PLANNING COMMITTEE 13.03.2024

SUPPLEMENTARY MATTERS TO BE CONSIDERED AS PART OF THE REPORT BY THE ASSISTANT DIRECTOR - PLANNING AND ECONOMIC GROWTH ON PLANNING APPLICATIONS

ITEM NO	REF NO	LOCATION	COMMENTS	RECOMMENDATION
1	23/01089/FUL	**ST JOHNS COLLEGE GROVE ROAD SOUTH SOUTHSEA**	Para 10.142 - Officers have reviewed this paragraph and noted that it appears to suggest that an additional mechanism within the required Parking Management Plan is needed to prevent prospective residents applying for parking permits. For clarity it is confirmed that no additional control is needed. The LHA have confirmed that the application site falls outside the adjacent Resident Parking Zone (MD and KD) the and future residential occupiers would therefore not be eligible for permits Para 10.195 - Officers have reviewed this paragraph and would clarify that 'final agreement' in respect of the FRA would be a decision of the council in consultation with Coastal Partners, not an agreement by Coastal Partners itself. 5 further representations have been received since finalisation of the agenda. All material	

			planning matters have however already been covered in the officer report. In addition to this two supplementary representations from a resident at Thicket Cottage, The Thicket have also been provided. These two representations repeat concerns regarding overlooking from residential windows and asks that the application be deferred for further consideration of the Human Rights Act, insofar as it relates to the neighbour's suggestion that the degree of overlooking from the proposed development to neighbouring properties would constitute a nuisance. The neighbour has suggested that a 2023 Supreme Court case [*Fearn v Tate Gallery Trustees [2023] 2 W.L.R. 339*] is relevant to this consideration. The Tate Gallery case was a case seeking an injunction against nuisance wherein the court concluded that the use of a viewing terrace which allowed "hundreds of thousands" of visitors to look into windows of neighbouring flats was an exceptional visual instruction above the use of land in the 'common and ordinary way' expected from an art gallery in a residential or mixed use area. It is clearly a very different scenario than that caused by the application before committee. The Officers' report considers the reasonableness of any overlooking causing a loss of privacy or visual intrusion created by the proposal and has found it to be acceptable. The report also considers the	

			Human Rights Act in respect of the enjoyment of property and right to a fair hearing and positively concludes the balance needed in their consideration in respect to other competing interests. That residents request that the application be deferred has been appended in full to this SMAT. The applicant, having reviewed that request to defer the matter, has sought and provided an opinion from a Barrister (Christiaan Zwart) which opines that 'nothing in the letter of the objector that could justify the deferment of the current planning application nor its refusal'. For completeness that Opinion is also appended to this SMAT. The applicant has also provided additional information on 5th and 8th of March, including A Shadow Habitats Regulation Assessment, a Flood Risk Assessment Addendum, additional computer generated images and a section through the neighbouring Thicket Cottage. These submission illustrate and explain details already contained within the submission of the application and do not make any material amendment. The applicant has also confirmed that, despite a finding within the assessed Viability Review that the scheme cannot support a normal level of developer profit and the provision of Affordable Housing (see 10.30) the developer is however willing to accept an	

			abnormal reduction in profit and, without prejudice, make a £200,000 contribution towards Affordable Housing within the City, to be secured by s106 agreement. The applicant has confirmed that it is not feasible to provide affordable housing directly on-site *'owing to the nature of the funding for the development and the fact Southsea Village Ltd intend to retain the ownership of the site to enable the properties to be rented out rather than sold as market dwellings'*. They have also suggested that in their experience *'Registered Provider would not wish to take ownership of a single or pair of properties on a development of this scale due to the likely management fees and service maintenance charges that would be incurred*.' While the development is considered to be compliant with Policy PCS19 of the Portsmouth Plan without a contribution for Affordable Housing the voluntary provision of such a contribution, contributing to meeting identified Affordable Housing need in the City is a material consideration justifying allowing such a planning obligation (albeit it inclusion or otherwise not constituting a reason to grant or withhold planning permission).	No Change to substantive recommendation, but with the addition to the identified Heads of Terms for the s106 agreement of a £200,000 financial contribution to Affordable Housing.
1	23/01074/LBC	**LINNHOLM HOUSE & THE CASTLE ST JOHNS COLLEGE GROVE ROAD SOUTH**	See above for additional representations and submissions from the applicant	No change to recommendation.

