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Case Law Update – Part 2

5th November 2020

Cornerstone Barristers
Planning Week 2020

Planning Week 2020

Tuesday 3rd - 10am - **Case Law Update - Part 1**
Speakers: Ryan Kohli, Emma Dring, John Fitzsimons; Introduction: Josef Cannon – available online

Tuesday 3rd - 2pm - **Is Net Zero still cool?**
Speakers: Michael Bedford QC, Estelle Dehon – available online soon

Wednesday 4th - 2pm - **Panel discussion on regeneration.**
Guest speaker: Jeremy Potter, Spatial Planning Manager, Chelmsford City Council.
Panellists: James Findlay QC and Clare Parry. Moderator: Josef Cannon – available online soon

Thursday 5th - 10am - **Case Law Update - Part 2.**
Speakers: Robin Green, Emmaline Lambert, Ben Du Feu

Friday 6th - 10am - **Plan-making in a changing climate.**
Speakers: Wayne Beglan, Rob Williams

Friday 6th - 2pm - **Remote events: where are we now?**
Speakers: Dr Ashley Bowes, Ruchi Parekh

Speakers

Robin Green
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Peel Investments (North) Ltd v Secretary of State for Communities and Local Government [2020] EWCA Civ 1175

- Peel Investments applied for (and been refused) planning permission for 2 developments in 2013 and 2017
- Expiry of plan end date in 2016
- Included Policy EN2 which prohibited development which would fragment or detract from the openness of a strategically important “green wedge”

- The key to interpreting NPPF 11d in **Suffolk Coastal/Hopkins Homes** [2017] UKSC 37 is at para 55:

- *whether a policy becomes out-of-date and, if so, with what consequences are matters of pure planning judgment, not dependent on issues of legal interpretation* [71]

Oxton Farm v Harrogate Borough Council [2020] EWCA Civ 805 (25 June 2020)

- Was it lawful for the tilted balance to be applied by the LPA?
- LPA entitled to apply 11d tilted balance even where able to demonstrate a (marginal) 5 year supply of housing
- Weight given to policies matter for decision maker

R. (on the application of Corbett) v Cornwall Council [2020] EWCA Civ 508

- Extension of a holiday park for lodges
- Breach of a landscape policy which was drafted in absolute terms
- Accord with policy which encouraged tourism in general terms
- Entitled to find in accordance with DP overall

- Whether a proposal is in accordance with the development is generally a matter of planning judgment

- Lindblom LJ did clearly consider that breach of a single policy could give rise to breach of the development plan as a whole [para 42]

R. (on the application of East Bergholt Parish Council) v Babergh DC [2019] EWCA Civ 2200

- Challenges to the assessment of 5 Y HLS:

