



# PLANNING AND ENVIRONMENT

## WEBINAR SERIES

### CASE LAW UPDATE

03.10.22

1 LEARNING HOUR



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# Richard Humphreys QC

## Planning and Environment

Year of Call: 1986 | Year of Silk: 2006

Email Clerks: [planning@no5.com](mailto:planning@no5.com)



Richard has extensive experience in planning, environment, highways, compulsory purchase and local government law, practising in courts at all levels, at public inquiries and related advisory work.

He joined No5 in 2014 having previously practised at 4-5 Gray's Inn Square, London for 20 years and Francis Taylor Building, London for 6 years.

### Planning

Planning practice includes extensive experience in substantial regeneration and infrastructure projects, including highways and aviation, development plan preparation, SA/SEA/HRA and EIA, residential, industrial/office, retail, heritage, leisure, agriculture, minerals and waste development, certificates of lawfulness and enforcement notices.

### Development Plans

Richard has been instructed to advise upon and appear at a number of Development plans and has considerable experience of promoting and opposing plans as well as representing clients in Legal Challenges to adopted Local Plans.

Recent instructions have related to Wiltshire Core Strategy, Lichfield Local Plan, Mendip Local Plan Part 1, West Lancashire Local Plan, Stafford Local Plan Parts 1 and 2, Hartlepool Local Plan, Cheltenham, Tewkesbury and Gloucester Plans, Harrogate Local Plan, North Essex Part 1 Local Plans and, currently, St Cuthbert's Garden Village, Carlisle.

### Residential

Richard has advised and/or represented a large number of developers (including Bellway Homes, Bovis Homes, Crest Nicholson, Redrow Homes, Barratts/BDW, Linden Homes, Orbit Homes and Orchard Homes) and Local Authorities at many public inquiries and through subsequent Legal Challenges. Richard therefore has a very good working knowledge of OAN, 5 year supply, employment, viability, Green Belt, heritage, landscape and EIA and Habitats Regulations issues. He recently secured a planning permission for residential development for North Warwickshire and Hinckley College.

He is currently representing the Appellant in the Court of Appeal in *Corbett v. Cornwall County Council* (interpretation of policy).

### Retail

Richard has represented large retailers including Asda, Tesco, Aldi, Sainsbury, the Co-op and B and Q as well as retail park operators and Local Authorities. Richard has extensive experience of convenience and comparison goods retailing, retail warehousing, warehouse clubs, and applications for certificates of lawful use in respect thereof. Recent examples include out of town retail developments in Sunderland and proposed new stores for Aldi at Fletton Close, Leicester and Great Barr, Birmingham.

### Industrial/Office/Commercial

Richard has advised and /or represented numerous clients in relation to a wide range of such proposals, from Europe's largest bottle making and filling factory, office development in the grounds of a listed building, a multisports complex, holiday park development and a crematorium. He has also advised Tritax Symmetry Ltd (and related companies) on a wide range of logistics sites (see, too, under "Highways" below).

### Conservation

Richard has many years' experience of projects which potentially affect heritage assets (both designated and non-designated). Examples include Nutfield, West Sussex enabling development, works affecting listed buildings, Dunstable and Eaton Bray, Harlestone, Northants enforcement inquiry, St John's Wood, London Robert Adam residential development, Extension of listed building, St John's Wood Water Research Company office redevelopment, Medmenham, West Walls of Carlisle/Tesco retail inquiry, Milton Keynes Council – Tesco, Wolverton redevelopment, Weston Lane,

Shavington, Cheshire, inquiries at Melksham and Semington, Wiltshire, Ticehurst, East Sussex and Calne, Wiltshire.

#### **Infrastructure**

Richard has been involved in some of the largest schemes considered at inquiry. He has experience of the DCO process under the Planning Act 2008, as well as substantial infrastructure development pursuant to the Town and County Planning Act 1990, the Transport and Works Act 1992, the Electricity Act 1989 and other infrastructure related legislation. Examples include the Thames Gateway Bridge, the City of London heliport, Redhill Aerodrome, Manchester Second Runway, Heathrow Terminal 5, London Gateway (Shellhaven) container port development, Carlisle Airport freight development, London Oxford Airport, telecommunication mast cases, wind turbine inquiries and proposed solar farms. Richard has advised and acted for the CAA in respect of numerous airports including Manchester, Stansted, Cardiff, Southampton and City Airport, London.

#### **Agriculture**

Richard has wide-ranging experience in agricultural development, from poultry processing to pig and cattle farming, to large scale greenhouse production and agricultural land classification.

#### **Minerals and Waste**

Richard has been involved in numerous cases involving mineral extraction (from tin to limestone to sand and gravel to gypsum to fullers earth; as well as waste development. He has represented some of the largest Quarry and Waste operators in the country, including Tarmac and Aggregate Industries. He has particular expertise in relation to issues concerning interpretation of permissions and conditions, review of minerals permissions, permitted development rights, environmental impact assessments requirements, viability of extraction, compatibility with residential development, sterilisation of minerals, assessment of reserves and resources, the sale of mineral product, the meaning of waste, waste delivery and the interpretation of supply agreements.

More recent case examples include Former Fullers' Earth site, Bath; Cornelly Quarries near Bridgend and Mepal Quarry, Cambridgeshire.

#### **Highways**

Richard has advised and/or represented numerous clients in relation to Highways matter. Experience includes road improvement schemes, bypass inquiries, Motorway Service Areas, Toll Roads, road bridges and footbridges, stopping up/ diversion of highways orders, and rights of way. He is currently representing DB Symmetry Ltd in the Supreme Court (Swindon BC v. DB Symmetry Ltd and Secretary of State (whether a planning condition does and can require a landowner to dedicate a right of way to the public).

#### **Enforcement**

Richard successfully argued the still leading case of *R v Wicks* in the House of Lords (the scope for a Defendant to challenge the validity of an enforcement notice when prosecuted for non-compliance). He has appeared at numerous enforcement inquiries and has in-depth knowledge of enforcement law.

Recent instructions have included those from Wycombe DC (Babs Park, Bourne End), and from Nick Hood (Brush Garage, Walsall).

#### **Environmental**

Environmental work has included numerous advices and/or representation in respect of statutory and public/private nuisances, environmental protection (prescribed processes, substances and waste) regulations, and hazardous substances regulations, including in relation to Buncefield depot, Hemel Hempstead. Recent instructions include representing Cank Farm, Tanworth-in-Arden (nuisance case) in the High Court.

#### **Compulsory Purchase and Regeneration**

Compulsory purchase work includes section 17 inquiries (certificates of appropriate alternative development), section 226 TCPA 1990 inquiries/compulsory acquisition for development/planning purposes, compensation, section 84 Law of Property Act 1925 applications (restrictive covenants), and Lands Tribunal (Lands Chamber of the Upper Tribunal) work.

Recent CPO work include the Network Rail (London to Corby) (Land acquisition, level crossing and bridge works) Order (Bovis Homes Ltd), and the promotion of the Manchester City (Brunswick) CPO.

#### **Local Government**

Local government work includes advising on the scope of statutory powers (including financial), State Aid, governance, the constitution of committees (including political balance), election law, Code of Conduct issues, freedom of information, the acquisition, appropriation and disposal of land, emergency planning, urgent works notices, the provision of affordable housing, the establishment, diversion, extinguishment and protection of public rights of way, town and village greens, common land, charter and statutory markets and fairs, hackney carriage licensing, caravan site licensing and duties in relation to travellers.

He is currently representing Carlisle City Council, Allerdale Borough Council and Copeland Borough Council in a High Court case brought by Cumbria County Council challenging the decision of the Secretary of State to create 2 rather new unitary authorities rather than a single authority for Cumbria.

He is also currently representing DB Symmetry Ltd in the Supreme Court (Swindon BC v. DB Symmetry Ltd and Secretary of State - whether a planning condition does and can require a landowner to dedicate a right of way to the public).

## Recommendations

"I find Richard an extremely approachable individual who is open to discuss both the positives and negatives of arguing potential points upon which might have an influence on the outcome. Richard's wide range of instantly recallable planning knowledge is extremely helpful and he communicates this complex knowledge in clear language which is easy for all to understand."

**Legal 500 2022 - Planning and Environment (Midlands)**

Ranked as a leading silk in Planning and Environment.

**Legal 500 2022 - Planning and Environment (London)**

"He really tests the case and identifies weaknesses in good time for them to be addressed."

**Legal 500 UK 2018**

"I am most grateful for the time and immense care you have taken to review this case."

**Planning consultant, 2018**

"Many thanks Richard: a thoroughly thorough opinion! Your advice, options and recommendation/s are understood and appreciated."

**Planning consultant, 2018**

"He is very thorough and has a mastery of the detail. Forensic would be the word that springs to mind."

**Chambers UK, 2016**



## Appointments

Bencher, Inner Temple

## Memberships

PEBA

ALBA

## Qualifications

LLB (Nottingham),

LLM (Cambridge)

## Other information

**Richard has contributed to the following publications:**

Contributor, Halsbury's Laws (Local Government) (2001);

A former editor of Crown Office Digest;

Contributor to Anti-Social Behaviour Law (publ. Jordans);

Contributor to RICS online guidance.

**Articles published in Journal of Planning Law include:**

"Interpreting planning permissions after Stevenage - the primacy of the plans?" (2011);

"Material Change in use - what's character got to do with it?" (2011);

"20 years of the 10 year period for enforcement: time for reform?" (2011);

"Integrity in the planning system in England: lacunas but lessons from a British Isle?" (2015); and

"Sustainable development: does the NPPF paragraph 14 ensure that future generations can meet their own needs?" (2016).

Richard was elected a Governor and Trustee of the English Speaking Union (a charity which promotes oracy) in 2021.

# Jack Smyth

## Planning and Environment

Year of Call: 2007

Email Clerks: [planning@no5.com](mailto:planning@no5.com)



Legal 500 awarded Jack the prestigious honour as "Legal 500 UK Regional Junior Barrister of the year" 2018. Its Judges noted:

"2017 was Smyth's tenth year of call and he continues to punch above his weight across a number of practice areas. He frequently acts for prominent clients such as Secretaries of State and makes frequent successful appearances in the higher courts"

Jack was also rated as a Top Tier grade 1 barrister in Planning law in the Midlands in 2017.

Jack has a strong practice across the piste in Planning and Environmental law with a particular interest in High Court challenges and enforcement.

Jack has been appointed by the Attorney General as Junior Counsel to the Crown for the Midlands (formerly known as the Treasury Solicitors' Panel). As a result, he frequently finds himself in the High Court defending the decisions of Planning Inspectors.

Jack has been appointed as a Drainage Member of the Lands Tribunal (Wales). He is the youngest appointee to the tribunal. In that role, he adjudicates on disputes which revolve around boundaries, the causes of flooding and the best solution to be found to mitigate harm. In that guise, he is experienced with scrutinising competing expert evidence in an area of the law which is both technical and fact-specific.

### Residential Development

Jack is experienced with dealing with residential development appeals for appellants, local authorities and residents' groups and frequently appears at Public Inquiries and Informal Hearings. Jack has experience of a range of issues relating to residential applications including 5 year supply, viability, Green Belt, heritage and landscape.

### Enforcement

Jack is considered to be one of the go-to barristers for enforcement matters, with a particular expertise in injunctive proceedings. He is experienced in advising on paper, appearing at inquiries and in the Court system, including Criminal proceedings. Cases include Enforcement prosecutions, Temporary Stop Notices, Injunctions (Gypsies and Travellers), CLEUDs, Tree Preservation Orders, Environmental issues pursuant to EPA including noise and odour abatement notices, Statutory nuisance, POCA, Committals for breaches of court orders and Breach of Condition notices.