2	23/01549/DOC	**SOUTHSEA SEAFRONT FROM LONG CURTAIN MOAT IN THE WEST TO EASTNEY MARINE BARRACKS IN THE EAST**		
3	24/00012/FUL	**ADVENTURE PLAYGROUND STAMSHAW PARK NEWCOMEN ROAD**	Cllr Lee Hunt has provided a representation in respect of the application: *'Having been to the public consultation at Stamshaw Playpark to see the plans and listen to officers proposals; I can report the enthusiasm of local residents present and since then, for the reports and request for planning consent before LPA tomorrow.* *I'd very much like to be with you all but have ongoing dental treatment underway with a 10:50 appointment; even so will attend to speak if I can.* *This is very much a good news story for the local community helping keep youngsters involved in useful activities. This coupled with Stamshaw & Tipner Community Centre and its groups including 'Golden Gloves' Boxing Club, the Playpark and ball courts is giving more young people more to do.* *Best wishes,* *Cllr Lee Hunt'*	No change to recommendation.
4	23/01592/FUL	**350-352 LONDON ROAD HILSEA**		
5	20/00944/FUL	**32 MONTGOMERIE ROAD SOUTHSEA PO5 1ED**	Elevation plans have been provided since report publication, Dwg. Ref. PG.02. These shall be included in the Presentation to the Committee.	No change to recommendation.

6	23/01220/FUL	**19 TAMWORTH ROAD PORTSMOUTH PO3 6DL**	Plan ref. no: The floor plan ref. no. has been updated (to Proposed Layout Ground Floor (Dated 26/01/2024); and Proposed Layout First Floor (Dated 26/01/2024)). There is no change to the plans themselves since publication of the Officer Report. Further objection comment: Following publication of the report, one of the objectors has provided a further comment, querying the accuracy of the stated external measurements of the ground and first floor. This has been reviewed and clarification sought from the agent. It has been confirmed that the property was measured internally, with the external measurements calculated by adding the average wall thickness to the internal measurements. A minor discrepancy of 0.03m identified by the objector is therefore explained due to variation in wall thickness within the building. The plans have been re-measured, and the Officers are satisfied the internal measurements stated on the plans are correct. Cllr Sanders have also provided a further representation in respect of the application: *'I thank members for reconsidering this application. I know you were all concerned about the discrepancies in room sizes that emerged last time. I remain concerned about the impact of this development on this unique road. Tamworth is one-sided - the park is on the other side - and a no-through road. Therefore, parking is even more valuable than normal as vehicles can only pass via the turning circle at the bottom.* *Therefore increasing parking, as this application will do, will have a disproportionate impact on*	Update Condition 2 as per the adjacent column.

			residential amenity and I urge that this be refused on those grounds. *This application is unique in other ways. This is the only one I can recall where the developer has said how many residents he wants and who they should be. It is right, then, that, if you grant permission by taking matters such as room size at face value, you should take those commitments - publicly lodged on the Council website - at face value too. Therefore, I ask that - should you decide to approve this scheme - you take separate votes on restricting residents to four and whether those people should be health professionals.* *Now, I know officers will say no and no, saying the applicant would appeal and we would lose. However, given that the applicant has put these in his application, it would be a bit daft for him then to tell an Inspector 'ah yes, but I did not really mean it', which he would have to do at appeal. You agreeing them will also strengthen licensing when enforcing is upcoming licence. If you take his application at face value, take all of it.* *My view remains that you should refuse this application for the reasons I gave before. However, if you approve it would assist the amenity of neighbours and future occupiers to do what the applicant wants and put these restrictions in place.* *Thanks for your time.* *Cllr Darren Sanders'*	

7	23/01420/FUL	**25 TOTTENHAM ROAD PORTSMOUTH PO1 1QL**	Location plan Ref HD0049-PL05 updated to HD0049-PL05 RevA to reflect change to extension from original submission .	No change to recommendation.
8	23/01544/FUL	**82 CHICHESTER ROAD PORTSMOUTH PO2 0AH**		
9	23/01584/CPL	**73 MARGATE ROAD SOUTHSEA PO5 1EY**		
10	23/01599/FUL	**165 LABURNUM GROVE PORTSMOUTH PO2 0HF**	Amended plans were submitted that label the previously unlabelled rooms 6 and 7, and confirmation received from the applicant that the works will have no impact on the tree outside the adjacent property (163). A written submission has been provided by Cllr Benedict Swann and is appended to the SMAT	No change to recommendation.

