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Planning case law update June 2021

James Findlay QC, Ryan Kohli, Ruchi Parekh and John Fitzsimons

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Planning case law update: Runways, Climate Change & the Supreme Court

James Findlay QC

Previous Webinars

12th April 2021 - 3pm - Local Plans: Tips for Success
Speakers: Paul Shadarevian QC, Wayne Beglan, Clare Parry and Dr. Ashley Bowes

19th April 2021 -11am - Getting to Grips with Infrastructure Projects as a Local Authority
Speakers: Michael Bedford QC, Estelle Dehon and Ruchi Parekh

4th May 2021 -11am - Planning for schools: academy and free school planning appeals
Speakers: Lisa Busch QC, Harriet Townsend, Ryan Kohli and Rowan Clapp

24th May 2021 -11am -Developing Greenfield Sites Outside Settlement Boundaries
Speakers: Jonathan Clay, Dr. Ashley Bowes and Rowan Clapp

7th June 2021 - 11am - Compulsory Purchase: A fresh perspective
Speakers: Paul Shadarevian QC, Harriet Townsend, Emmaline Lambert and Dr. Christina Lienen

Recordings and slides can be found at:

www.cornerstonebarristers.com/events

Other cases of interest

- *Barking and Dagenham LB v Persons Unknown* [2021] EWHC 1201

  https://cornerstonebarristers.com/news/local-authority-injunctions-against-ldquopersons-unknownrdquo-civil-law-runs-out/
- *Monkhill v SoSHCLG* [2021] EWCA Civ 74 – interpretation of Framework & AONB
- *Gladman Developments Ltd v SoSHLG* [2021] EWCA Civ 104 – tilted balance
- *R(Hudson) v Windsor and Maidenhead RBC* [2021] EWCA Civ 592 – approach to failure to carry out habitats assessment

R (Friends of the Earth & Plan B Earth) v Heathrow Airport Ltd [2020] UKSC 52

R (Friends of the Earth & Plan B Earth) v Heathrow Airport Ltd [2020] UKSC 52

- An increase in airport capacity in SE will lead to a substantial increase in C02
- CA allowed challenge solely on basis of failure to have regard to Paris climate accord
- 4 bases for CA decision. (i) concerned regard to policy. CA was of view that:

  Policy was an just ordinary English word to be applied in ordinary sense in any given context.

R (Friends of the Earth & Plan B Earth) v Heathrow Airport Ltd [2020] UKSC 52

(1) Was Paris agreement Government policy?

- Appropriate that there should be clear limits on what statements count as Government policy to render them readily identifiable.
- Usually it will consist of a formal written statement of established policy.
- In exceptional circumstances beyond written statements must be clear, unambiguous and devoid of relevant qualification (as per legitimate expectation)
- Does not include inchoate or developing policy, or a ratified international treaty not implemented in domestic law or a mere policy commitment.

R (Friends of the Earth & Plan B Earth) v Heathrow Airport Ltd [2020] UKSC 52

(ii) Statutory duty to act with objective of achieving sustainable development

- Allegation decision left out of account Paris accord
- **3 categories of considerations** (i) those identified (exp or by impl) by Statute as material (ii) those likewise as not material and (iii) those a decision-maker can have regard to if he/she wishes.
- In last category, there will be “some matters so obviously material” they have to be taken into account.
- Test is Wednesbury irrationality.

R (Friends of the Earth & Plan B Earth) v Heathrow Airport Ltd [2020] UKSC 52

Paris agreement in Category 3

- Question was whether the SOS acted irrationally in omitting to take the Paris Agreement *further* into account or give it *greater* weight than he did.
- The test is again rationality or Wednesbury.
- An unincorporated treaty may be obviously material but court did not decide that issue.

R (Friends of the Earth & Plan B Earth) v Heathrow Airport Ltd [2020] UKSC 52

(iii) SEA CHALLENGE

- SC endorsed previous cases that adequacy of an environmental report for purposes of SEA can be cured by steps taken at subsequent stages, e.g. the production of supplementary material (provided complies with information & consultation requirements)
- SEA failed to mention Paris agreement.
- What information to include was for authority subject to not acting Wednesbury unreasonably.
- No unduly legalistic approach.