### Injunctions

He commonly obtains injunctive relief in respect of unauthorised breaches of planning control. This is done on an emergency basis for anticipated breaches and also to compel compliance with enforcement notices and conditions attached to planning permissions. He regularly finds himself in the High Court for injunctions and is used to advising at short notice and undertaking emergency injunctions. Recently, Jack completed a long-running injunction in respect of the illegal tipping of waste on land in the open countryside. During the course of the litigation, a witness was sent to prison for 28 days for perjury following Jack's cross-examination. In light of the defendant's failure to obey the injunction, he was committed to prison for 12 months for contempt. This is the longest sentence ever imposed for breach of a planning injunction.

### Gypsy Traveller Law

His forte is successfully representing Councils and residents' groups in resisting gypsy traveller sites. He has represented residents' groups in two high profile gypsy cases in the Midlands which have both featured on Midlands Today and in the national press: Beausale and Meriden. He often obtains injunctions.



### Historic Heritage

He has extensive experience of advising and providing advocacy in the area of built heritage, in particular, the impact of new development upon Conservation Areas and Listed Buildings. Recent cases include a 2-week inquiry against a Silk on behalf of a residents' group resisting the demolition of a large building in a Conservation Area to make way for a large supermarket development (the appeal was dismissed) and successfully representing a local authority at an appeal for residential development within the setting of a listed mill. On the enforcement side, recent cases include advising an architect being investigated for unauthorised works to a Listed Building and a home owner facing a joint prosecution by Historic England and the local authority for the gutting of a Listed Building and the excavation of an Ancient Scheduled Monument.

### Statutory Nuisance

He frequently advises appellants and local authorities in respect of statutory nuisance. He is experienced with interrogating technical expert evidence in respect of noise and odour. Recent successes include prosecuting a restaurant in Leicester for failing to obey an abatement notice for odour and resisting an appeal made by a Working Men's Club in Cannock in respect of a noise abatement notice.

### High Court Work

Jack is adept at advising potential Claimants and Defendants on a wide range of High Court challenges including Judicial Reviews and statutory challenges (such as s288 and 289 claims). He has a reputation for turning work around at short notice and providing hard-headed, commercial advice to clients.

### Recommendations

"Jack understands his client's position and area of law."  
*Chambers UK 2022*

Ranked in Tier 2  
*Legal 500 2022*

"Pre-eminent in enforcement injunctions." "He is very good - he knows exactly what he is doing."  
*Chambers UK 2021*

"Professional, supportive, approachable, and knowledgeable."  
*Legal 500 2021*



### Notable Cases

#### Mole Valley DC v Casey et al [2021] 6 WLUK 130

Jack successfully obtained an injunction for the council to maintain the status quo at an unauthorised gypsy traveller site in the green belt and stop its expansion until such a time as the planning merits are settled.

#### Hedges v Secretary of State for Housing, Communities and Local Government [2021] EWHC 2392

Jack represented the defendant and successfully defended an Inspectors decision following an enforcement appeal. The case turned on whether the Inspector was entitled to focus exclusively on evidence of actual use when deciding whether the unauthorised camping use was immune rather than other evidence about 'usability' of the site.

#### North Northamptonshire Council v Monghans [2022] EWHC 536 (QB)

Emergency injunction to prevent the importation and spreading of unauthorised waste. At the return date, the judge granted a mandatory order requiring the removal of the waste which had been illegally deposited.

#### East Cheshire BC v Maloney and Ors [2021] EWHC 350 (QB)

Jack successfully represented the council in this high-profile injunctive claim. After the emergency hearing, officers arrived at the site in the nick of time to serve the injunction as heavy machinery was in the process of expanding the

unauthorised gypsy site. The injunction was repeatedly breached in the succeeding months and the council brought 4 committal applications. The matter culminated in a 4 day trial in the High Court where a final order was made and the contempt allegations were found proven.

**Abbey Properties Cambridgeshire Ltd v East Cambridgeshire D.C. [2020] EWHC 3502 (QB)**

Jack successfully represented the Council in resisting a claim for judicial review to quash the Witchford Neighbourhood Plan. The claim revolved around an apparent tension between the content of the emerging neighbourhood plan and the existing local plan and the legality of a Local Green Space designation.

**R (oao Manor Oaks Homes Ltd) v East Cambridgeshire DC [2020] EWHC 2039 (Admin)**

Jack represented the Council resisting a JR against the Witchford Neighbourhood Plan ("NP") brought by a housing developer. The claim revolved around the allegation that the NP did not meet the basic conditions and the Council was wrong to treat it as making allocations when the Examiner had removed references to this term and replaced them with "housing proposal sites". At the renewal hearing, Lang J refused permission on all grounds and awarded the Councils costs in full.

**R (oao Coventry Gliding Club) v Harborough DC [2019] EWHC 3059**

A claim for judicial review against a local authority's decision to grant an application for prior approval for a barn conversion under the new Class Q permitted development. The case revolved around whether the site notice was "near" to the land and the quality of the officer's report.

**London Borough of Bromley v Persons Unknown and London Gypsy Travellers [2020] EWCA Civ 12**

This has become a "test case" for the use of borough-wide injunctions by local authorities to protect public open spaces from Gypsy Traveller incursions. 34 such injunctions had been granted by the High Court. In Bromley's case the court refused to grant the injunction but, unusually, gave permission for the matter to be finally determined by the Court of Appeal. A number of organisations, including the pressure group Liberty, appeared as Interveners. At the final hearing, the Court of Appeal set out sweeping guidance on the deployment of such injunctions and what conditions must be met before they are granted in future.

**Gladman Development Ltd v Secretary of State for Communities and Local Government and Sedgemoor DC [2019] EWHC 128 (Admin)**

The High Court found that the Inspector's decision to dismiss an appeal for residential development was unlawful on the basis that he had refused to make a finding as to whether the Council could demonstrate a 5-year housing land supply.

**Banghard v Bedford Borough Council [2017] EWHC 2391 (Admin):**

It provides guidance on how local planning authorities should exercise their discretion to decline to determine a planning applications pursuant to s.70C of the Town and Country Planning Act 1990.

**Daventry District Council v Secretary of State for Communities and Local Government [2016] EWHC (Admin) 1555**

He successfully represented the Secretary of State against a section 288 claim. The case turned on the lawfulness of the Inspector's decision which followed a written representations procedure where the parties had failed to tell the Inspector that the LPA's Local Plan had been adopted. The Judge, whilst finding that the Inspector had reached his decision on an erroneously unlawful basis, exercised his discretion not to quash the planning permission on the basis that the claimant LPA had been incompetent and contributed to the error by failing to inform the Inspector of the important change.

**R (oao Headcorn Parish Council v Secretary of State for Communities and Local Government [2016] EWHC 1158**

He successfully represented the Secretary of State against a claim for permission to pursue a judicial review. The case turned on the lawfulness of the Secretary of State's screening opinion. In particular, the manner in which the screening opinion addressed the effects of the proposed residential development on the highway and a SSSI.

**Whitby v Secretaries of State for Transport and Communities and Local Government and Network Rail Infrastructure Limited [2016] EWCA Civ 444**

He successfully represented the Secretaries of State in the Court of Appeal [led by Richard Kimblin QC]. This is the first reported case on the proper meaning and interpretation of paragraphs 132 and 133 of the (original) NPPF in respect of justifying harm to heritage assets.

**Malvern Hills District Council v Secretary of State for Communities and Local Government and Jones [2015] EWHC 2244**

He successfully represented the District Council in its section 288 appeal to quash an Inspector's decision. The appeal centred around the proper interpretation to policies of an out of date Local Plan.

**Crane v Secretary of State for Communities and Local Government and Harborough District Council [2015] EWHC 425**

He successfully represented the District Council upon the claimant's section 288 appeal to quash the Secretary of State's decision to afford "very substantial negative weight" to an identified breach of a Neighbourhood Plan. This was one of the first challenges to the Secretary of State's flagship localism policy.



**Hampton Bishop Parish Council v Herefordshire Council [2014] EWCA Civ 878**

He was led by a Silk in the High Court and later the Court of Appeal, the claim to quash the grant of planning permission was successfully resisted. The case provides useful guidance on the extent to which off-site benefits can reasonably be regarded as material considerations to which the CIL regulations apply. It is a case quoted approvingly by the Planning Encyclopaedia.

**Gilbert v Secretary of State for Communities and Local Government, Harborough District Council [2014] EWHC 1952**

He successfully represented the District Council in the High Court and Court of Appeal upon the claimant's judicial review to quash the Secretary of State's screening decision and the Council's grant of planning permission. The case revolved around the proper interpretation of the EIA regulations and whether the noise arising from vehicles using the former World War II airfield at Bruntingthorpe, Leicestershire was likely to have significant environmental effects.

**Greaves v Boston Borough Council [2014] EWHC 2237**

He successfully represented a local authority in resisting an application to quash a grant of planning permission for a single wind turbine. The case turned on the lawfulness of a noise condition. Following an appeal to the Court of Appeal, the claim was dismissed.

**Appointments**

Deputy District Judge

**Awards**

Legal 500 UK "Regional Junior Barrister of the year", 2018

The Jules Thorn Scholarship by Middle Temple, 2006

Rated as a Top Tier grade 1 barrister in Planning law in the Midlands, 2017

**Memberships**

UKELA  
HELA

PEBA

**Qualifications**

Degree in Politics from the Durham University, First Class Honours

Graduate Diploma of Law, with Distinction - LLB

**Articles and Publications**

**Local Government Lawyer: 'Injunctions: a no-brainer? The quickest, easiest, cheapest and most effective way to enforce compliance'**

**How to Prosecute a Breach of an Enforcement Notice: A Practical Guide**

**Listed Building Prosecutions: A Practical Guide**

# LEGAL UPDATE

## **Barton Park Estates Ltd v Secretary of State for Housing, Communities and Local Government & Anor [2022] EWCA Civ 833**

1. The Court of Appeal upheld the Inspector's decision to dismiss an appeal against the refusal of an application for a certificate of lawful use for the stationing of up to 80 caravans "*for the purposes of human habitation*" on land in the Dartmoor National Park ("the CLEUD"). In doing so, it upheld the decision of the High Court.
2. Planning permission was granted in 1987 (and amended in 2013) to "*allow for 9 residential vans, 16 holiday chalets, 18 static vans & 30 touring units*" on the site. There was no condition attached to the permission limiting the number of caravans and chalets to those specified in the description of development, although there were conditions restricting the number of months for which the chalets, static vans and pitches for touring units could be occupied and the period of time for which the touring units could persist there. In 2018, the site owner applied for a CLEUD, which was refused.
3. The Inspector dismissed the Appellant's appeal, finding:

*...the words in the 1987 Permission permit a caravan site at which caravans provide both permanent residential accommodation and holiday accommodation, the year-round use of the latter being prevented by condition. The proposed use for "the stationing of up to eighty caravans for the purposes of human habitation" would be a change from this permitted use, in that it would encompass the use of any and all caravans on the site to provide permanent residential accommodation, with no holiday use at all.*
4. The Inspector went on to find that, as a matter of fact and degree, this would bring about a substantial and fundamental change in the character of the site's use which amounted to a material change of use requiring planning permission.
5. The High Court found that the Inspector had applied the correct assessment and was entitled to reach this conclusion.