JAMES KIRBY
THICKET COTTAGE, THE THICKET, SOUTHSEA PO5 2AA

An application to Portsmouth City Council to adjourn the hearing of planning application (23/01089/FUL)

Introduction

1. This is an application to adjourn consideration of the above planning application (currently scheduled for next Wednesday 13 March – i.e. in 4 days time) as aspects of the application may be unlawful, and may leave the Council (and the applicant) open to a claim for damages under section 6 of the Human Rights Act 1998, as PCC is a public authority about to make a decision that has an impact on the civil rights of some local residents.

2. Section.6.(1) of the Act states that "It is unlawful for a public authority to act in a way which is incompatible with a Convention right".
"*In this context, your civil rights and obligations are those recognised in areas of UK law such as property law and planning law*"[1]

3. Those who may be affected by a breach of S.6 have a right to a fair and public hearing that[2]:
   - is held within a reasonable time
   - by an independent and impartial decision-maker
   - within a reasonable time

   A hearing that
   - gives those affected all the relevant information
   - is open to the public
   - allows you representation
   - is followed by a public decision.

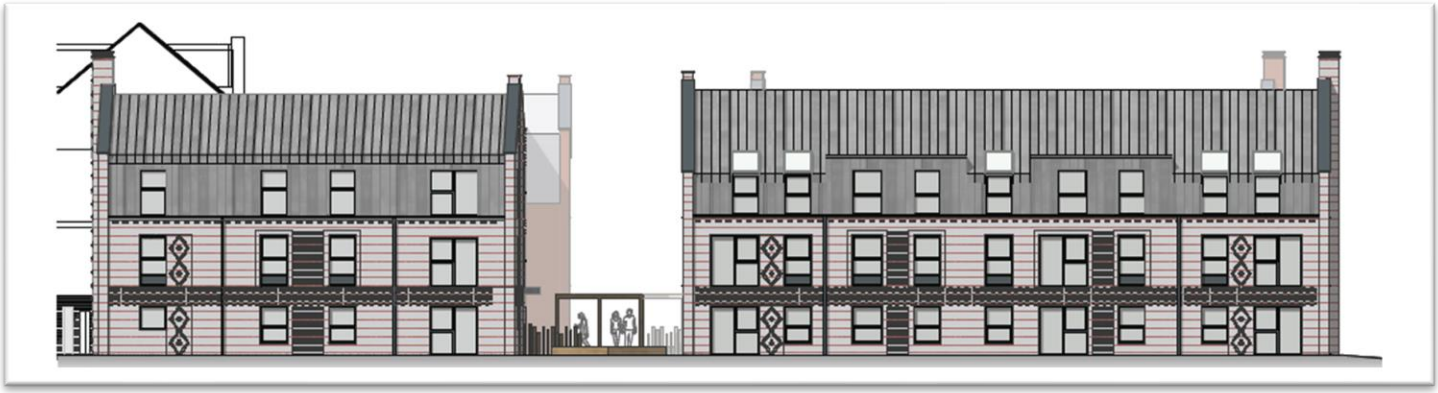
[1] https://www.equalityhumanrights.com/human-rights/human-rights-act/article-6-right-fair-trial
[2] As above

which determines whether such a development (or this particular aspect of the development) would be in breach of the Rights protected by S.6 of the 1998 Act, given that PCC has a duty to protect those affected by any breach of those rights.

4. In this case, there is the very clear prospect of an overlooking nuisance (a cause of action in law) caused by the sheer number, size and proximity of the windows proposed. This was suddenly increased by the developer 3 weeks ago by 28% from 21 windows in Simon Wing West to 27, making a total of 39 windows in the 2 Simon Wings, seen below[3]. Note also that all the new windows are of the largest possible size!

- Those 39 windows are now totalling 86 sq. m. – taking up much of the elevation.
- That is in fact 40% of the elevation, which is absurd when the usual size of a window is 10-20% of the floor space[4].
- There are 13 windows on 3rd floor (which is much higher than any of the homes in The Thicket, those alone totalling over 27 sq. m.
- Those 3rd floor windows are positioned at a minimum height of 6.7m above the ground, and reach up to 8.13m at their highest.

5. Present proposal:



6. Previous proposal:

Please note that both proposals give rise to this objection under s.6 of the HRA 1998, given the rulings in the case of Fearn, below.

