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Planning and the historic environment

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1. Introduction

Decision making in heritage cases

- Tilted balance (**Monkhill Ltd v. (1) SofS (2) Waverley BC** [2021] EWCA Civ 74)
- Heritage policies in local plans (**Bloor Homes Ltd v. SofS** [2017] PTSR 1283; **Safe Rottingdean v. Brighton & Hove CC** [2019] EWHC 2632 (Admin); **Peel Investments v. (1) SofS (2) Salford CC** [2020] EWCA Civ 1175; **Bramshill** – awaited)
- Report to committee – recent example (**R. On the application of Wyeth-Price and (1) Guildford BC (2) Bewley Homes Ltd** [2020] EHC 3355 (Admin))



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Tilted balance (Monkhill)

- CofA: judgment end January 2021
- Case concerned AONB
- Detailed guidance re NPPF/11 tilted balance
- References to NPPF/196





NPPF/11

“11. Plans and decisions should apply a presumption in favour of sustainable development.

...

For decision-taking this means:

c) approving development proposals that accord with an up-to-date development plan without delay; or

d) where there are no relevant development plan policies, or the policies which are most important for determining the application are out-of-date [FN7], granting permission unless:

i. the application of policies in this Framework that protect areas or assets of particular importance provides a clear reason for refusing the development proposed [FN6]; or

ii. any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole.”



Footnotes

“6. The policies referred to are those in this Framework (rather than those in development plans) relating to: habitats sites (and those listed in paragraph 176) and/or designated Sites of Special Scientific Interest; land designated as Green Belt, Local Green Space, an **[AONB]**, a National Park (or within the Broads Authority) or defined as Heritage Coast; irreplaceable habitats; **designated heritage assets** (and other heritage assets of archaeological interest referred to in footnote 63); and areas at risk of flooding or coastal change.” (Emphasis added.)

“7. This includes, for applications involving the provision of housing, situations where the local planning authority cannot demonstrate a five year supply of deliverable housing sites”



Monkhill

- 11 d) engaged by virtue of FN7 (5 year housing land supply shortfall) – J[17]
- Q: whether the inspector was wrong to interpret the first sentence of paragraph 172 of the NPPF, which says “great weight should be given to conserving and enhancing landscape and scenic beauty” in an AONB, as a policy whose application is capable of providing “a clear reason for refusing” planning permission under paragraph 11d) i of the NPPF – J[4]



And?

- Inspector was right...
 - J [28]
 - The sense of the word “provides” in paragraph 11d) i is that the application of the policy in question yields a clear reason for refusal – in the decision-maker’s view, as a matter of planning judgment (see paragraphs 51 to 53 and 63 of the judgment of Holgate J.).
 - The CofA did not accept “that a policy, when applied, can only provide a “clear reason for [refusal]” if it includes its own self-contained criteria or test, failure of which will be, or will normally be, fatal to the proposal. That is not what the policy in paragraph 11d) i says, and it is not to be inferred from the policy. Nor is there any indication in footnote 6 that this was what the Government intended.



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On the tilted balance generally...

See the Court's judgment at [18] for “15 points” on the application of the tilted balance which were matters of common ground between the parties, and “rightly so”.





Obvious parallel – NPPF/196?

Wording:

“194. [any] harm to, or loss of, the significance of a designated heritage asset (from its alteration or destruction, or from development within its setting), should require clear and convincing justification.

196. Where a development proposal will lead to less than substantial harm to the significance of a designated heritage asset, this harm should be weighed against the public benefits of the proposal including, where appropriate, securing its optimum viable use.”

- HC thought so – re NPPF/196, see J [39(13)] (in CofA judgment at [18 (13)])
- As did CofA – see J [45] & 196 & 194 must be read together...



Practical implication

- The application of heritage policy within the NPPF can dis-apply the tilted balance
- Why?
 - It is inherent in the policy that if the harm to the heritage asset is not outweighed there may be a “clear reason” for refusing planning permission. J [45]
 - Conservation of the historic environment an aspect of sustainable development. NPPF/8(c)
 - If opposite conclusion reached: risk of undermining 30+ yrs of national policy?

Heritage policies in local plans: out-of-date?