6. In the Court of Appeal, the Appellant argued that the planning permissions made it clear that the site could lawfully be used as a “*caravan site*” which would include use for entirely residential or entirely holiday purposes (caravans for both purposes being “merely caravans”). Relying on authorities including I’m your Man, the Appellant argued that the conditions did not restrict the use of the land for any particular form of caravan site; a restriction on the type or number of caravans could only be achieved by way of planning condition.
7. Lindblom LJ rejected this argument, noting that it misinterpreted I’m Your Man. The permissions allowed a specific mix of 73 caravans and chalets, only 9 of which were authorised for residential use and the conditions matched the grant and reflected its terms, preventing year-round residential occupation of most of the development permitted. He concluded:
  - a) The reasonable reader of the planning permission would not say that it had been granted simply for a “caravan site” but, rather, the combined effect of the description of the development and the conditions was to grant permission for caravans of several types in the numbers stated.
  - b) The absence of a condition specifically restricting the number of residential caravans does not have the effect of altering the description of development in the grant itself.
  - c) The permission, as a whole, did not envisage that all the caravans on the site would ever be used for permanent residential occupation.
8. Lindblom LJ emphasised that these conclusions did not conflict with the seam of I’m Your Man authorities, which did not apply where there was a material change of use. As to whether the proposed use amounted to a material change of use, Lindblom LJ noted that the question for the decision-maker was whether, as a matter of fact and degree, there had been a change in the character of the use. He found that the Inspector, having reached the conclusion that the planning permissions were not merely for a “caravan site” but instead a caravan site housing a mixture of both permanent residential and holiday accommodation, found lawfully that the proposed use would be a change

from the permitted use because it "*would encompass the use of any and all caravans on the site to provide permanent residential accommodation, with no holiday use at all*".

9. The judge found that she was entitled to find, as a matter of fact and degree, that the proposed use would be a material change of use – since it "*would bring about a substantial and fundamental change in the character of the appeal site's use*". This conclusion was predicated on the following findings which were justifiable:
  - a) In place of a seasonal pattern of occupation, there would be unrestricted residential occupation which would generate a steady level of activity throughout the year;
  - b) There would be a year-round presence in presently unoccupied parts of the site;
  - c) The pattern of movement to and from the planning unit would likely change significantly; and
  - d) Caravans in year-round occupation adjoining the entrance would have the effect of visually extending the existing caravan site.

**Goesa Ltd, R (On the Application Of) v Eastleigh Borough Council [2022] EWHC 1221 (Admin)**

10. This was an unsuccessful challenge by a campaign group to Eastleigh Borough Council's decision in June 2021 to grant planning permission to Southampton International Airport Limited for a 164-metre extension of a runway with an associated blast screen and the reconfiguration and enlargement of a long-stay car park. There were 4 grounds of challenge:
  - a) There was a legitimate expectation that the permission would not be issued until the Secretary of State had had sufficient time to decide whether to call in the application. The Council's statement on 16 April 2021 indicated that the Planning Casework Unit had apparently received several requests for the SoS to consider calling in the application and that it had asked the Council not to issue the permission until the SoS had decided whether to call in the application for a public inquiry. It stated that the completion of the s106 legal agreement would not be completed until the middle of May and, as such, it had agreed to this informal request. The Court found that this

announcement did not contain any clear, unequivocal representation that the decision notice would not be issued until the SoS had decided whether to call in the application irrespective of the length of time that might take. The Court was satisfied that the Council had allowed the SoS time to consider the case when it granted the permission over 7 weeks later and also that the Council made it plain that it was not agreeing to any further delay beyond May 2021.

- b) The Council breached its duty under the EIA regulations by failing to make an assessment of the cumulative effects of greenhouse gas emissions in combination with other projects. This was rejected on the basis that the Council had followed the guidance published by the IEMA but that no criteria or thresholds had been set by which to measure the significance or acceptability of GHG emissions from a particular proposal. The Court found that there was nothing unlawful about the Council using the benchmarks it considered to be appropriate (national aviation targets) in order to reach a judgment on these issues.
- c) The Council misinterpreted paragraph 11(d) of the NPPF and unlawfully applied the ‘tilted balance’ in favour of granting permission without finding that the “*most important policies for determining the application*” were out of date. The Court rejected this argument as an impermissible legalistic dissection of the officer’s report. Here, it was found that deciding what are the most important policies did not engage a question of law (such as the interpretation of a policy) which might be susceptible to only one answer but rather was a subjective judgment about what are the most important policies for deciding the application in question.
- d) The Council unlawfully took into account an immaterial consideration, namely that refusing planning permission would lead to the loss of the airport. The Court concluded that the claimant was referring to a small number of comments which came nowhere near establishing the “*general tenor*” of the 20-hour discussion by the full Council so as to show that there was a general view that the airport would close if the application was refused or that the councillors would have voted the other way had they disregarded the closure issue.

**R (on the application of Fiske) v Test Valley BC Queen's Bench Division (Administrative Court) | [2022] EWHC 1111 (Admin)**

11. The Court held that there was nothing wrong in principle in a local planning authority granting planning permission which was incompatible with an earlier permission for the same site. It was for the developer to resolve any incompatibility and choose which permission to carry out. There was no statutory requirement or policy requirement for an authority to have regard to the consequences of incompatibility in deciding the later application.
12. The Council had granted the interested party planning permission for the installation of a 72-hectare solar park and ancillary equipment at a countryside site. The permission was conditional on the development not being carried out other than in complete accordance with approved plans, including the specified size and location of a 33kV substation. Later, the Council granted a 2<sup>nd</sup> permission to accommodate a larger 132kV substation in a different location, increasing the site by another 6.78 hectares, in order to enable the solar park to become operational and meet the requirements for connection to the national power grid.
13. It was common ground that implementation of the 2021 permission would make it impossible to complete the development in accordance with the 2017 permission and that this incompatibility had not been dealt with in the officer's report to the planning committee or otherwise brought to the attention of its members. The claimant contended that in granting the 2021 permission, the Council had failed to have regard to a material factor, namely its incompatibility with the 2017 permission.
14. This argument was rejected. The Court identified the following legal principles:
  - a) There was nothing wrong in principle with an authority granting more than one permission which were incompatible with one another. That allowed developers to choose which permission to carry out.



- b) Where, however, development had been carried out under the first of two incompatible permissions, the question was whether it was possible to carry out the development proposed in the second permission, having regard to that which was done or authorised to be done under the permission which had been implemented.
- c) If a building operation was not carried out fully in accordance with the permission, the whole operation was unlawful, not just that part which deviated from the permission.
- d) Where development under the original permission had begun, but then development under incompatible permissions was built out so that the development under the original permission could not be completed, the subsequent development as a whole would be rendered unlawful.
- e) It does not follow that if a building was built which conformed to planning permission but was not completed, the whole building was unlawful. Building might be carried out under two identical permissions, one after the other.

15. Here, the question of the incompatibility of the 2 permissions was not a material consideration and therefore it was not an error of law for the Council to fail to grapple with it.

**R (Suliman) v Bournemouth, Christchurch and Poole Council [2022] EWHC 1196 (Admin)**

16. The claim concerned the scope of the power of a local authority to impose conditions under the Wheatcoft and Newbury principles, as well as whether, on the facts of the case, a legitimate expectation had arisen. The claim was for judicial review of the decision of the Bournemouth, Christchurch and Poole Council to grant full planning permission for a mixed-use development, including 130 residential dwellings, on the site of the former police station in Christchurch.

17. Useful guidance was provided as to the extent to which a Council can amend the scheme to which permission is sought. Lang J observed at the outset that the applicant prepares and submits the planning application. It is the responsibility of a local planning authority to determine that application by approving that application (conditionally or otherwise) or refusing that application (see section 70(1) TCPA 1990). 59. It is not the function of a local planning authority to reformulate a development proposal. It can offer advice, but it is a matter for the applicant as to whether to accept that advice and amend the proposals, or to reject it and require the application to be determined.

76. There was a second ground in respect of the failure of members to undertake the promised site visit. The Claimant submitted that the correspondence between the Claimant and the Council generated a legitimate expectation that Members of the Committee would undertake a site visit to her property to view the outlook from her garden towards the adjoining Site. The Claimant relied on the Council's representation to her detriment because, in the belief that Members would visit her property, she did not organise high quality visual aids to demonstrate the impact of the development on the outlook from her house. In breach of its representation, Committee Members only undertook a visit of the Site, not of the Claimant's property.

18. The challenge revolved around an apparent promise in an email from the Council:

*...in regard to the request for a Site Visit, I can confirm that this is agreed to be appropriate and the Chairman and relevant officers are in agreement with this. The precise details will be confirmed in due course.*

19. The Court found that it did not give rise to a legitimate expectation. The email was best understood as an agreement in principle to a site visit, with the details to be confirmed at a later date. It was not sufficiently clear or explicit that the Council had agreed to visit the Claimant's property.

**London Historic Parks And Gardens Trust v Minister of State for Housing & Anor [2022] EWHC 829 (Admin)**

20. This was a statutory challenge in respect of the decision of the Minister of State for Housing to grant planning permission for the installation of the United Kingdom Holocaust Memorial and Learning Centre at Victoria Tower Gardens in Millbank, London. It succeeded on two grounds related to the London County Council (Improvements) Act 1900 and so the decision was quashed. The 1900 Act included the power for the London County Council to make an extension of the Thames Embankment and a new street and improvements at Westminster. The key provision of this Act was section 8(1) which the Judge held to impose an enduring obligation to lay out and retain the new garden land for use as a public garden and integral part of the existing Victoria Tower Gardens. She held that it is not an obligation which was spent once the Gardens had been laid out so that the land could be turned over to some other use or be developed or built upon at some point after it had been laid out whenever it suited those subject to the obligation.
21. Although in general the decision to grant planning permission is without prejudice to any further consents which may be required for implementation of the planning permission, in this case timing of deliverability of the proposal was a material consideration which was given considerable weight by the Inspector because of the importance attached to the construction of the Memorial in the lifetime of Holocaust survivors. Section 8 of the 1900 Act was therefore a material consideration because of the potential impediment it presents to construction of the Memorial in Victoria Tower Gardens and this material consideration was not considered at the inquiry.

**R (On the Application of Stratton) v The London Borough of Enfield [2022] EWHC 404 (Admin)**

22. This case concerned a challenge by a neighbour (the Claimant) to the grant of planning permission for a residential extension by the London Borough of Enfield (the Defendant). The Defendant accepted that the planning permission had been granted unlawfully, as the relevant planning officer had relied on the mistaken understanding that the Claimant's property had a bricks and mortar extension at its rear.

23. The question for the Court was whether substantive relief should be withheld pursuant to Section 31(2A) of the Senior Courts Act 1981. It provides:

*The High Court must refuse to grant relief on an application for judicial review...if it appears to the Court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred*

24. The Defendant argued that the planning permission would have been granted even if the error identified by the Claimant had not been made. In particular the Defendant sought to rely on the fact that the officer, when making the relevant decision, would have considered the fall-back argument that if permission were refused a similar extension could have been constructed under permitted development rights. The judge held that it is not enough to acknowledge that the existence of a fall-back argument represents a material consideration, one must also consider the weight which should be accorded to it. That consideration inescapably requires the exercise of planning judgment into which the Court cannot be drawn. Mr Justice Smith considered the wide-ranging case law regarding the application of Section 31(2A) and declined to refuse relief under this provision. However, in light of the factual situation, and in particular the grant by the Defendant of a subsequent planning permission for an extension similar in size and scale to that permitted by the planning permission the subject of these proceedings, the Judge exercised his general discretion not to quash the permission as it was fair to conclude that the claim is now academic by reason of the grant of the subsequent permission.

**Jones & Anor v Secretary of State for Housing Communities and Local Government & Anor [2022] EWHC 520 (Admin)**

25. This was a statutory challenge in respect of the decision of an Inspector to dismiss appeals against an enforcement notice issued by Horsham District Council. The notice attacked the construction of a vehicular access without planning permission. This involved the removal of boundary planting and the deposit of material to form a hard surface access track and concrete apron as a crossover onto the highway. The appeals were pursued on grounds (c) and (d) of section 174(2) of the Town and Country

Planning Act 1990 on the basis that the works did not constitute a breach of planning control and that enforcement action had become impossible by the lapse of time respectively.