[3] Submitted 16 February 2024: 23_01089_FUL-22171-HGP-19-XX-D-A 0351__P05__B19_ SIMON_WING_PROPOSED_ELEVATIONS_SHEET_2_OF_2.-2616583

[4] https://assets.publishing.service.gov.uk/media/61deba42d3bf7f054fcc243d/ADF1.pdf

7. Such a nuisance (actionable under law) was found in the recent Supreme Court case of *Fearn v Tate Gallery Trustees [2023] 2 W.L.R. 339* when residents of a block of flats brought a claim under S.6 of the 1998 Act against the Trustees of the Tate Gallery, who had erected a gallery where visitors "*had a clear and uninterrupted view in to the living areas"* of the flats in question, from a distance of just over 30 metres, for the 8 hours a day when the Gallery was open – whilst this plan would allow the equivalent 24 hours a day, from distances of 14 to 22 metres.

8. The Supreme Court found that those looking from the gallery were given a "*clear and uninterrupted view of how the claimants seek to conduct their lives in those flats. One can see them from practically every angle on the southern walkway*''.

9. It was found that that "*intrusive viewing from a neighbouring property can in principle give rise to a claim for nuisance*", and that this was a "*straightforward case of nuisance"*.

10. Moreover, that "*anything which materially interfered with the ordinary use and enjoyment of neighbouring land by a person with a legal interest in that land was capable of being a nuisance*".

11. What is proposed here is to erect these blocks just 14-22 metres from various homes in The Thicket, <u>giving the inhabitants of Simon Wing a clear and uninterrupted view 24 hours a day from a considerable height in to those homes in The Thicket</u>.

    The plans[5] submitted by the applicant reveal that in fact the Simon Wings would be situated
    - 14m distance from 21 & 22 The Thicket;
    - 20m to The Lawns;
    - 21m to Thicket Cottage; and
    - 22m to Trematon.

12. They would have, as was found in the case of Fearn, a "*clear and uninterrupted view of how" (*we, the residents of the homes they overlook) *"seek to conduct their lives".* Exactly as in the case above, the residents of Simon Wing would be able to "*see straight into the living areas*" of our homes.

13. Nor would it be "*a defence to an action for nuisance that (those looking) were only making reasonable use of their own land*" by just looking out of their windows. The design of the building itself gives rise to this unlawful condition.

[5] 23_01089_FUL-22171-HGP-19-XX-D-A-0250__P05__B19_SIMON_WING_PROPOSED_PLANS_1_OF_4.-2616568

14. As a public authority, PCC has a duty to protect our rights under the 1992 Act, and must therefore not enable a development that may infringe upon those rights.

15. The Law Society has advised that
"Planning authorities may need to assess the potential impact of causing an overlooking nuisance on future developments before granting planning permission to avoid this type of situation from reoccurring. There is no guarantee that lack of foresight will be tolerated by the courts in future".[6]

16. They also pointed out that
"*There is also the question whether remedial and mitigating steps could have been taken by both sides to reduce the intrusion and inconvenience suffered by the tenants*".

17. Some legal commentators have advised that
"*The Supreme Court then left the question of the remedy (for such harm) for a future determination by the High Court… Lord Leggatt suggested that …any injunction and the possibility of quantifying damages may constitute the relevant factors*".[7]

18. I would also urge PCC to consider this point, also made by Brabners Solicitors, that
"*A proper consideration of the prospect of intolerable visual intrusion at the planning stage could have forestalled the claim altogether. The prospect of private nuisance claims and the injunctions that may be obtained to prevent certain developments must be woven into the risk assessment by developers early on in the process*".

19. That has clearly not happened so far in this case, but legally must take place now, before this application can proceed any further.

James Kirby, Barrister at Law
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The Thicket
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9 March 2024

[6] https://www.lawsociety.org.uk/topics/property/what-a-nuisance-the-impact-of-fearn-v-tate-gallery-on-future-nuisance-claims
[7] https://www.brabners.com/blogs/how-will-fearn-v-tate-gallery-impact-developers-and-landowners

OPINION: ST JOHN'S COLLEGE PLANNING APPLICATION

INTRODUCTION

1. I am instructed by David Jobbins of Lukenbeck Planning Consultants to advise Southsea Village Ltd whether an objection relying on the recent Tate Modern case about private nuisance constitutes a valid reason to defer the planning application. The planning application relates to redevelopment of a site in Southsea including by means of the erection of a three-storey apartment building. There is another building opposite, about 21m from that proposed building, in which lives Mr Kirby. Mr Kirby has objected to the application for planning permission and asserts that his Human Rights will be breached, that a private nuisance would result, and that the *Tate Modern* case [2023] supports his position. He contends there to be an overlap between the statutory regime of the Town and Country Planning Act 1990 and the common remedy of private nuisance. But, as I set out below, there is no such overlap in law or in fact.

