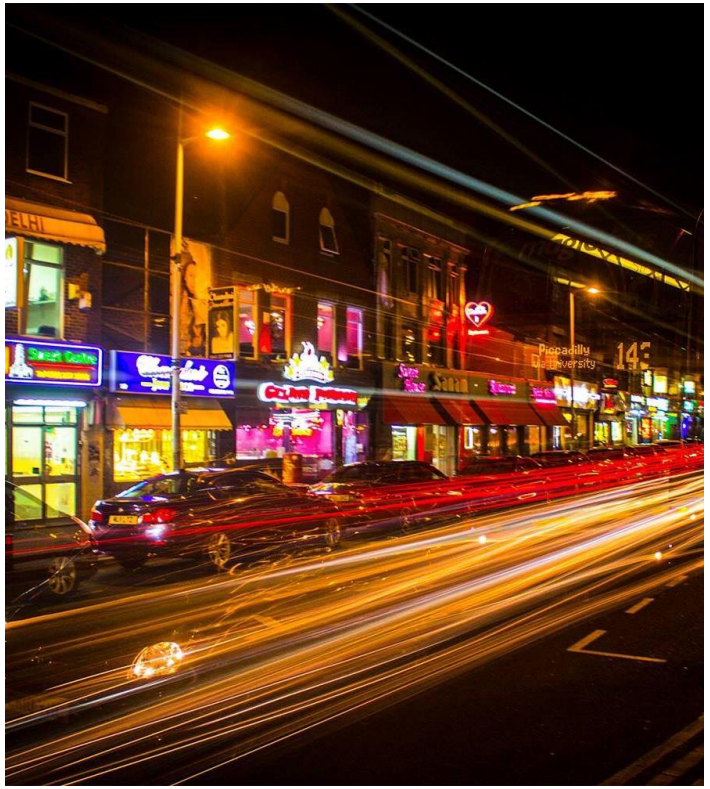
Guy Bolton, born in Broxbourne.

- The issue: how to interpret Class AA (upwards extensions) PD rights.
- Key findings:
  - Impact on amenity not limited to overlooking, privacy or loss of light;
  - "Adjoining premises" includes neighbouring properties, not simply those with a common boundary;
  - Control of external appearance includes assessment of impact on neighbouring premises & the locality.



- Implications:
  - Scope of relevant considerations is broad.
  - Many LPAs resistant to Class AA will feel emboldened to refuse Prior Approval applications.
  - Increase uncertainty in development industry re: reliance on Class AA.

Manchester City Council v SSHCLG [2021] EWCA Civ 1920



- EN for change of use of a house into commercial units – travel agent (A1), two couriers' offices (B1) and a therapy room (D1).
- Appeal on ground a. LPA said if granted should have a condition limiting use to that already in place.
- Inspector granted permission with no conditions as not necessary.

Manchester CC

- High Court – quashed as ambiguous on whether each of the four rooms was a planning unit. Failure to give effect to intention to restrict the use of the four units to those specified in the grant.
- Effect of this decision important for s.55(f):

> (f) in the case of buildings or other land which are used for a purpose of any class specified in an order made by the Secretary of State under this section, the use of the buildings or other land or, subject to the provisions of the order, of any part of the buildings or the other land, for any other purpose of the same class.

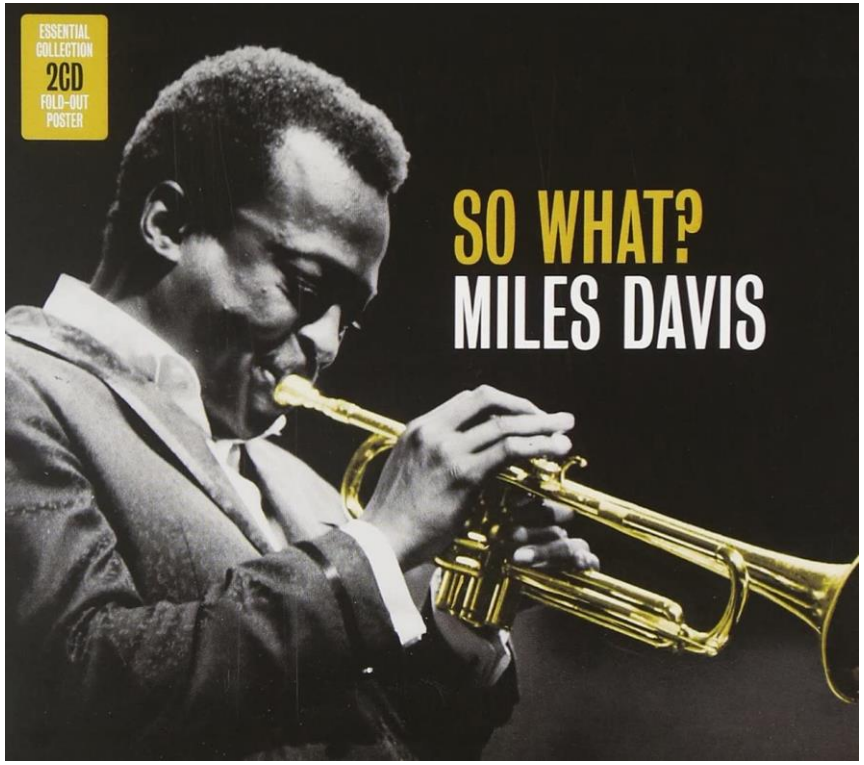
Court of Appeal says….

Useful case for bringing together number of principles:

- Interpretation of planning permission is objective and the natural and ordinary meaning of the words.
- Reasonable reader has some knowledge of planning law.
- Mixed uses don't benefit from a use class - sui generis. So s.55(f) doesn't apply.
- Whether CoU is material is fact and degree. Start with the planning unit.
- Description of development tells you what can be done. Conditions tell you what can't.