26. The Inspector dismissed both appeals and held that the notice, which required reinstatement, should stand. The statutory challenge was pursued in respect of the Inspector's conclusion on ground (c) on the following grounds:

- a) The Inspector erred in law in failing to deal with a specific issue raised in the appeals, namely whether the development was permitted by the General Permitted Development Order 2015 (the "GPDO");
- b) The Inspector failed to deal with a material consideration, namely a previous decision letter;
- c) The Inspector's conclusions were incorrect as regards the finding that the relevant road was 'classified' and in relation to the legal status of the access;
- d) Having found that there was a pre-existing gate, the Inspector failed to take account of this fact, or failed to explain why he could ignore it, when upholding the notice to the extent that it would require the filling-in of that lawful opening; and
- e) The Inspector failed to vary the notice so that the steps for compliance left the pre-existing and lawful opening capable of being used, this being an obvious alternative to overcome any planning difficulties.

27. The challenge was dismissed on all grounds. As regards the GPDO, it was contended that the development fell within Class B of Part 2 of Schedule permitting the formation, laying out and construction of a means of access to a highway which is not a trunk road or classified road, where that access is required in connection with development permitted by any Class in Schedule 2 (other than Class A). This turned on whether the highway to which the access related was a 'classified road'. The judge found that the Inspector had not erred in law in finding that the road in question was a classified road and had addressed the question of whether the development was permitted under the GDPO. Even if he had erred in law, the access was not required in connection with

development, as prescribed by Class B, and so the Inspector would have been bound to conclude, as he did, that the work did not constitute permitted development. On the residual grounds, the judge found that there was no evidence before the Inspector that, before the unauthorised development took place, there was a useable opening from the field at that point. In fact, all the evidence appears to have been to the contrary. Furthermore, there was no appeal under ground (f) of section 174(2) of the TCPA 1990 and the Inspector was not otherwise asked to amend the notice. The judge followed Najafi v Secretary of State for Communities and Local Government [2015] EWHC 4094 (Admin) in which it was held that an Inspector does not have a duty to consider an alternative not put to him and that, if an alternative is not put to him but he perceives an obvious means of remedying the planning difficulties by lesser enforcement, he may consider it, but is not bound to do so. In this case, there was clearly no obvious alternative. The removal of the hedging to construct the access had consequences for the amenity of the site.

#### **Corbett v. Cornwall Council [2022] EWCA Civ 1069**

28. The Court of Appeal upheld a decision that a local planning authority had not erred in deciding that proposed development was within or “immediately adjoining” an existing settlement, as required by the Cornwall Local Plan, notwithstanding that the proposed development would be separated from the settlement by the coast road and an existing 60 m long access road.
29. Planning permission had been granted on the basis that the proposed development – a single house with integrated garage - would be on land immediately adjoining the settlement (Trevarrian, a hamlet in North Cornwall). In policy terms the site was in the open countryside where specified “special circumstances” (none of which were applicable) had to be demonstrated if development were to be acceptable.
30. Lindblom LJ held in particular:
  - a) The words immediately adjoining “do not necessarily mean “contiguous” or “coterminous” or “next to” or “very near”. They allow the decision-maker to judge, on



the facts, whether the site and proposed development can be regarded as sufficiently close to the settlement in question to be “immediately adjoining” it”; (para 27)

- b) “If “adjoining” ... meant simply “contiguous”, in its literal sense of “touching”, the addition of “immediately” would not have been necessary. I agree with the judge that the effect of this word is to indicate, as she put it, “the element of judgment in whether a site is or is not adjoining, if that word is construed as including “very near” or “next to”” (para 27)

31. This paper is presented for information only and does not constitute legal advice.

**RICHARD HUMPHREYS QC**

**JACK SMYTH**

# Howard Leithead

## Planning and Environment

Year of Call: 2014

Email Clerks: [planning@no5.com](mailto:planning@no5.com)



Howard is a specialist planning and environmental barrister. He is experienced in dealing with appeals to the Secretary of State (drafting written representations and appearing in hearings and inquiries) and in representing clients in cases in courts and tribunals from the magistrates' court to the Court of Appeal.

He acts for and advises clients of all types, including developers, local authorities, campaign groups, local residents, and private individuals.

Howard accepts instructions both from professional clients and on a public access basis.

### Enforcement

The enforcement work in which Howard is engaged broadly falls into three main areas: (1) appeals to the Secretary of State against enforcement notices and other enforcement actions; (2) High Court work, such as s.289 appeals and applications for injunctions; and (3) criminal prosecutions (such as for breach of an enforcement notice, or for harm to a heritage asset) and other court work (such as s.215 notices and advertising control).

Howard is skilled at providing clear advice and advocacy and is focused particularly on helping clients to find practical solutions in an area where the law can be particularly complex.

#### Appeals:

- Land at Unit 33, Lordswood Industrial Estate, Chatham, Kent APP/U2235/C/20/3247757, represented the developer in an appeal against an enforcement notice concerned with a car park within an industrial estate
- Land at Flat 5, 28 Harrington Gardens, London, APP/K5600/C/18/3195807 (808), represented the developer in an appeal against an enforcement notice concerned with a terrace on a residential property, which was eventually withdrawn after reaching agreement with the local planning authority
- Land at Elgar Coaches, Lightwood Lane, Cotheridge, APP/J1860/C/17/3187661 (665), represented the local planning authority in an appeal against enforcement notices concerned with unauthorized operational development on a commercial site
- Land at Watercress Farm, Bristol Road, Wraxhall, APP/D0121/C/18/3194965 (994/995), represented the developer in an appeal against an enforcement notices which were concerned with the material change of use of land to a mixed use that included residential use

#### Notable case:

- Ball v Secretary of State for Housing Communities and Local Government (High Court), represented the appellant in a s.289 appeal against an appeal decision of the Secretary of State

### Development

Howard is involved in a variety of development work. Much of his work is focused on helping clients to obtain or oppose grants of planning permission, including at the planning application stage, in appeals to the Secretary of State, and in challenges in the High Court and the Court of Appeal.

He is experienced in dealing with all the main issues that arise in this context, such as heritage impact, Green Belt, interpretation of policy, landscape and visual impact, appropriateness of location and sustainable travel, five years housing land supply, highways, air quality, ecology, viability, affordable housing, and the public sector equality duty.

Other development issues that he deals with include disputes over the interpretation of planning permissions and listed building consents, section 106 agreements, lawful development certificates, applicability of permitted development rights (such as in relation to domestic projects, agricultural buildings and barn conversions), use class disputes, implications of the granting of planning permissions by mistake, and issues that arise in the context of mineral permissions.

Howard also has a particular interest in compulsory purchase disputes and has represented the Secretary of State for Transport in valuation references to the Upper Tribunal concerning properties compulsorily purchased to facilitate the development of the new HS2 Euston Station.

#### **Appeals:**

- Land off Melton Road, Burton on the Wolds, Leicestershire, APP/X2410/W/20/3264488, represented the local planning authority in an appeal against its refusal to grant planning permission for a proposed housing development (appropriateness of location, affordable housing, impact of an emerging neighbourhood plan)
- Land at Former Poultry Processing Plant, Haughley Park, Haughley, Stowmarket, APP/W3520/W/20/3258516, led by Richard Kimblin QC, represented the developer in an appeal against the refusal of the local planning authority to grant planning permission for a housing development adjacent to a Grade I listed building (heritage, appropriateness of location, commercial impact, noise, highway)
- Land at Barn, Back Lane, Darley Moor, Matlock, APP/P1045/X/19/3223796, represented the local planning authority in an appeal against its refusal to grant a lawful development certificate (time limits for enforcement action and permitted development rights)
- Land to the east of Reading Road, Lower Shiplake, Oxfordshire, APP/Q3115/W/19/3220425, led by Christopher Young QC, represented the developer in an appeal concerning the proposed redevelopment of a retirement village, (accommodation for the elderly, highways, landscape and visual impact, five years housing land supply, affordable housing)
- Land at Oakhurst Rise, Charlton Kings Cheltenham, APP/B1065/W/19/3227293, led by Satnam Choongh, represented the developer in an appeal against the local planning authority's refusal to grant planning permission for housing development appeal housing development (heritage, arboricultural, ecology, affordable housing)
- Land at Clack Hill, Kettering Road, Market Harborough, APP/F2415/W/17/3190327, acted for the local planning authority and secured a costs award against the appellant after it withdrew its appeal shortly before the inquiry was scheduled to take place (landscape and visual impact, five years housing land supply)
- William Sutton Estate, Cale Street, London, APP/K5600/W/17/3177810 (Secretary of State decision), represented Save the Sutton Estate, a Rule 6 Party, which opposed the proposed demolition and redevelopment of the Sutton Estate (heritage, design, effect on character and appearance of the area, viability)
- Land south of High Street, Tetsworth, Oxfordshire, APP/Q3115/W17/3182192, led by Jeremy Cahill QC, acted for the developer in an appeal against the local planning authority's refusal to grant planning permission for a housing development (landscape and visual impact, sustainable travel, highways, educational provision)
- Land at Foxley Lane, Binfield, Berkshire, APP/R0335/W/17/3177088, led by Christopher Young QC, represented the developer in an appeal against the local planning authority's refusal to grant planning permission for a housing development (landscape and visual impact, objectively assessed housing need, five years housing land supply, affordable housing, heritage, agricultural land, highways, sustainability, air quality and impact on a Special Protection Area (SPA))
- Mythe Bridge House, Tewkesbury, Worcestershire, APP/J1860/X/3171996, represented the local planning authority in an appeal against a refusal to grant a lawful development certificate (permitted development rights, interpretation of pre-commencement conditions)
- Land to the north of Oaks Road, Great Glen, Leicester, APP/F2415/W/17/3167654, represented the local planning authority, which did not give evidence in the appeal (landscape and visual impact, five years housing land supply, sustainable travel, drainage and flooding)
- Land at Daw Mill Colliery, Arley, North Warwickshire, APP/R3705/W/16/3149827 (Secretary of State decision), led by Christopher Young QC, represented the local planning authority, which opposed a proposed development on a former mining site (Green Belt, landscape and visual impact, ecology, noise, tranquillity, restoration plan, employment land)
- Land south east of Warwick Road, Kibworth Beauchamp, APP/F2415/W/16/3152485, represented the local planning authority, which did not give evidence in the appeal (educational provision, sustainable travel)

#### **Notable Cases**

- County of Herefordshire District Council v Secretary of State for Housing, Communities and Local Government (High Court, ongoing), represented the local planning authority claimant in s.288 statutory review concerning a residential development where the Secretary of State and the interested parties consented to judgment.
- Miah v Secretary of State for Transport; Diamond and Diamond v Secretary of State for Transport (Upper Tribunal (Lands Chamber), 2020), represented the Secretary of State in valuation references relating to properties compulsorily purchased as part of the HS2 project
- R (Besser) v Brighton and Hove County Council (Court of Appeal, 2020), led by Christopher Young QC, represented the developers of a proposed development that included a new synagogue in opposing a judicial review claim in the High Court (unled) and the Court of Appeal
- Retirement Villages Development Ltd v Oxfordshire County Council (High Court, 2020), led by Christopher Young QC, judicial review claim linked to a planning appeal concerning Land to the east of Reading Road (see above) regarding the speed limit on a stretch of road adjacent to the appeal site, which was discontinued after the Secretary of State granted planning permission
- Lucy Developments Ltd v Secretary of State for Housing, Communities and Local Government (High Court, 2019), led by Richard Kimblin QC, challenged an appeal decision in a section 288 review concerning a residential development where the Secretary of State consented to judgment
- R (Mencke) v London Borough of Islington (High Court, 2019), acted for a local resident opposing a controversial development near her property

## Environmental

Howard undertakes a range of environmental work, both within the context of planning disputes and separately.

This includes: appeals to the Secretary of State, statutory nuisance, judicial review claims, and criminal prosecutions (including those relating to waste disposal).