  (1) definition of deliverable; and

  (2) whether financial costs of defending appeals were wrongly taken into account

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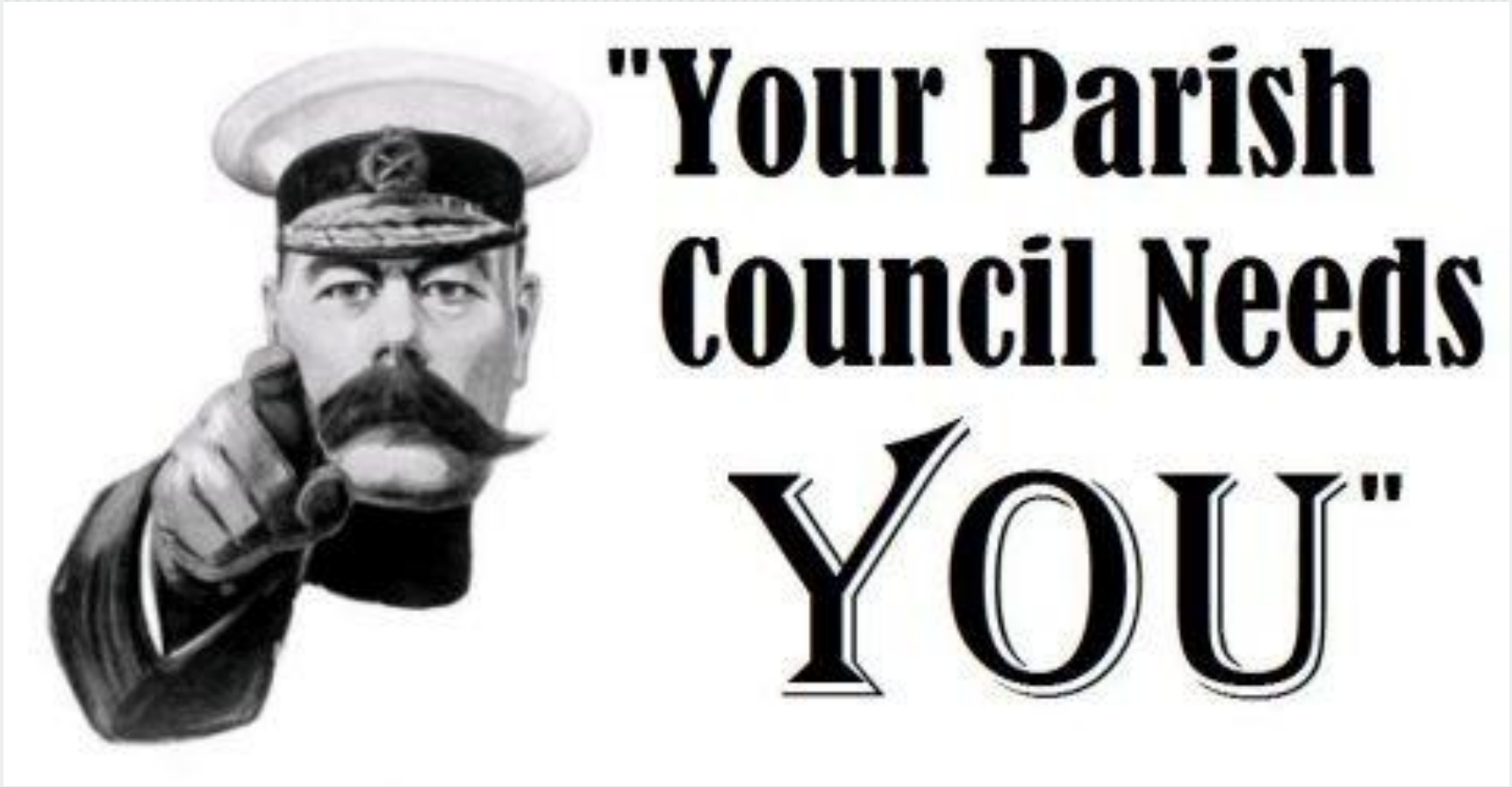
- The issue of “deliverability” is “replete with planning judgment and must always be sensitive to the facts”

- Planning judgment cannot be distorted by non land use considerations but no evidence that judgment had been wrongfully influenced

Neighbourhood Plans



R. (on the application of Wilbur Developments Ltd) v Hart DC [2020] EWHC 227 (Admin)

- Helpful summary of the legal framework for NP challenges
- Important to remember the role of the Council cf. the examiner in the NP examination process.
- Also important to remember the distinction between a neighborhood plan examination and a local plan examination when framing / responding to challenges.