R (Friends of the Earth & Plan B Earth) v Heathrow Airport Ltd [2020] UKSC 52

Scope of JR

- *a limited judicial review of the action which that authority alone is entitled to perform must be exercised, since otherwise that authority's freedom of action would be definitively paralysed*
- Ground (iv) fact specific

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Planning case law update: Climate Change

Ruchi Parekh

R (Elliot-Smith) v SSBEIS

- Challenging decision to create UK Emissions Trading Scheme
- Q: Failure to have regard to the imperative for urgent action in the Paris Agreement?
- Dove J [2021] EWHC 1633 (Admin):
  - Paris Agreement a material consideration = common ground
  - As for element of urgency, not for court to resolve definitively questions of construction in relation to unincorporated international treaty
  - Court's role, at most, to assess if government's view of Paris Agreement "tenable"

R (Finch) v Surrey County Council

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R (Finch) v Surrey County Council

- Central Q: Did EIA Regulations require an assessment of GHG emissions from the use of the end product?
- Holgate J [2020] EWHC 2566 (Admin):
  - Legal test: whether an effect on the environment is an effect of the development for which PP is sought
  - "Indirect effects": consequences which are less immediate but must still be effects which development itself has on the environment
- CoA (permission):

1. As the judge said at [4] to [8], the issue raised by ground 1 has far reaching ramifications. The emission of GHG is a matter of considerable public concern. The judge's interpretation of the EIA regime was that development means the development for which planning permission is sought: see [101]. Although the judge's reasons for his conclusion are cogent, they are open to proper challenge; and in view of the importance of the question, I regard this as a compelling reason for the appeal to be heard: CPR Part 52.6 (1) (b).

R (Client Earth) v SSBEIS

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R (Client Earth) v SSBEIS

- Central issue: proper interpretation of the Overarching NPS for Energy (EN-1)
- SoS: GHG emissions would have "significant adverse impact" but outweighed by development contributing to the identified need for CCR fossil fuel generation
- HC [2020] EWHC 1303 (Admin): Agreed
- CoA [2021] EWCA Civ 43: Agreed, but –
  - EN-1 does not prevent GHG emissions from being taken into account and could, in a particular case, be "*decisive, whether with or without another "adverse impact""*"
  - Matter of weight

Stansted Airport expansion

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Case law update: Equality law in planning decisions

Ryan Kohli

R on the application of Stuart Danning v (1) Sedgemoor District Council; (2) David Folland [2021] EWHC 1649 (Admin)

- Grant of permission for change of use – from a public house to a residential dwelling
- Claimant brought three grounds:
  - Two based on material misdirection as to planning policies in Local and Neighbourhood Plans
  - Breach of the public sector equality duty contained in Section 149 of the Equality Act 2010
- Limited success concerning LP policy that, in considering whether facilities were fit for their intended purpose, evidence of local community consultation was considered
- No reference to the PSED in the materials put to the Planning Committee or in any note of the discussion of their reasoning
- Steyn J rejected relevance *ex post facto* evidence that Officer had the PSED in mind when making his report – considerations were at no point expressed to the Committee, PSED not delegable
- Section 31(2A) Senior Courts Act 1981 – "highly likely" outcome would be not different not met

R on the application of United Trade Action Group Ltd v Transport for London, Mayor of London [2021] EWHC 72 (Admin)

- Claimants were Hackney carriage trade bodies, representing industry and drivers
- Objected to restrictions brought in during the Covid-19 pandemic to prohibit general traffic (motor vehicles except buses) on certain sections of the A10 from 7am to 7pm on weekdays
  - A10 Order
  - London Streetspace Plan and Interim Guidance to Boroughs
- Second ground of challenge – Claimants argued that TfL and the Mayor failed to have proper regard to the PSED required by section 149 of the Equality Act 2010
- Defendants argued that TfL had carried out a comprehensive equality impact assessment of the A10 Order; further, the Guidance was not a “decision” itself requiring an equality impact assessment.
- Court found a breach of the PSED in relation to the Guidance: the specific needs of the elderly and disabled were not assessed
- Equality Impact Assessment carried out in relation to the A10 Order insufficient to meet the PSED

R on the application of United Trade Action Group Ltd v Transport for London, Mayor of London [2021] EWHC 72 (Admin)