SUMMARY

2. On the basis of the papers before me, my views are as follows. In my opinion, the views of the objector are misplaced and misconceived. There is no valid reason for the local planning authority to defer consideration of, nor to refuse, planning permission for the redevelopment of the land near to the objector on the basis that of Human Rights or private nuisance matters.

3. The Court of Appeal determined as long ago as 2004 in the previous Tate Modern case of *Lough* [2004] (in which I was junior counsel) that the balancing act required under the Human Rights Act (and within Articles 8 and Article 1 of the First Protocol) are "inherent" in the evaluative balance of whether or not to grant planning permission. No particular evaluation is required under those two Convention Rights. In that case, a potential 15-20% reduction in value would result from overlooking caused by from the development if permitted. But the Court of Appeal rejected that property value reduction was a material consideration in the planning sphere nor evidence of the seriousness of overlooking. Instead, the policies of the statutory development plan are the usual means by which the competing interests of the developer, neighbours, and the wider public interest of the community, fall to be resolved in determining whether to grant planning permission.

4. Further, it is clear from the *Tate Modern* case [2023], a private nuisance concerns not the wider public community but the landowner and neighbour alone. The Supreme Court held that: "when granting planning permission for a change of use, a planning authority would be entitled to assume that a neighbour whose private rights might be infringed by that use could enforce those rights in a nuisance

action; it could not be expected to take on itself the role of deciding a neighbour's common law rights." Thus, the neigbbour's current reliance on the common law remedy of private nuisance cannot in law be matter for the local planning authority to arbitrate upon.

5. For the foregoing reasons, in my opinion, there is nothing in the letter of the objector that could justify the deferment of the current planning application nor its refusal. Instead, in substance, the neighbour is contending that the distances relating to intervistability are too short, whereas the development will have regarded those distances as sufficient in the particular context of the local environment of the development site. The evaluation of the acceptability of that situation, by reference to the development plan and by application of planning judgement, is a paradigm classic example of the Town Planning regime in operation.

ANALYSIS

6. My Analysis is set out in **Appendix A** to this Opinion.

LAW

7. The Law is set out in **Appendix B** to this Opinion.

CONCLUSIONS

8. I have set out my opinions in Summary at the outset and do not repeat it herein. If I can be of any further assistance, please do not hesitate to contact me by email or in Chambers.

CHRISTIAAN ZWART

39, Essex Chambers,
81, Chancery Lane,
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12th March 2024

APPENDIX A

ANALYSIS

9. The following is apparent.

10. By section 57(1) of the Town and Country Planning Act 1990 ("TCPA"), planning permission is required for the development of land. By section 55(1), "development" is defined to mean operational development and, in particular in this matter, the making of a material change of use of land.

11. The exercise of discretion under section 70(1) of the TCPA is required by section 38(6) of the Planning Act 2004 to be made in accordance with the provisions of the statutory development plan, unless material considerations indicate otherwise.

12. In reaching its determination under section 38(6), the law requires the decision-making local planning authority to properly direct itself on the meaning of policy, and in its subsequent application. See *Tesco v Dundee*. This is because the meaning of policy is a question of law whereas the application of policy is a matter of planning judgement. See *Hopkins Homes*.

13. In the *Lough* case, the Court of Appeal held that the balance required to be struck between private and public interests was "inherent" in the evaluative determination of whether or not to grant planning permission.

14. In the more recent *Tate Modern* case, the Supreme Court considered a claim in private nuisance and not an application for, nor grant of, planning permission by a local planning authority. It agreed with Lord Neuberger who had previously observed in *Lawrence v Fen Tigers Ltd* [2014] UKSC 13; [2014] AC 822, at para 95: (Emphasis added)

> *"when granting planning permission for a change of use, a planning authority would be entitled to assume that a neighbour whose private rights might be infringed by that use could enforce those rights in a nuisance action; it could not be expected to take on itself the role of deciding a neighbour's common law rights."*

15. Thus, the Supreme Court has held that the local *planning* authority is not an arbiter of a threatened claim in nuisance. On that basis alone, there is no valid reason to defer or to refuse planning permission on the basis of threatened a threatened claim for nuisance. Indeed, unless and until *after* a permission has been granted (and so the local planning authority is functus office), there can be no potential for any claim in nuisance in any event. Thus, it is difficult to see how cases about private nuisance at common law *can be legally relevant* to an application for planning permission under the statutory regime of the Town and Country Planning Act 1990.