Lochailort v Mendip DC [2020] EWCA Civ 1259

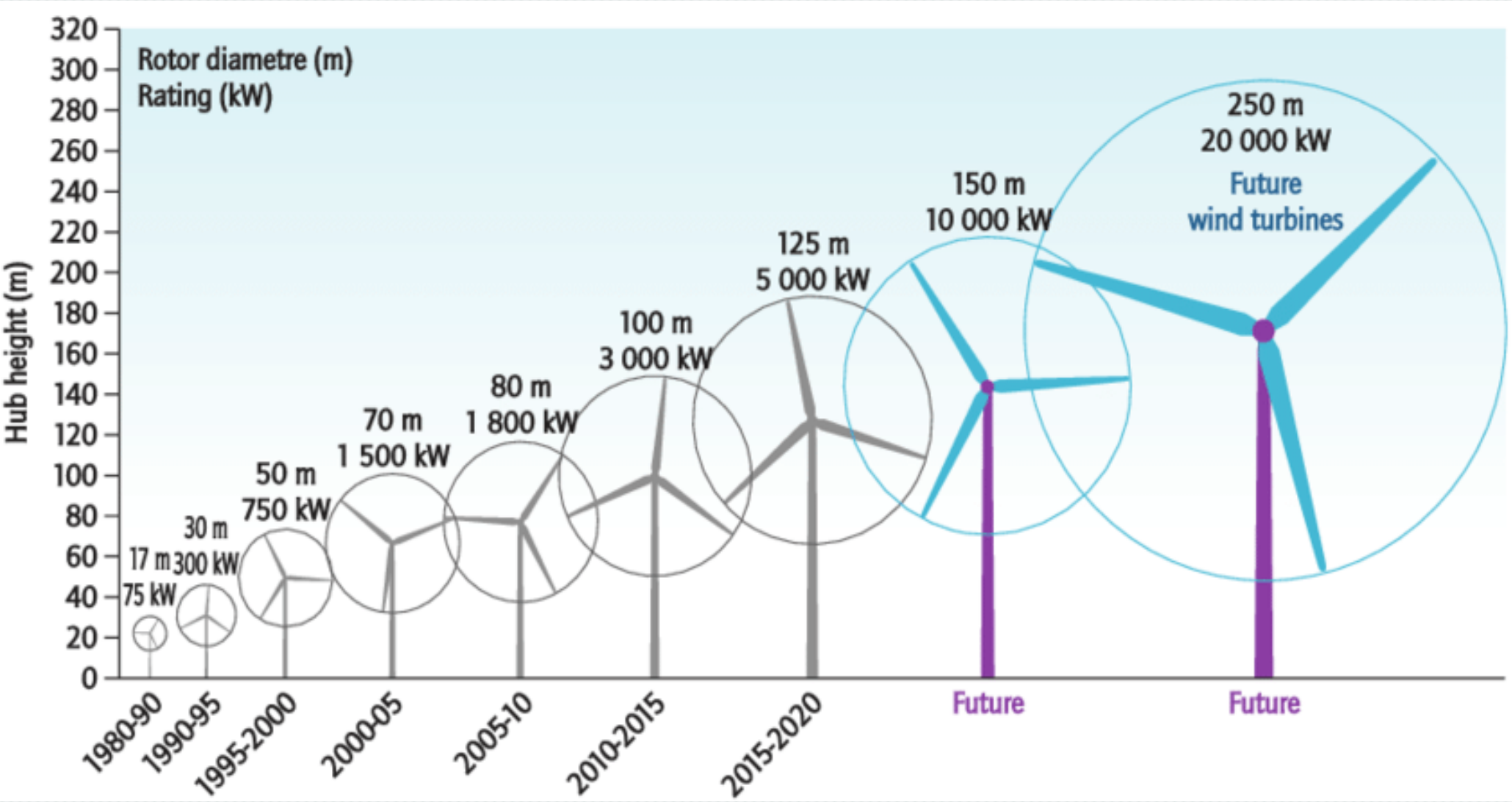
- Challenge to the Norton St Philip NP. In particular, policy5 designating certain areas as Local Green Space.
- Interim injunction secured at all stages of the legal challenge to prevent referendum.
- Court highlighted that where a NP departs from national policy, an examiner must engage with the issue.
- The wording of the policy, without justification, departed from para 100 of the NPPF regarding LGS.

Conditions

DB Symmetry Limited v Swindon Borough Council [2020] EWCA Civ 1331

- The dispute between the parties is whether that condition required the developer to dedicate the roads as public highways (as Swindon contends) or whether it merely regulates the physical attributes of the roads (as the developer, supported by the Secretary of State) contends).
- Held - a **condition** that requires a developer to dedicate land which he owns as a public highway without compensation would be an unlawful condition.

Finney v Welsh Ministers [2019] EWCA Civ 1868



Finney v Welsh Ministers [2019] EWCA Civ 1868

- Planning permission granted for installation of “two wind turbines, with a tip height of up to 100 metres”. A condition required the development to be carried out in accordance with approved plans, one of which specified a tip height of 100 metres.
- Subsequent application made under s 73 TCPA 1990 to vary the plans condition to enable 125 metre tip height turbines to be installed. The LPA refused.