- “...or the policies which are most important for determining the application are out-of-date...” (11d))
- Housing land supply shortfall “included” as a reason why policies might be out-of-date (FN7)
- Another reason?
 - Where a plan contains relevant policies, they may have been overtaken by things that have happened since it was adopted, e.g. some change in national policy (***Bloor*** at [45]).
 - Note – 11 d) “policies” which are most important & see ***Wavendon Properties Ltd v. SofS*** [2019] EWHC 1524 (Admin) at [55] & [58]



Safe Rottingdean

- HE3 & HE6 of the 2005 Local Plan (listed buildings & conservation areas respectively)
- Drafted in absolute terms “development will not be permitted where it would have [/is likely to have] an adverse impact...”
- No “balance” element contained expressly within policy (cf. NPPF/196)
- PPG – public benefits include heritage benefits (& those which sustain or enhance significance) – PPG 18a-020-20190723
- Approach in HC – policy required an overall judgment about harms/benefits, therefore no conflict if benefits outweighed harms

Analysis

- Policy drafted in absolute terms – out-of-date as a result of the formulation of NPPF/196?
 - **Safe Rottingdean** – inferred that in the OR a balance had been undertaken within policy & decision lawful (J [58])
 - **Peel** – lawful to treat as up-to-date & give weight to policies which continue to be effective in delivering their original objectives (J [39-40], [54], [68])?
 - NPPF/213
 - Section 70 TCPA 1990, 38 PCPA 2004? **Bramshill**



Report to committee (*Guildford*)

Recent example of a decision quashed on the basis that the OR “seriously and materially mislead the Planning Committee”. It:

- (i) Did not advise members on how they were required to apply the section 66 PLBCA Act 1990 duty to the balancing exercise – that “considerable importance and weight” must be given to a finding of harm [37]
- (ii) Did not identify/summarise NPPF/193-4 & various indications that meant the HC was not prepared to infer they had been taken into account [39-41]
- (iii) On a fair reading of the OR, an un-tilted balance was applied [41(iv)]



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Planning and the Historic Environment

The news so far in 2021...

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22 February 2021

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The news so far in 2021

- *Clin v Water Lilly & Co Ltd* [2021] EWCA Civ 136
- The draft revisions to the NPPF (30 January 2021) and associated consultations
- The Written Ministerial Statement on Historic Statues, plaques, memorials and monuments (18 January 2021)



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Clin v Water Lilly (CA) – Palace Gardens Terrace, London W8



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The Facts

- Mr Clin owned nos. 48 & 50 Palace Gardens Terrace
- Water Lilly was the contractor
- Project was to carry out demolition, refurbishment and reconstruction works to form a single property
- Involved removal of entire interior, leaving the party walls (to nos.46 and 52), much of the front elevation and some of the rear elevation
- Work began in March 2013 but ceased in August 2013 when RBKC said that CAC was required
- Work resumed in August 2014 when Mr Clin had obtained CAC
- Contractual dispute over responsibility for delay



The issue

- Previous litigation had concluded implied term of contract that Mr Clin would use all diligence to obtain any permission or consent required for works
- Issue for CA was whether or not CAC was lawfully required for the demolition works
- Specifically, what is the correct approach to take when determining when construction works should be treated as amounting to “demolition” for the purpose of s.74 P(LB&CA)A?
- That question required some consideration of the principles identified by the HL in the case of *Shimizu* (relating to Listed Buildings)



S.74 P(LB&CA)A 1990 and S196D TCPA 1990

- **S74: Control of demolition in conservation areas**
 - (1) A building in a conservation area shall not be demolished without the consent of the appropriate authority (in this Act referred to as “conservation area consent”)...
- **The Enterprise and Regulatory Reform Act 2013:** repealed s74 (but still applies in Wales) and added a new requirement for “demolition planning permission”
- **S55(1)(A):** “demolition of buildings” included as a “building operation” in the meaning of development (nb s55(2)(g) exclusions by SoS Directions)
- **S196D TCPA 1990**
 - (1) It is an offence for a person to carry out or cause or permit to be carried out relevant demolition without the required planning permission.
 - ...
 - (3) In this section “relevant demolition” means the demolition of a building that—
 - (a) is situated in a conservation area in England...
- **GDPO 2015 (Class B Part 11):** “relevant demolition” under s196D is excluded from permitted development rights relating to demolition



Mr Clin argued that where a substantial part of the building remained intact consideration of the impact on the CA might be highly relevant. Two main reasons were given:

- The purpose of the legislative conservation area scheme is to preserve the character or appearance of such areas as are designated. Shimizu confirms that a building may be demolished even though part of it remains intact. In that situation at least a partly qualitative exercise of judgment (and not a purely quantitative exercise) is required. It may be highly relevant if, for example, the demolition proposed would be capable of having a significant adverse impact on the character or appearance of the CA in question.
- S.72 expressly requires that, when exercising any function under any of the provisions in any planning Act (as defined), "special attention" is to be paid to (the desirability of preserving or enhancing) the character or appearance of the CA in question. S.72 thus extends to the function of making a determination that CAC is (or is not) required, which is a separate and discrete function from the separate (and subsequent) exercise of deciding whether to grant CAC (if required).
- *Shimizu* related to demolition of listed buildings; the HL's comments on CAs were obiter.
- These reasons could arguably be extended to apply to the requirement for demolition planning permission in CAs.