### Appeal:

- Nine Mile Point Industrial Estate, Cwmfelinfach, Caerphilly, ENV/3172985, represented local campaign group who opposed an application for an environmental permit for the operation of a waste recycling facility to produce solid recovered fuel and waste derived fuel (air quality)

## Other

- Opposed application to discharge extended civil restraint order in the High Court in Bozeat v Hannington Parish Council and Swindon Borough Council [2019] EWHC 2894

## Further Experience

Howard regularly writes articles and speaks about planning and environmental issues. He provides expert analysis articles for LexisPSL, appears on No5 Planning Podcasts, takes part in webinars, and gives papers at seminars and conferences. He has also contributed to several specialist publications, including the NAPE Planning Enforcement Handbook.

He is committed to education and training and is involved in training professional witnesses for planning inquiries, coaching law students, and judging mooted competitions.

## Awards

Major Scholarship, Inner Temple  
Lightfoot Prize, University of Cambridge

Exhibition Award, Inner Temple  
Senior Scholarship and Tripos Prize, Trinity College, Cambridge

## Memberships

Planning and Environment Bar Association (PEBA)

United Kingdom Environmental Law Association (UKELA)

Inner Temple

## Qualifications

GDL and BPTC, City University, London  
BA (Hons), Trinity College, Cambridge (First Class)

MPhil, Trinity College, Cambridge (Distinction)

# Sioned Davies

## Planning and Environment

Year of Call: 2019

Email Clerks: [planning@no5.com](mailto:planning@no5.com)



### Planning

Sioned has gained a broad range of planning and infrastructure experience, including at hearings, inquiries, call-ins and in the High Court, both in a led and unled capacity. This has included acting for and advising a wide range of clients including developers, national and local government, the Welsh Ministers, and other interested parties.

Recent highlights have included:

- 2 day enforcement inquiry and 1 day hearing (sole counsel)
- 8 day inquiry for 473 houses in an Area of Outstanding Natural Beauty (led by Christopher Young QC)
- 9 day hearing for mixed use development for 216 homes, 1600 square metres of commercial space (led by Christopher Young QC)
- 8 day inquiry for 45 houses with complex heritage issues (led by Christopher Young QC)
- 4 day inquiry for industrial development in the Green Belt (led by Peter Goatley QC)
- 9 day inquiry for planning permission for residential use (led by Clive Newberry QC)
- sole counsel in the High Court permission hearing
- pupil barrister shadowing the High Court and Court of Appeal proceedings in some of the most important decisions of 2020 relating to NPPF interpretation (*Gladman v SSCLG* and *Peel Investments v SSHCLG*)

Sioned's advisory practice encompasses the following areas:

- Section 106 agreements, negotiations, ransoms
- Housing land supply, land allocations and regeneration of previously developed land
- Green Belt Areas of Outstanding Natural Beauty and heritage assets
- Permitted Development and Use Classes Order
- Judicial and Statutory Review
- Injunctive relief

### Infrastructure

Sioned has gained broad experience of the infrastructure planning and consenting regimes in both England and Wales. Throughout her pupillage, she gained experience of challenges to major infrastructure projects, including offshore decommissioning projects in the North of England, to HS2, Drax Power Station, and the North London Heat and Power Project.

More recently, and in her own right, she has advised on:

- aspects of compulsory purchase and compensation for HS2
- as sole counsel on legal aspects of using Special Development Orders for border infrastructure works in light of the UK's exit from the European Union

- a Transport and Works Act Order for a 35 square kilometres commercial testing offshore tidal power demonstration zone

### Civil Orders and Injunctive relief

Sioned has a broad range of experience seeking injunctive relief in a variety of courts. This has included:

- seeking injunctive relief against direct action protestors on a major infrastructure project for trespass
- defending gypsy and travellers in injunctive relief for unauthorised development in the Green Belt
- seeking civil orders on behalf of the Metropolitan Police including for Domestic Violence Protection Orders, Sexual Risk Orders and Closure Orders, some of which included vulnerable defendants

### Environment

Sioned has a keen interest in developing her environmental law practice. During pupillage, Sioned was exposed to leading challenges relating to climate change risk assessment and climate litigation. This included challenges to the UK Emissions Trading Scheme (R (on the application of Georgia Elliot-Smith v SSBEIS).

Areas on which she has been asked to provide advice include:

- climate change legislation
- marine licensing
- flooding
- habitats regulations assessments
- environmental impact assessments

Recent work has included:

- Advising on environmental assessments in respect of residential development; road projects and border infrastructure works
- Advising on the marine licensing and assessment aspects of an offshore tidal demonstration zone
- Working as part of a team of researchers to analyse international obligations on environmental impact assessment

### Compulsory Purchase and Valuation

Sioned gained experience on a broad range of compulsory purchase and valuation matters during pupillage and has worked, in her own capacity, on a range of matters, including for HS2.

### Regulatory

Sioned has gained a broad range of regulatory law experience and of private prosecutions.

### Public and EU Law

Sioned has advised on a broad range of public law matters, judicial reviews including on matters which are devolved.

### Other information

Prior to coming to the Bar, Sioned was the Chair of a national agricultural youth charity and worked as Head of the Secretariat to the Climate Law and Governance Initiative at COP24 in Katowice, Poland. This event brought together lawyers in the global climate discussion including from states, the World Bank, Green Climate Fund and leading law firms.

### Languages

English

Welsh (fluent)

### Appointments

Government Legal Department Panel of Junior Junior Counsel

Welsh Government Junior Barrister Public Law Scheme



## Awards

Kate Bertram Prize for academic distinction (University of Cambridge)  
Bentham Award for high academic achievement (UCL)

John Frederic Whitehouse Award for highest marked law dissertation (UCL)

## Memberships

UKELA  
Young Compulsory Purchase Association

PEBA  
Administrative Law Bar Association

## Qualifications

BPP Law School - Bar Professional Training Course – Very Competent (2019)  
University College London (UCL) – Law (LLB) – First Class Honours (2017)

University of Cambridge – Environmental Law and Policy (MPhil) – First Class Honours (2018)

## **LEGAL UPDATE (2)**

- **R (Finch) v Surrey County Council [2022] EWCA Civ 187, 23 May 2022**
- **R (On the Application Of Ashchurch Rural Parish Council) v Tewkesbury Borough Council [2022] EWHC 16 (Admin), 7 January 2022**
- **Camilla Swire v Canterbury City Council [2022] EWHC 390 (Admin), 25 February 2022.**
- **R (Wyatt) v Fareham BC [2022] EWCA Civ 983, 15 July 2022**
- **Harrison CIC v Leeds CC [2022] EWHC 167, 6 July 2022**
- **Hiley v SSLUHC [2022] EWHC 1289 (Admin), 27 May 2022.**

### **1) EIA and ‘indirect effects’**

***R (Finch) v Surrey County Council [2022] EWCA Civ 187***

#### **Background**

The developer applied to the local planning authority for planning permission for the retention of two existing hydrocarbon wells for the commercial production of oil and gas and the expansion of the site by drilling four new wells.

The application was accompanied by an environmental statement (“ES”) which assessed the greenhouse gas that would be produced by the operation of the development itself, although it did not attempt to assess the greenhouse gas that would

be emitted when the crude oil produced from the site was used by consumers, typically as a fuel for motor vehicles, after being refined elsewhere.

A delegated officer of the planning authority conducted a review of the ES. The Officer concluded that it contained sufficient information to comply with the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 (“the EIA Regulations”). The planning authority granted the permission sought, accepting an officer’s report which dealt with the need for hydrocarbon supply and concluded that the development would contribute to meeting the national need to maximise indigenous oil and gas resources.

The Claimant sought judicial review of the grant of permission on the grounds that the planning authority had failed to comply with its obligations under the EIA Directive and the 2017 Regulations implementing the Directive. In particular, there was an alleged breach of regulations 3 and 4 by failing to assess the indirect greenhouse gas impacts of the development arising from the combustion of the oil it produced and/or by failing to take into account the environmental protection objectives established by the United Kingdom which were relevant to the project.

The Claimant’s central complaint was that the “downstream” greenhouse gas emissions which would inevitably result from the combustion of end products emanating from crude oil produced at the site ought to have been estimated and assessed as an indirect, long-term, negative effect of the development on the environment. Proceeding on the agreed basis that the eventual combustion of the refined products of the oil extracted at the site was inevitable, the Judge in the High Court dismissed the claim, holding that, under the 2017 Regulations, the true legal test of whether an impact constituted an indirect likely significant effect of the development on the environment was whether it was an effect of the development for which planning permission was sought.

In the High Court, the Judge also held that the scope of the EIA required under the 2017 Regulations did not include the environmental effects of consumers using, in locations which were unknown and unrelated to the development site, an end product which would be made in a separate facility from materials to be supplied from the development

being assessed; and that therefore the assessment of “downstream” greenhouse gas emissions from the future combustion of refined oil products said to emanate from the development site was, as a matter of law, incapable of falling within the scope of the EIA required by the 2017 Regulations for the planning application. Alternatively, it was held that the decision of whether such an assessment ought to be carried out as part of an EIA is a matter of judgment for the planning authority subject to judicial review on grounds of irrationality. The planning authority’s judgment that greenhouse gas emissions from the combustion of refined fuels were not an environmental effect of the proposed development was not beyond the range of conclusions which a rational decision-maker could lawfully reach.

### Court of Appeal

Sir Keith Lindblom SPT and Lewison LJ held that, in considering whether a particular impact on the environment was a “likely significant [effect]”, whether “direct” or “indirect”, of “the proposed development” or “the project” under the Directive or the Regulations, the real question was not the meaning of the concepts of “the project” and “the proposed development”, but the meaning of the concept of “effects”- in particular, the focus was on “indirect” effects, of the proposed development and the degree of connection needed to link the development and its putative effects.

It was not appropriate to include a non-statutory gloss to express that degree of connection. That whether there was a sufficient degree of connection between the two was ultimately a matter of fact and evaluative judgment for the relevant planning authority as decision-maker, subject to the scrutiny of the court on public law grounds; and that, therefore, it was not possible to say that “downstream” greenhouse gas emissions from the future combustion of refined oil products said to emanate from the development site were legally incapable of being an environmental effect requiring assessment under the legislation.<sup>1</sup>

Dismissing the appeal (Moylan LJ dissenting) the Court held that the crude oil extracted at the application site could only find its way to the various uses that might be responsible for the impacts in question once it had passed through several other distinct

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<sup>1</sup> §§38–43, 141.

processes and activities. The environmental effects of “downstream” emissions could reasonably be seen as far removed from the proposed development itself, and not causally linked to it, because of the series of intervening stages between the extraction of the crude oil and the ultimate generation of those emissions. These were remote enough for the local planning authority lawfully to conclude that it did not qualify as one of the “likely significant effects of the proposed development” on the environment. Accordingly, the planning authority had been entitled to conclude that the “downstream” greenhouse gas emissions were not sufficiently connected to the proposed development to require their assessment as indirect effects under the Directive and the 2017 Regulations.<sup>2</sup>

### Practical points

The case grapples with the question of whether the EIA regulations require the ES to include an assessment of the impacts of greenhouse gas emissions arising from development by some later, end user.

There are several key takeaways from the judgment.

- (1) The judgment says that an EIA must address the particular development under construction, not some further or different project. It reaffirms, for example, that an EIA for the proposed exploration of shale gas was not legally required to include the effects of the potential later commercial extraction.<sup>3</sup> Likewise, an assessment of an energy recovery facility was not legally required to extend to the impact of combined heat and power pipelines running from the application site, which would be the subject of another planning permission.<sup>4</sup> The environmental statement therefore needs to consider the impacts arising from the development for which permission is sought.
- (2) The key point is that the existence and the nature of the ‘indirect’, ‘secondary’ or ‘cumulative’ effects will always depend on the particular facts and

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<sup>2</sup> §60, 61, 63–66, 93, 149–150.

<sup>3</sup> *Preston New Road Action Group v SSCLG* [2018] Env LR 18

<sup>4</sup> *R (Khan) v Sutton London Borough Council* [2014] EWHC 3663 (Admin)

circumstances of the development under construction. Where an EIA has to address the ‘indirect’ effects of a proposed development, it must include a sufficient assessment of such effects<sup>5</sup>. We would urge that care be taken over this issue.