Finney v Welsh Ministers [2019] EWCA Civ 1868

- In an appeal against the LPA's refusal the Inspector concluded that the change in tip height would be unobjectionable and she granted planning permission for the installation of two wind turbines, without including the tip height in the description of development. The new permission had a plans condition referring to a different plan showing a 125 metre tip height.

Finney v Welsh Ministers [2019] EWCA Civ 1868

- The claimant challenged the grant of planning permission on the ground that s 73 did not permit a change in the description of development, only a change in condition.
- In the Court of Appeal this was held to be correct: s 73 cannot be used to change the description of development. Instead, its purpose is to allow the same development subject to different conditions. The Inspector’s decision was therefore quashed.

Finney v Welsh Ministers [2019] EWCA Civ 1868

- If a change to the description of development is needed, s 96A TCPA 1990 would allow this if the change is not material.
- If a change to the description of development is material, a fresh permission must be sought.

R (Samuel Smith Old Brewery (Tadcaster)) v North Yorkshire CC [2020] UKSC 3

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- Planning permission granted for a 6-hectare quarry extension in the Green Belt.
- Challenged on basis officer report (100+ pages) had incorrectly approached the issue of whether the development would preserve the openness of the Green Belt – mineral extraction may be appropriate development in a Green Belt if it preserves openness and does not conflict with Green Belt purposes (now NPPF para 146).

R (Samuel Smith Old Brewery (Tadcaster)) v North Yorkshire CC [2020] UKSC 3

- Claimant argued LPA had erred in its approach to the effect of the proposal on openness. The officer had treated openness as essentially the absence of built development, and had not taken account of the landscape impacts of the proposal in assessing its effect on openness. The Court of Appeal (i.e. Lindblom LJ) agreed this was an error.
- The Supreme Court (i.e. Lord Carnwath JSC) disagreed.

R (Samuel Smith Old Brewery (Tadcaster)) v North Yorkshire CC [2020] UKSC 3

- The law distinguishes between considerations that must be taken into account (because, e.g., statute requires it or they are obviously material to the decision) and considerations that may be taken into account.
- As a matter of interpretation, Green Belt policy in the NPPF did not **require** the decision maker to have regard to visual impact in assessing the effect of development on openness.

R (Samuel Smith Old Brewery (Tadcaster)) v North Yorkshire CC [2020] UKSC 3

- Whether visual impact is relevant in any particular case is a matter of planning judgment. On the facts of this case, the relatively limited visual impact of the quarry extension was not so obviously material that the LPA had to have regard to it.

David Gathercole v Suffolk CC [2020] EWCA Civ 1179

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- Planning permission granted by SCC to itself for a primary school and pre-school outside the village of Lakenheath
- Needed because LPA had resolved to permit up to 663 new dwellings in the village and the existing primary school was close to capacity
- Site affected by aircraft noise from RAF Lakenheath used by USAF

David Gathercole v Suffolk CC [2020] EWCA Civ 1179

- Environmental statement had addressed, among other things, alternative sites and excessive outdoor noise, and raised (but did not resolve) the issue of the effect of noise on children with special hearing and communication needs
- JR brought on several grounds. Ended up in CA which had to consider (1) alleged failure to have due regard to effect of outdoor noise on children with protected characteristics, in breach of public sector equality duty (PSED) in s 149 of the Equality Act 2010 and (2) alleged failure of ES to assess the environmental effects of the alternative sites properly.

David Gathercole v Suffolk CC [2020] EWCA Civ 1179

- CA held there had been a breach of the PSED as issue not dealt with in officer report.
- S 31(2A) Senior Courts Act 1981 applied – relief refused because highly likely decision would have been the same had PSED been met. Proposed school less noisy than existing and no better site existed. Rejected argument s 31(2A) limited to procedural/technical errors. Power exists to avoid the waste of time and money inherent in quashing a decision that is highly likely to be repeated, and ensures JR is flexible and realistic.

David Gathercole v Suffolk CC [2020] EWCA Civ 1179

- Court rejected complaint about alleged lack of detailed assessment of alternatives in ES.
- A detailed environmental assessment of alternatives was not required under EU law.
- It was for the LPA to assess the sufficiency of the ES (subject to *Wednesbury* review). No complaint had ever been raised about the ES before the JR had been brought and its treatment of alternative sites was adequate.

Questions

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