"In my judgment, the EqIA did not meet the required standard of a "rigorous" and "conscientious" assessment, *conducted with an open mind. The mitigation entries (save for impact 13), and the implementation/explanation entries were perfunctory or non-existent, and failed to grapple with the serious negative impacts and high level of residual risks which emerged from the assessment. The residual risk assessment was inconsistent and irrationally understated the risks.* Most worryingly of all, the EqIA read as if its purpose was to justify the decision already taken*… The reports read as if the EqIA was merely a formality, and the outcome was a foregone conclusion."*

(paragraphs 193 - 194)

R on the application of Paula Fraser v Shropshire Council v The Wrekin Housing Trust [2021] EWHC 31 (Admin)

- Claimant challenged the lawfulness of the grant of planning permission for specialist residential development for people aged over 55:
  - Unlawful direct and/or indirect discrimination on the grounds of age in the approach to open space, contrary to section 29(6) of the Equality Act 2010
  - Breach of the public sector equality duty ("PSED") imposed under section 149 of the Equality Act 2010
- OR explicitly set out that the proposals for open space in the development were acceptable irrespective of whether the intended occupants required additional care or were the public at large – no less favourable treatment
- PSED consideration carried out of "an abundance of caution" was sufficient to meet the duty to have due regard

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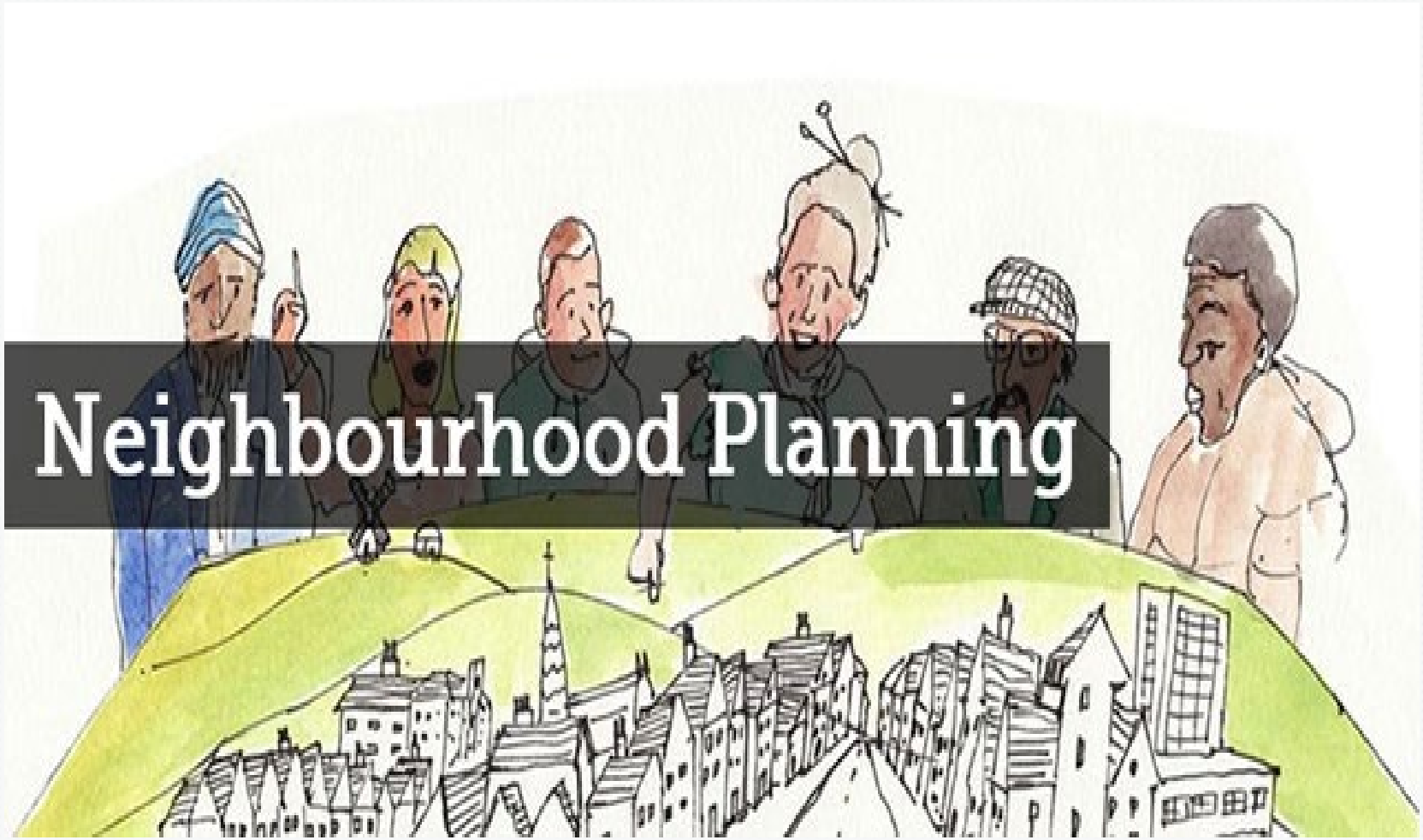
Planning case law update: Neighbourhood Development Plans and Orders