- (3) Ultimately, establishing what information should be included in an ES (and whether or not the information is adequate) is for the relevant planning authority, subject to the court’s jurisdiction on conventional public law grounds. The applicable standard of review is *Wednesbury*. Whilst it is helpful to be as comprehensive as possible, ensuring that ES’ meet the standard of information that the authority require is important.
- (4) The authority will need to decide if there is a sufficient causal connection between the proposed development and the impacts of the greenhouse gasses which is a question of fact and judgment for the decision-making authority.
- (5) The Court leaves open the question of whether, in different circumstances involving development for the extraction of hydrocarbons, “downstream” impacts might properly be regarded as “indirect” effects on the environment, so that it would be reasonable and lawful for a local planning authority in those circumstances to require their assessment (post, § 67). In other words, there may be developments which give rise to greenhouse gases where such effects, do need to be assessed.

Permission to appeal to the Supreme Court was granted on the 9 August 2022.

The Court of Appeal’s decision will not be the final word on this issue.

## **2) EIA and Screening**

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<sup>5</sup> *R (Squire) v Shropshire Council* [2019] Env LR 36 §39 and 69 of the leading judgment holding that the EIA for an intensive poultry rearing development was defective because it failed to properly consider the impact of odour and dust produced by poultry manure spread on surrounding farmland.

□ ***R (on the Application of Ashchurch Rural Parish Council) v Tewkesbury Borough Council*** [2022] EWHC 16 (Admin) (07 January 2022)

This case was an unsuccessful challenge of the grant of permission of a road bridge over the Bristol to Birmingham railway, north of Ashchurch which was required for access to a future garden town for 826 homes.

The focus of the challenge was on the lawfulness of the grant of planning permission for the bridge, where it was alleged that the committee had been wrongly informed that the officer's report could take account of the benefits of building the bridge (facilitating largescale development), but not to take account of the harms that might arise from such a development.

The second ground argued that the Defendant failed to comply with the EIA Regulations as the screening report relating to the bridge concluded that it would not be likely to have significant effects on the environment and did not consider the environmental effects of the wider large-scale development. As a result, the Claimant said that the council reached an unlawful decision that an EIA assessment was not required.

The third ground argued that involvement of certain members and officers of the Defendant in the development and implementation of the proposed Tewkesbury Garden Town, constituted a breach of the Defendant's EIA duties regarding objectivity and bias.

High Court

The first ground was dismissed. Lane J found that it was rational for the report to reference the bridge's facilitation of the garden town and that the bridge would deliver planning benefits even if delivered before the garden town.

Ground 2 was dismissed as the Claimant failed to show any error of law in the screening report. The Court found that the applicant had not attempted to 'salami slice' elements within a masterplan to evade proper scrutiny under the EIA regulations. The Court found that the application for the garden town (plus the highway works associated with that proposed development) would govern the planning application. The effects of the bridge would then be considered.

On Ground 3, Lane J found that the Planning Committee was considering the application for the bridge, which was not EIA development. Therefore, the committee was not performing any duty under the EIA regulations. There was no evidence that the person responsible for drafting the screening report was then involved in promoting or assisting in the promotion of the bridge project. Ground 3 was also dismissed.

There is an appeal outstanding.

### **3) EIA and Habitats Regulations**

#### ***R (on the application of Camilla Swire) v Canterbury City Council [2022] EWHC 390 (Admin)***

##### **Background**

On 12 November 2018, the Council granted outline planning permission on allocated land at Cockerling Farm, Thanington for up to 400 dwellings, commercial and community floorspace and new highway infrastructure including a spine road, on a site to the West of Canterbury.

The site is near the River Stour and an internationally important wetland site at Stodmarsh, which is designated as a Ramsar site, a Special Area of Conservation (“SAC”), a Special Protection Area (“SPA”) and Site of Special Scientific Interest (“SSSI”). In addition, the Larkey Valley SSSI lies immediately to the south of Cockerling Road. The development had outline planning permission and was EIA development. There was an ES, as well as a parameter plan and an indicative masterplan. A Habitats Regulations Assessment was undertaken before the grant of the outline planning permission.

The development, which was the subject of outline planning permission (“OPP”), was EIA development. The Environmental Statement was submitted with the application and the EIA process was carried out leading up to the grant of the OPP. It was common ground that the application for permission was accompanied by parameter plans and an



indicative masterplan, so that the details would remain within the scope of the 'likely significant effects' assessed for the project.<sup>6</sup>

The Claimant, a local resident, brought two claims for judicial review. The first claim for judicial review, challenged the decision of the Council on 23 March 2021 to approve details of a masterplan under condition 8 of the OPP. The Claimant said that the approval was unlawful because the masterplan "materially strays outside the parameters of the OPP", in that a section of the spine road at the western end and the roundabout connection with Milton Manor Road would not accord with the vehicular access parameter plan.<sup>7</sup>

The claim was brought on four grounds:

- (1) That the masterplan approved under condition 8 conflicted with condition 6.
- (2) That there was a failure to comply with requirements for Environmental Impact Assessment (EIA) and Habitats Regulations Assessment (HRA).
- (3) Ground 3 was not pursued at the hearing.
- (4) That the masterplan approved under condition 8 did not comply with the relevant conditions because, in part, the information submitted on the sustainable urban drainage system (SUDS) was only "indicative" or "illustrative".

The second claim is of limited relevance for these purposes, so we have not dealt with the issues raised therein here.

### High Court

Ground 1 of the first judicial review was not made out, for the following reasons.

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<sup>6</sup> see e.g. *R v Rochdale Metropolitan Borough Council ex parte Milne. (No.1)* [2000] Env. L.R. 1; *R v Rochdale Metropolitan Borough Council ex parte Milne (No.2)* [2001] Env. L.R. 22.

<sup>7</sup> There were also a further five claims which were stayed pending the outcome of the two proceedings.

- The interpretation of a planning permission is an objective question of law, it is irrelevant to ask what the intentions of the parties were involved in its genesis or to have regard to the subsequent conduct of any such party (§40)
- The degree of conformity required by condition 6 depended upon a combination of inter-related factors: the meaning and effect of the words "in accordance with", the nature of the parameter plans to which condition 6 relates, and how condition 6 sits with other conditions of the outline planning permission. "In accordance with" was found to mean in agreement or 'in harmony with' - draftsman of a planning permission may go further and require this to be 'exactly' or 'strictly' in accordance with. This was not the case here (§43)
- Deciding whether a development is in conformity or harmony with parameter plans may well involve matters of planning judgment and degree. While some of the relevant parameter plans in this case established clearly defined maxima, others were more diagrammatic in nature, their object being to show the principles of the overall scheme and its main components, with which the details subsequently submitted for approval must accord. This included the approved masterplan. The permission did not require rigid adherence to plans, particularly where they were schematic/diagrammatic.
- The Judge found the approval of the masterplan did not conflict with any of the parameter plans in condition 6 or involve any misinterpretation of the permission and the Defendant did not grant an approval going beyond the scope of the permission (§63)

Ground 2 was that the approval of the masterplan was unlawful under Condition 8 of the Outline Planning Permission as this was a 'subsequent consent', and therefore unlawful because an EIA was not carried out in respect of the development. It was alleged that because the Council failed to assess two elements of the masterplan that differed from the parameter plan (namely the relocation of the access road by 5m), the decision was unlawful.

Similarly, the Claimant submitted that the approval of the masterplan under Condition 8 was unlawful because the Council failed to carry out a HRA. It was contended that such an assessment is to be carried out before the masterplan was approved because of Natural England's change of stance on the potential effect of wastewater discharges on the SPA and SAC at Stodmarsh.

Ground 2 was also not made out. In respect of the challenge to the EIA:

- The approval of the masterplan under condition 8 of the outline planning permission was a "subsequent consent" within the meaning of the EIA Regulations reg.2(1) and consequently an EIA was required to be carried out under reg.3.
- As a s.73 application, if granted, it would have resulted in a fresh outline permission for the entire development, it was unsurprising that the Council concluded that that project would constitute EIA development.
- The Council had stated that Redrow could consider whether the alterations involved in a relatively modest element of the overall scheme, would give rise to any new or materially significant environmental effect not addressed in the ES accompanying the outline application and whether any further environmental information needed to be provided.
- The Defendant in its advice to the interested party, Redrow Homes had well in mind the same factors as are required to be taken into account when applying the EIA Regulations reg.9(2) and (3) to an application for subsequent consent (§81)
- The authority acknowledged that no further environmental information might be needed for those changes in the project which were subsequently put forward in the application under condition 8 for approval of the masterplan (§81).

The aspects of Ground 2 relating to the HRA were not made out either

- There was nothing to suggest Natural England had an objection in principle which could not be resolved by mitigation, or that the issue and HRA should be addressed prior to determining the condition 8 application (§93)

- Natural England was content for the subject to be dealt with under applications for approval of reserved matters. A second HRA was being undertaken which would address the nutrient neutrality issue. Applying *R. (on the application of Wingfield) v Canterbury CC* [2019] EWHC 1974 (Admin), for the purposes of the Habitats Regulations
- there is no decision authorising the implementation of the project in the case of a multi-stage consent until reserved matters are approved. Reserved matters approval is the "implementing decision". Unlike the EIA Regulations, there is no legislative objective requiring HRA to be carried out at the earliest possible stage. Accordingly, HRA may lawfully be completed at the reserved matters stage, even if not carried out prior to the grant of outline permission.

Ground 3 was not pursued.

Ground 4 of the First Claim was also not made out. The officer in her delegated report referred to the Claimant's concerns raised in correspondence and was satisfied that sufficient detail had been provided by the interested party. Her satisfaction with this aspect of the masterplan was not open to challenge in Court, applying the *Wednesbury* standard of review.

#### Practical points

In effect, this case was a late attack on the grant of an outline permission - an approach the courts have frequently deprecated. It underlines the importance of ensuring that, at discharge of conditions stage, the development continues to be within the 'envelope' of environmental effects considered at the outline planning permission stage. It also underscores the differences between the EIA and HRA regimes: that HRA could be carried out up until reserved matters stage, which in contrast to EIA, has to be carried out at the earliest possible stage of considering a proposal.

#### 4) EIA and nutrient neutrality

*R (Wyatt) v Fareham BC* [2022] EWCA Civ 983

## Background

Fareham Borough Council (“the Council”) granted outline planning permission for the development of eight houses. The site was near to the River Hamble and the Solent and Southampton Special Protection Area (“the SPA”), a European protected site. The SPA provided aquatic habitats for many species of plants and birds, which were vulnerable to the excess deposition of nutrients, especially nitrogen compounds in wastewater, which cause the growth of algae.

As well as being the relevant local planning authority (“LPA”), it was the “competent authority” for the purposes of reg. 7 of the Conservation of Habitats and Species Regulations 2017 (“the Habitats Regulations”). In its role as competent authority, the Council was required by reg. 63 of the Habitats Regulations (“regulation 63”) to undertake an “appropriate assessment” to ensure that the development would not adversely affect the integrity of the protected site.

In carrying out the appropriate assessment, it had regard to guidance published by Natural England concerning “nutrient neutrality”, which was issued under s.4 of the Natural Environment and Rural Communities Act 2006: “Advice on Achieving Nutrient Neutrality for New Development in the Solent Region (Version 5 – June 2020)” (“the NE Guidance”). The NE Guidance indicated that when granting planning permission, an LPA would need to secure appropriate mitigation measures if the development were likely to generate greater levels of nitrogen than would the existing lawful use of the site. In calculating average land use figures in calculating the baseline nitrogen deposition from the site, the Council used average land use figures and it based its calculation of how much the proposed development would produce on a national average occupancy rate for new dwellings of 2.4 persons per dwelling and applied a 20% buffer.