Carr LJ rejected that argument for five main reasons

- Although there are two questions under s.74 (ie whether “demolition” and if so whether CAC required), the planning authority is performing a single function ie controlling the demolition of buildings in CAs. S72 is for the second question only. Parliament is unlikely to have intended for the matters identified in s.72 to be considered twice.
- The concept of paying special attention to the desirability of preserving or enhancing the character or appearance of a CA is not apt in the context of what is a fact-finding exercise as to whether or not a building is being demolished. It involves questions which go beyond simple questions of fact and degree.
- It would be wholly unrealistic to place on developers the burden of assessing the impact of proposed works on the character or appearance of a CA in order to identify whether or not CAC was required. That qualitative assessment is a matter for the planning authority.
- *Shimizu* confirms that the question of demolition is a question of fact and degree to be assessed on a quantitative basis only. There is no suggestion of any qualitative exercise to be carried out. This would apply to s74 and demolition in a CA (ie Part II of the P(LB&CA)A) just as it does to the LB regime (in Part I) (irrespective of whether HL observations obiter).
- These conclusions would be pertinent to any similar arguments in the context of “demolition planning permission”



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Draft revisions to national policy and guidance



Ministry of Housing,
Communities &
Local Government

National Planning Policy Framework

Draft text for consultation





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The draft revisions to the NPPF

- Consultation period: 30 January to 27 March
- Text has been revised to implement policy changes in response to the Building Better Building Beautiful Commission “Living with Beauty” report (Jan 2020)
- 8(c) (the overarching environmental objective of sustainable development) has been strengthened to emphasise the role of planning in protecting and enhancing our natural, built and historic environment
- 127 (chap.12): “all local planning authorities should prepare design guides or codes consistent with the principles set out in the National Design Guide and National Model Design Code and which reflect local character and design preferences” (guides/codes for plans or SPDs)
- 197 (chap.16): “In considering any applications to remove or alter a historic statue, plaque or memorial (whether listed or not), local planning authorities should have regard to the importance of retaining these heritage assets and, where appropriate, of explaining their historic and social context rather than removal.” (retain and explain)



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Update to the National Design Guide 2021

The National Design Guide:

- First published in October 2019
- To support the NPPF in achieving high quality places and buildings
- Includes the “10 Characteristics” to contribute to the cross-cutting themes for good design in the NPPF
- “Context” – well designed places and buildings are influenced strongly by:
 - History and heritage
 - Significance and setting of heritage assets
- Now updated to align with the National Model Design Code and Guidance Notes for Design Codes



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Draft National Model Design Code

- The purpose is to provide detailed guidance on the production of design codes, guides and policies to promote successful design. It expands on the ten characteristics of good design set out in the NDG
- Its objective is to give guidance to local planning authorities in developing local design codes, taking account of the National Design Guide and the National Model Design Code.
- It sets out clear design parameters to help local authorities and communities decide what good quality design looks like in their area, based on local aspirations for how their area will develop, following appropriate local consultation.
- Includes a 7 step coding process: analysis, vision and code (each broken down)
- A somewhat mechanistic approach with too much constraining detail?
- Is there enough guidance on heritage and how it should influence design of places and buildings? Should there be more cross-reference to HE guidance?



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Draft Guidance Notes for Design Codes

- The guidance note sets out possible contents for a design code, based on the ten characteristics of well designed places set out in the NDG
- “Development should always take account of heritage assets within or close to the site as defined in the NPPF. The character and distinctiveness of a place is created by the richness of the buildings that have been built up over time. Not just the individual buildings or monuments, but how they relate to each other and how they have contributed to the evolution of the place has a whole. The presence of such historic character, either directly on the site, or nearby, should always be seen as an opportunity to add value to any development by helping to provide inspiration.”
- A somewhat mechanistic approach with too much constraining detail?
- Is there enough guidance on heritage and how it should influence design of places and buildings? Should there be more cross-reference to HE guidance?



The Written Ministerial Statement on Historic Statues

- Mr J concerned that heritage assets may have been removed without proper debate, consultation with the public and due process - removal of statue in Bristol an act of criminal damage.
- He intends to make removal of any historic unlisted statue, plaque, memorial or monument subject to an explicit requirement to obtain planning permission, and to require LPAs to adhere to similar notification requirements as for listed building consent applications (requiring directions and changes to legislation).
- In considering any proposals (listed or not) LPAs must have regard to WMS 25.9.20 re “retain and explain” (see draft para 6 to NPPF).
- There is reference also to HE stance to retain and explain “to provide thoughtful, long-lasting and powerful reinterpretation that responds to their contested history and tells the full story.”



That's all the news for now...

Thank you for tuning in!

Craig Howell Williams QC

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