John Fitzsimons

R(on the application of Fylde Coast Farms Ltd) v Fylde Borough Council [2021] UKSC 18



R(on the application of Fylde Coast Farms Ltd) v Fylde Borough Council [2021] UKSC 18

- Interpretation and Effect of section 61N Town and Country Planning Act 1990
- Challenges to Neighbourhood development plans and orders
- (1)A court may entertain proceedings for questioning a decision to [make a plan or order] only if - (a) judicial review, and (b) claim filed six weeks from the day after the decision is published.
- (2)A court may entertain proceedings for questioning a decision [at stage five – examiner's report] only if - (a) judicial review, and (b) claim filed six weeks from the day after the decision is published.
- (3)A court may entertain proceedings for questioning anything relating to [stage 6 – referendum] only if - (a) judicial review, and (b) claim filed six weeks from the day after the decision is published.

R(on the application of Fylde Coast Farms Ltd) v Fylde Borough Council [2021] UKSC 18

- Does s61N preclude a challenge when the plan or order is finally made if you could have brought a challenge at an earlier stage in the examination or administrative process? Answer – YES.

- Background:
  - Challenge brought under s61N(1) – final stage
  - Substance of challenge related to Stage 5.
  - Substance of grounds were arguable.
  - But was the claim brought out of time?

R(on the application of Fylde Coast Farms Ltd) v Fylde Borough Council [2021] UKSC 18

- S61N is not a complete and exclusive code for all public law challenges – disagreed with the Court of Appeal
- But s61 is entirely restrictive – it subjects existing rights of challenge that exist under public law principles to the twin conditions
- Therefore Courts considering challenges should ask:
  - Does the challenge question a decision (or something relating to a referendum) within stages 5, 6 or 7 of the process?
  - If so, has the claim been made by way of JR?
  - If so, has the claim form been filed within the specified time limit?

R(on the application of Fylde Coast Farms Ltd) v Fylde Borough Council [2021] UKSC 18

- **Appellant argued**:
  - Difficulties in good administration
  - Multiplicity of suit
  - May require injunctive relief
  - Required to challenge before you know whether your rights and interests are affected.

- **Supreme Court answered:**
  - Court regularly screens cases at permission stage
  - Possibility of more than one claim but can be case managed
  - Required to challenge early but Parliament has struck a balance in its approach

R(on the application of Fylde Coast Farms Ltd) v Fylde Borough Council [2021] UKSC 18

- **<u>Practical Implications:</u>**
  - LAs should always check if challenge brought on time
  - Challengers need timely legal advice and to act swiftly
  - Challengers may need to seek injunctive relief alongside their JR challenges in order to halt the plan or order making process in its track
  - Still possible to challenge at the end in certain circumstances involving retained EU obligations or Convention rights

R(CPRE Kent) v SSCLG, Supreme Court 2021

- Awaiting judgment – heard in January 2021
- Question for the Court: whether a claimant in statutory and judicial review cases who is unsuccessful at the permission stage should be liable for the costs of multiple parties, including respondents and interested parties
- Arose in a case in which Appellants brought a JR and permission was refused. It was held that this was a costs capped claim of £10k under the Aarhus convention. Appellant ordered to pay both the Respondents' and Interested Party's costs up to a total of £10k. Appellants challenge that order.

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Planning case law update: Any Questions?

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