Natural England, which was consulted as statutory consultee in reg.63(3) of the Habitats Regulations, did not object to the approach taken by the Council.

Mr Wyatt, the Chairperson of a local objectors’ group, objected to the approach that the Council had taken. He argued that the use of the buffer was irrational as there was no evidential basis for it and he also expressed his concern regarding the occupancy rate.

In recommending the grant of planning permission, the Council's planning committee concluded that, given the mitigation measures proposed, there would be no adverse effect on the integrity of the site.

Mr Wyatt challenged the Council's decision to grant planning permission in the High Court. While the Judge, Jay J, was critical of some aspects of the NE Advice and of the Council's use of an occupancy rate of 2.4 persons per dwelling in this case, he concluded that it was appropriate to consider the issue on a Wednesbury basis<sup>8</sup> and said that it was inappropriate for him to intervene.

He further argued that the Council had failed to perform its duty under s.38(6) of the Planning and Compulsory Purchase Act 2004 ("PCPA 2004") ("the s.38(6) duty") to determine the application in accordance with the development plan unless material considerations indicated otherwise. While the Judge was critical of the Officer's Report ("OR") in some respects, he said that the duty had been discharged.

Mr Wyatt appealed to the Court of Appeal.

### Court of Appeal

There were two main questions for the Court of Appeal to answer:

- 1) Did the Council lawfully perform its duty to make an appropriate assessment under reg. 63 when it granted planning permission?
- 2) Did the Council comply with its duty under s.38(6)?

### 1) Regulation 63 duty

The Court of Appeal held that the Council did not fail to perform its duty under reg. 63. It said that the duty required the Council to make an "evaluative judgment" as

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<sup>8</sup> Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223. Lord Green MR gave three conditions on which it were possible for the court to intervene to correct an administrative decision, which included (at p.230) that the decision was "so unreasonable that no reasonable authority could ever have come to it."

“competent authority” and that the conclusion it reached as a matter of evaluative judgment was legally sound.

In his judgment with which the rest of the Court agreed (though Males LJ provided further reasoning), Sir Keith Lindblom SPT did not fault the approach taken by the Judge in the High Court below and rejected the various criticisms made. He said that the High Court Judge knew that he had to establish whether in all, the circumstances, the Council had reached a reasonable and lawful conclusion, as a matter of its own exercise of evaluative judgment, in ascertaining whether the high threshold set by the duty under reg. 63 had been met. He further said that the High Court Judge had applied an appropriately intense standard of scrutiny, consistent with the proper application of Wednesbury principles in the light of the jurisprudence. The duty of the court, he said was to ensure that the Council’s evaluative judgment was lawfully exercised.

Sir Keith Lindblom SPT further said that he did not think that there could be any proper challenge to the lawfulness of the NE Guidance, noting that it seemed to have been the real target for Mr Wyatt. He emphasised that the Guidance was not statute, but an advisory document, that was neither mandatory nor prescriptive of a single correct procedure to be followed.

## 2) Section 38(6) duty

Sir Keith Lindblom SPT said that this was an issue to be dealt with “in the spirit of realism and common sense to which this Court has often referred” and referred, *inter alia*, to his judgment in *R (Mansell) v Tonbridge and Malling BC* [2019] PTSR 1452. There he said (at §42) that an OR should not be read with undue rigour, but with reasonable benevolence and bearing in mind that it is written for councillors with local knowledge.

He further said (at §97) that, while he would accept that the officer’s assessment “may, in part, be infelicitously expressed”, he did not accept that it was unlawful and that, reading the report fairly, he could not conclude that the members had been materially misled.

Consequently, the Court dismissed the appeal.

### Practical points

In relation to the reg. 63 duty, the NE Guidance that was considered in this case no longer applies. NE issued further guidance on nutrient neutrality in March 2022. However, the way in which the Court approached the issue remains relevant. Sir Keith Lindblom SPT emphasised in his judgment that the Court was not to perform the authority's evaluative judgment, but to determine whether that judgment was lawfully exercised deploying the Wednesbury standard of review.

Further, the judgment serves as a reminder that guidance is not statute and that an LPA can (and sometimes should) depart from it where there is good reason for doing so.

As to the criticism of the OR, this judgment again demonstrates the reasonable benevolence with which the courts will read such reports. Both the High Court and the Court of Appeal were critical of aspects of the OR, but ultimately the challenge failed.

### **5) Need to have regard to the development plan**

□ *Harrison CIC v Leeds CC [2022] EWHC 167*

### Background

The Claimant, TV Harrison CIC ("TV Harrison"), was a community interest company. It challenged the decision of the Defendant, Leeds City Council ("the Council"), to grant itself outline planning permission for up to 61 affordable dwellings on land at Oldfield Lane in Wortley ("the site") by means of a judicial review claim. The site was a longstanding sports field that was used for informal leisure and recreational activities and, following recently completed restoration work, was used as a sports field. It was partly owned by the Interested Party, Leeds Schools' Sports Association.

There were four grounds of appeal. Permission had previously been granted on Grounds 1 and 3, which were before the Court for substantive determination. The court was further required to consider TV Harrison's renewed application for permission in respect of Grounds 2 and 4 and to determine those grounds if appropriate.

### Judgment



### Ground 1: failure to have regard to Policy N6

TV Harrison alleged that in failing to take into account Policy N6 (“Policy N6”) of the Leeds Unitary Development Plan (“the LUDP”), which restricted the development of playing pitches, the Council had erred in law in that it failed to have regard to the relevant policies of the statutory development plan contrary to its statutory duties under s.70(2) of the Town and Country Planning (“TCPA 1990”) and s.38(6) of the PCPA 2004. The Council argued that, while the OR should have mentioned Policy N6, the failure to do so did not render the decision unlawful as there was an overlap between Policy N6, §99 of the NPPF, and the Council’s Site Allocations Plan (“the SAP”), which was adopted after the LUDP and which allocated the site for housing.

The judge agreed with TV Harrison. He said that Policy N6 was clearly of relevance and that, moreover, the site had been identified as a “protected playing pitch” on the map that accompanied the LUDP. He further said that, while NPPF §99 was similar to Policy N6, there were relevant differences in substance and that, while the NPPF was a material consideration, it did not have the same statutory status as a policy which formed part of the development plan.

### Ground 3: failure to have regard to NPPF paragraph 99a, and/or to obtain further information

NPPF paragraph 99 provided:

“Existing open space, sports and recreational buildings and land, including playing fields, should not be built on unless:

- a) an assessment has been undertaken which has clearly shown the openspace, buildings or land to be surplus to requirements; or
- b) the loss resulting from the proposed development would be replaced byequivalent or better provision in terms of quantity and quality in a suitable location; or
- c) the development is for alternative sports and recreational provision, thebenefits of which clearly outweigh the loss of the current or former use.”

TV Harrison argued that it was not open to the Council rationally to conclude that a recognised playing field was surplus to requirements such that the exception under NPPF §99(a) applied in the circumstances. However, the Judge said that the errors in the OR that TV Harrison relied on were very far from being sufficiently material that a failure to refer to them meant that the planning committee was misled. He further concluded that it was rationally open to the Council to conclude on the basis of a 2011 assessment that the site was surplus to requirements and that a further assessment was not required.

In any event, the Judge said that even if he had decided that it was not open to the Council to conclude that the §99(a) exception applied, this would not be a basis for quashing the decision as it was appropriate for the OR to set out a series of alternative or different reasons leading to the same conclusion, which included that the exception under NPPF §99(b) applied.

#### Ground 2: the reasons for the decision were inadequate

TV Harrison argued that fairness required that the Council give reasons for the decisions beyond those set out in the OR in the circumstances, which were said to include that there was substantial opposition to the proposal, that there was arguably a failure to comply with the development plan, and that the Council was granting planning permission to itself. It was argued that the reasons in the OR were inadequate as a number of alternatives were listed, some of them illegitimate, and that it was not possible to know whether the members of the planning committee had all reached the decision for the same, or for different, reasons and that some of the reasons might have been illegitimate.

The Council argued that there was no duty to give reasons in the circumstances of the case and that, even if there were such a duty, the reasons in the OR were adequate.

In concluding, the Judge said that, while the Council was obliged to give reasons for the decision, that duty was capable of being discharged by the OR in the present circumstances. He further said that it was legitimate for the OR to set out alternative or different reasons for a single conclusion. The Judge said that it would be artificial and

unnecessary to assume that the adoption of the reasoning in the report was anything less than total in the absence of a particular indication to that effect.

Ground 4: the OR was materially misleading as to the satisfaction of NPPF paragraph 99(b)

TV Harrison argued that the OR was materially misleading in advising the members of the planning committee that a condition securing the requirements of the SAP would be sufficient to meet the requirements of NPPF §99(b) and that the planning committee therefore failed to have regard to a material consideration. However, the Judge said that the adequacy of a condition was a matter of planning judgment and that, while there was scope for the differing views as to the type and rigour of condition required, the condition did operate to impose significant restrictions on the development of the site in the absence of alternative sports provision.

The Judge concluded that the ground was not arguable and he refused permission to renew it. He further commented that, while he did so without reference to the Council's argument that the ground was academic as it had decided that planning permission ought to be granted, it had considerable force.

Relief

Finally, the Judge considered whether relief should be refused under s.31(2A) of the Senior Courts Act ("SCA 1981"). He concluded that it should not and said that he could not be satisfied that it was highly likely that the outcome would not have been substantially different if the Council had, as it should have done, had regard to Policy N6. The Judge explained that even if consideration of the policy had not led to a refusal of permission, it could have led to the imposition of a different condition or conditions to ensure the provision of replacement playing pitches. Consequently, he said that the decision would be quashed.

Practical points

First, the judgment emphasises the importance of the development plan and the need to comply with the statutory duties to have regard to it under s.70(2) of the TCPA 1990

and s.38(6) of the PCPA 2004. Even where a site is allocated for housing, there is still a need to consider all the relevant development plan policies.

Secondly, the judgment confirms that reasons will not normally be required where members agree with the recommendation of an officers' report. The Judge decided that there was no requirement for the members of the relevant committee to provide further reasons in circumstances where: a) the members accepted the recommendation of the officers' report (OR), but b) the OR provided alternative reasons for that recommendation. However, if members agreed with the recommendation of an OR, but became aware that its reasoning was materially deficient, it would be prudent for them to clarify their reasoning.

Thirdly, in the context of judicial review challenges of decisions to grant planning permission, the judgment shows that, when a court considers whether it is highly likely whether the outcome would have been substantially different in deciding whether to refuse relief under s.31(2A) of the SCA 1981, it is not simply a matter of considering whether it is highly likely that planning permission would have been granted were it not for the error. In this case, it was sufficient that a different condition, or conditions, might have been imposed as that could have been a difference of substance in the outcome.

## **6) Curtilage**

### **□ Herbert Hiley v SSLUHC [2022] EWHC 1289 (Admin)**

#### **Background**

The Appellant applied to East Lindsey District Council ("the Council") for a lawful development certificate under s.192 of the TCPA 1990 to establish the lawfulness of the proposed development of a steel-clad workshop and storage building with associated hardstanding and vehicular access ("the proposed development") on an industrial site.

He argued that the proposed development constituted permitted development under Classes H and J ("Classes H and J") of Part 7 of Schedule 2 of the Town and Country (General Permitted Development) (England) Order 2015/596 ("the GPDO").

The Council refused to grant the certificate and the Appellant appealed to the Secretary of State. The appeal turned on whether a green field and a pond predominantly bounded by a hedge on which it was intended that the proposed development would be built formed part of the curtilage of the adjacent industrial buildings.

In dismissing the appeal, the Inspector decided that the proposed development was not within the curtilage of the industrial buildings and therefore did not benefit from the permitted development rights under Classes H and J.

The Appellant then challenged the Inspector's decision by means of an application for statutory review under s.288.