So what?

- If consent granted for mixed use, section 55(f) doesn't apply, so conditions not needed.
- If consent resulted in four new planning units, then conditions would be necessary.
- It was the latter. Inspector error was that conditions not needed. Can't say the description limits the use in the same way as a condition.



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Wiltshire Council v SSHCLG [2022] EWHC 36 (Admin)

- Consent granted on appeal for 10 affordable houses outside settlement boundary.
- LPA argued not in a suitable location, impact on landscape, and heritage.
- HELD – para 72 doesn't disapply the development plan. BUT NPPF envisages some harm to the landscape. Weight to be given to that harm is a matter of judgement.
- Paves the way for more entry-level housing.

72. Local planning authorities should support the development of entry-level exception sites, suitable for first time buyers (or those looking to rent their first home), unless the need for such homes is already being met within the authority's area. These sites should be on land which is not already allocated for housing and should:
(a) comprise of entry-level homes that offer one or more types of affordable housing as defined in Annex 2 of this Framework; and
(b) be adjacent to existing settlements, proportionate in size to them [35], not compromise the protection given to areas or assets of particular importance in this Framework [36], and comply with any local design policies and standards.

R (Finch) v Surrey CC [2022] EWCA Civ 187

Finch

- JR of LPA's decision to grant permission to expand oil drilling at Horse Hill, Surrey.
- Issue: how to assess significant indirect effects for the purposes of EIA.
- EIA confined to direct release of greenhouse emissions from the site, not the subsequent use of crude oil produced by the wells.
- Ms Finch claimed that end use effects must be considered.

And the Court of Appeal said ..

- Not possible to say that such impacts are legally incapable of being an effect requiring assessment in an EIA.
- All three judges agreed that the question of whether any particular impact, including the impact in this case, is truly a "likely significant effect" of the proposed development – be it a "direct" or "indirect" effect –is ultimately a matter of fact and evaluative judgment for the authority.

Unanswered questions

- Can it be right to leave it to judgment of LPA? Will that generate uncertainty and inconsistency, and leave out relevant effects from assessment?
- Is it always possible to distinguish a project from its effects?
- How does the judgment on indirect effects interact with the question of what is a material planning consideration?
- If the downstream effects had been assessed, what impact would that have on the decision whether to grant planning permission?

STOP PRESS!

- Supreme Court granted permission to appeal: 9th August 2022.

Warwick DC v SSLUHC [2022] EWHC 2145 (Admin)

- New buildings in the Green Belt are inappropriate unless:
  - They are an ”extension or alteration of a building provided that it does not result in disproportionate additions over and above the size of the original building”
  - NPPF §149(c).

- **The proposal**: demolition of existing outbuilding & replacement with garden room/home office.
- Outbuilding was not physically attached to the main house.
- LPA & Inspector concluded that proposal was not an extension.
- **The issue**: interpretation of ‘extension’ in §149(c) NPPF.

Court's Decision

- SoS argued that the term "extension" should not be defined by the Court but left to decision takers on a case by case basis.
- Court disagreed: interpretation of policy is a question of law; its *application* for decision makers.
- Discussion about PPG2 (extensions to *dwellings*) v NPPF (extensions to *buildings,* which has a much wider definition, including structures – see s.336 TCPA).

- Key findings:
  - §149 NPPF focused on new ‘free-standing’ buildings;
  - Building can be regarded as an ‘adjunct’ to another even though they are not physically connected: *e.g.* not artificial to describe a domestic garage or outbuilding as an extension of the principal dwellinghouse;
  - Allowing extensions not physically attached to the main building to be extended does not necessarily undermine Green Belt purposes;
  - Physically connectivity is “not conclusive and arguably is of minimal relevance to the degree of impact on the Green Belt.” (§48)

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Conclusion.

53. If, as I have found, an extension can be detached from the building of which it is an extension the Inspector did not err in law in granting planning permission and this claim fails.

Corbett v Cornwall Council [2022] EWCA Civ 1069

- Challenge to pp for house & garage.
- Local Plan permitted dev of PDL "within or immediately adjoining a settlement".
- NB – many local plans include similar policies.

- Words “immediately adjoining” didn’t require elaborate explanation.
- Shouldn’t be given unduly prescriptive meaning.
- Not necessarily mean ‘contiguous’, ‘coterminous’ or ‘next to’.
- Also: although main focus was physical & visual relationship, functional relationship could also be relevant.

Some others….

Blacker v Chelmsford City Council [2021] EWHC 3285

Council members can change their mind between committee meetings after a deferral of a decision. All comes down to the wording of the resolution.

NB – there is an appeal outstanding.

Barking and Dagenham LBC v Persons Unknown [2022] EWCA Civ 13

The courts can grant final injunctions that prevent unidentified and unknown persons, who might in future set up unauthorized encampments on local authority land (newcomers), from occupying and trespassing on that land. Where newcomers knowingly breached injunctions granted against persons unknown, they automatically became parties to the proceedings and did not need to be added as parties.

Ones to watch

Hillside Parks Ltd (Appellant) v Snowdonia National Park Authority (Respondent)

(Hearing on 4th July 2022)

- Where there are successive planning permissions relating to the same site, and the later permissions are for changes to one part of a wider development approved in the original planning permission, is the effect of implementing the later permission(s) that the original permission is completely unimplementable?
- Or can the original permission still be implemented in relation to areas unaffected by the later permission(s)?

DB Symmetry Ltd v Swindon BC (Hearing on 12/7/22)

- Issue:
- Can a planning condition lawfully require a developer to dedicate land for a public purpose without compensation – in this case the dedication of a highway?

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Thank You

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