### Judgment

#### Case law on curtilage

In the High Court, Knowles J considered the law on curtilage and referred to the definition of curtilage in *Methuen-Campbell v Walters* [1979] 1 QB 525 ("*Methuen-Campbell*"). Here Buckley LJ said (at p543E-G) that in answer to the question "What then is meant by the curtilage of a property?", the land must be

"so intimately connected with [the building] as to lead to the conclusion that the former in truth forms part and parcel of the latter."

The Judge further considered the recent case of *R (Hampshire CC) v SSEFRA* [2022] QB 103 (which he referred to as "*Blackbushe Airport*" as the case was concerned with land at Blackbushe Airport in Hampshire). He noted that, in *Blackbushe Airport*, the Court of Appeal confirmed that the correct test for curtilage was that set out in *Methuen-Campbell*, quoted above.

The parties also agreed that the following propositions could be distilled from *Blackbushe Airport* (see §20):

- "a. There are some words or expressions which are like an elephant; its essence is difficult to put into words, but you know it when you see it. "Curtilage" is a word of that nature ([50]);

- b. It is not possible to give a comprehensive definition of 'curtilage' and it would be 'most inadvisable' to try to do so ([50];
- c. The focus should be on the building whose curtilage is to be ascertained ([47] and [69]);
- d. The determination of what is the curtilage is is a matter of fact and degree for the decision-maker, taking into account the relevant considerations ([116]);
- e. There is no prescribed or exhaustive list of relevant factors ([114]);
- f. One needs to ask whether the land in question is so intimately associated with the building as to lead to the conclusion that the land forms 'part and parcel of the building' ([61]-[62] and [127]). Applying that test, one may conclude that the land and building together constitute an 'integral whole' but that is a consequence of applying the test not another way of articulating that test ([64]);
- g. The three 'Stephenson factors' (named for Stephenson LJ) identified in *Attorney General, ex r Sutcliffe v Calderdale Borough Council* (1983) 46 P&CR 399 (namely, (i) the physical layout of the listed building and the structure; (ii) their ownership, past and present and (iii) their function, past and present) are factors which may be applied; they are not determinative, and they do not displace the 'part and parcel' test ([88]-[90]). (Mr Whale criticised the Inspector for describing these factors at [17] of the Decision as 'tests' So far as it goes, that criticism is valid. They are factors be taken into account as part of the *Methuen-Campbell* test, as *Blackbushe Airport* makes clear at [88]. But as I said at the hearing, I would not quash the Inspector's Decision on that basis).
- h. 'Functional equivalence', or 'functional interdependence' is irrelevant ([47], [116]);

- i. The question whether the land and building together form part of some residential or industrial or operational 'unit' is irrelevant ([47] and [65];
- j. The test is not whether the building and land 'fall within a single enclosure' ([65]);
- k. 'Smallness' is not inherent in curtilage. There is no test that a curtilage has to be 'small', but that does not mean that relative size is an irrelevant consideration ([102] and [108]);
- l. The land does not have to be 'ancillary' to the building in order to fall within its curtilage, although whether it is ancillary is relevant and may be highly relevant ([118]);
- m. The 'curtilage' of a building is a different concept from 'the planning unit' ([115]).”

The Judge further said (at §39) that the following passage in of the judgment of Lieven J (at §18) in *Challenge Fencing Ltd v SSHCLG* [2019] EWHC 553 (Admin) (“*Challenge Fencing*”), and which was approved at §§113-115 in *Blackbushe Airport* was “helpful”:<sup>9</sup>

"18. From these cases I draw the following propositions:

- i) The extent of the curtilage of a building is a question of fact and degree, and therefore it must be a matter for the decision-maker, subject to normal principles of public law;
- ii) The three Stephenson factors [from *Calderdale*] must be taken into account;
  - a) Physical layout;
  - b) The ownership past and present;

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<sup>9</sup> Lieven J referred to the judgments in *Skerritts of Nottingham Ltd v SSETR* [2001] QB 59, *Sumption v LB Greenwich* [2007] EWHC 2776 (Admin), and *AG, ex r Sutcliffe v Calderdale BC* (1983) 46 P&CR 339.

- c) The use or function of the land or buildings, past and present.
- iii) A curtilage does not have to be small, but that does not mean that the relative size between the building and its claimed curtilage is not a relevant consideration. *Skerritts* p.67;
- iv) Whether the building or land within the claimed curtilage is ancillary to the main building will be a relevant consideration, but it is not a legal requirement that the claimed curtilage should be ancillary; *Skerritts* p.67C;
- v) The degree to which the building and the claimed curtilage fall within one enclosure is relevant, *Sumption* at para 17 and the quotation from the OED of curtilage as "A small court, yard or piece of ground attached to a dwelling house and forming one enclosure with it". In my view this will be one aspect of the physical layout, being the first of the *Calderdale* factors.
- vi) The relevant date on which to determine the extent of the curtilage is the date of the application; but this will involve considering both the past history of the site, and how it is laid out and used at the time of the application itself; *Sumption* at [27]. It appears from *Sumption* that the Judge considered future intended use of the land or buildings may be relevant, but in my view some care would be needed in applying this proposition to the facts of a particular case. A developer cannot change the curtilage simply by asserting that s/he intends to use the site in a particular way in the future."

Finally, he noted that while generally approving the passage, Andrews LJ said in *Blackbushe* (at §§114 and 115):

"114. Holgate J said in the present case at [123] that the guidance in paragraph 18 of *Challenge Fencing*, although helpful, and sufficient for the purposes of that case, did not purport to be exhaustive on the approach to identifying a "curtilage," and it is important to read that decision as a whole. I would strongly endorse that observation. Just as it would be inadvisable to try and define "curtilage", there are obvious dangers in attempting to be too



prescriptive about what factors are relevant to determining the curtilage in a given case, or in trying to create an exhaustive list of them. Reading her judgment as a whole, it is plain that Lieven J did not fall into that trap. Paragraph 18 does no more than helpfully identify some important propositions drawn from some of the earlier authorities.

115. What matters for present purposes is that (i) Lieven J approached the question on the basis that the 'part and parcel' test adopted in *Dyer* but taken from *Methuen-Campbell* was correct; and (ii) she expressly acknowledged (at [31]) that, whilst the facts that the land and building were being used together and were closely related to each other were relevant considerations, there may be situations where the planning unit is different from (and almost certainly larger than) the curtilage of the building. The two concepts are not the same."

### Conclusions

The Judge concluded that the Inspector had made numerous errors when deciding whether the proposed development came within the curtilage of the industrial buildings.

For instance, the Judge said (at §41) that the Inspector erred when he referred to curtilage being "a feature constrained to a small area about a building" and that the considered land "must be part of the enclosure" with the building.

Consequently, the judge allowed the statutory review, quashed the decision of the Inspector, and remitted the decision to the Secretary of State for redetermination.

### Practical points

The leading judgment on curtilage remains that of the Court of Appeal in *Blackbushe Airport* and the judgment in *Hiley* does not add anything in terms of the interpretation of the law. (In fairness to the Inspector, the decision in *Blackbushe Airport* was handed down between the hearing before him and the issuing of his decision and it was not brought to his attention.)

However, the judgment is useful in practical terms as it succinctly sets out many of the key points in *Blackbushe Airport* and sets out many of the pitfalls.

These can be seen particularly clearly in the legal propositions agreed between the counsel quoted above, which clearly set out what the test is not as well as what it is. For instance, if a decision-maker directs themselves that a curtilage is something that is “small” or considers whether the relevant building and land fall within a “single enclosure”, or takes into account the “functional interdependence” of the relevant building and land, they will be inviting legal challenge.

Further the principles summarised by Lieven J in *Challenge Fencing*, notwithstanding the words of caution quoted by Andrews LJ in *Blackbushe Airport* and then again by Knowles J in *Hiley*, will be useful to those considering the extent of a curtilage.

Decision-makers, or indeed anyone else considering the extent of a curtilage, will need to consider the judgment in *Blackbushe*. In doing, so they would do well to have a copy of the judgment in *Hiley* to hand.

Law correct as of 3 October 2022.

This paper is presented for information only and does not constitute legal advice

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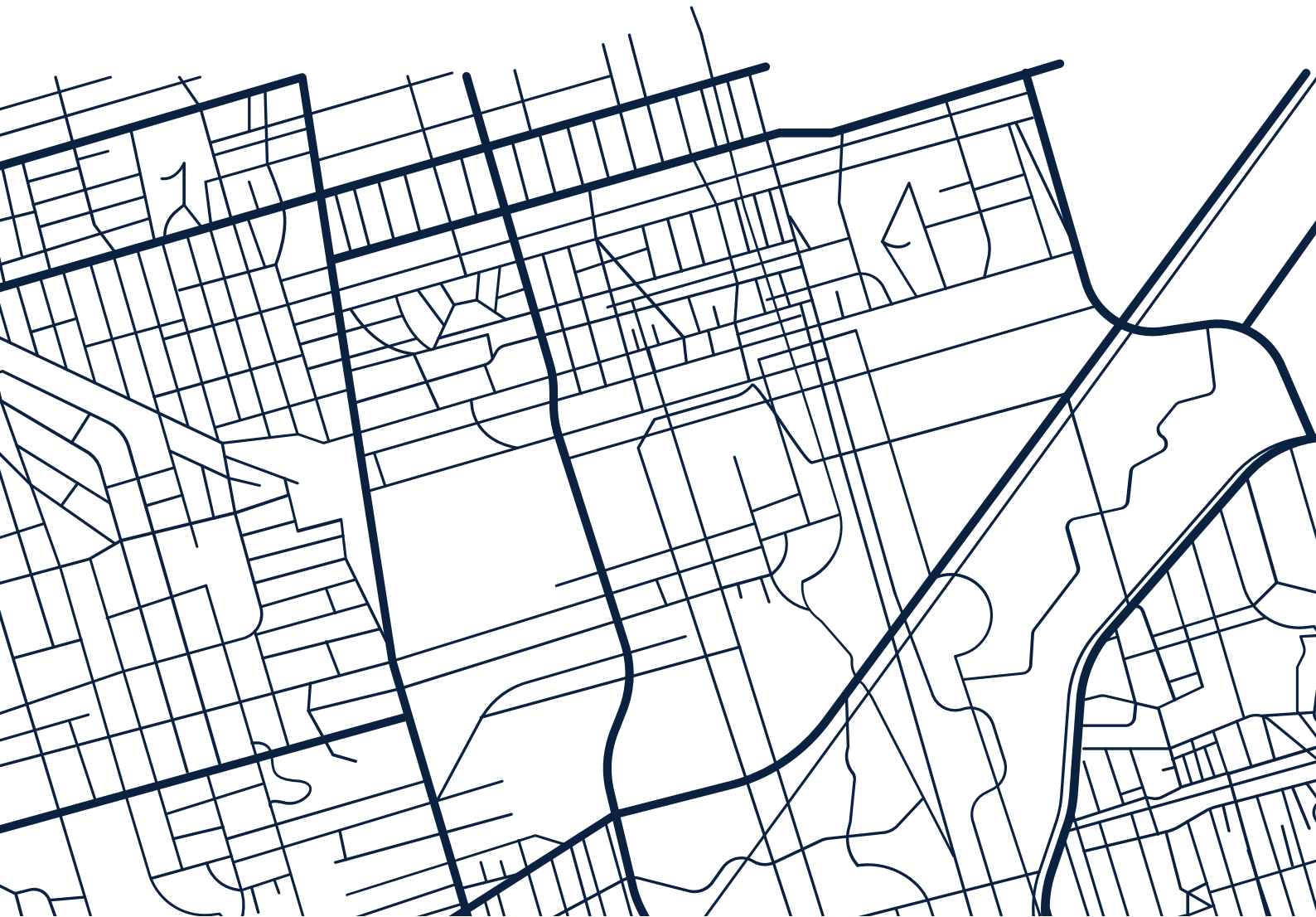
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