16. The instant matter relates to an application for planning permission to redevelopment land under the Town and Country Planning Act 1990 and so cannot in itself relate to a claim for private nuisance. In this respect, the Supreme Court further held that:

> *Private nuisance is a tort concerned with real property and the violation of rights pertaining to real property. It involves either an interference with the legal rights of an owner or a person with exclusive possession of land, including an interest in land such as an easement or a profit à prendre, or interference with the amenity of the land, ie the right to use and enjoy it, which is an inherent facet of a right of exclusive possession.*

17. It follows that the evaluation of whether or not planning permission is a matter for the local planning authority to determine. In the usual way, the local planning authority will apply the policies of the development plan and evaluate as a matter of fact and degree, whether any particular policy would be breached. If it were to be breached, then the local authority to evaluate whether or not the proposal complied with the development plan as a whole. The balancing of those factors does not in law require discrete evaluation of Article 8, or Article 1 First Protocol matters. If the proposed did so comply with the development plan taken as a whole, then section 38(6) of the Planning Act 2004 would require the local planning authority to grant planning permission for the development.

18. If the result of the construction of the development so previously permitted, as aforesaid, was to create a private nuisance, then, at that subsequent stage, the objector could take advice and ascertain whether there was or was not a claim in private nuisance. But that would be a stage *subsequent* to the instant determination of whether or not to grant planning permission and without which the subsequent stage cannot even theoretically arise.

19. It follows that there is no valid reason to defer or to refuse *planning permission* for redevelopment based on the Tate Modern case in the Supreme Court in 2023.

APPENDIX B

LAW

Town and Country Planning Act 1990

20. The Town and Country Planning Act 1990 regulates the development of land.

21. By section 55:

> *1) Subject to the following provisions of this section, in this Act, except where the context otherwise requires, "development," means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land.*
>
> *1A) For the purposes of this Act "building operations" includes—*
>
> *a) demolition of buildings;*
>
> *b) rebuilding;*
>
> *c) structural alterations of or additions to buildings; and*
>
> *d) other operations normally undertaken by a person carrying on business as a builder.*
>
> *2) The following operations or uses of land shall not be taken for the purposes of this Act to involve development of the land— …*
>
> *a) the carrying out for the maintenance, improvement or other alteration of any building of works which—*
>
> *i) affect only the interior of the building, or*
>
> *ii) do not materially affect the external appearance of the building,*
>
> *and are not works for making good war damage or works begun after 5th December 1968 for the alteration of a building by providing additional space in it underground;*

22. By section 57(1), planning permission is required for development.

23. By section 70:

> *1) Where an application is made to a local planning authority for planning permission—*
>
> *a) subject to section 62D(5) and sections 91 and 92, they may grant planning permission, either unconditionally or subject to such conditions as they think fit; or*
>
> *b) they may refuse planning permission…*
>
> *2) In dealing with an application for planning permission or permission in principle the authority shall have regard to—*
>
> *a) the provisions of the development plan, so far as material to the application, …*
>
> *b) …*
>
> *c) any other material considerations…*

Planning Act 2004

24. The Planning Act 2004 includes under section 38:

6) *If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise.*

Case Law

25. In *Lough v First Secretary of State* [2004] EWCA Civ 905, the Court of Appeal considered circumstances in which an objector to a planning application contended that his Human Rights would be breached by the construction of a tall tower opposite his flat. His flat was constructed in a 'warehouse' style with floor to ceiling glass windows like a viewing platform. His flat afforded uninterrupted views of the West Entrance elevation of the Tate Modern Gallery. A developer proposed to construct a twenty storey residential tower between the flat and the Entrance elevation that would result in inter-vistibility as between the new development and the flat. The objector contended that a loss of a view, of light and of some 15-20% in the property value of numerous residents in the affected flats, would result and that, in turn, a breach would arise of his (and their) Article 8 Right and his Article 1, First Protocol Right to Property under the Human Rights Act. The Inspector evaluated the situation and concluded that the interference was acceptable and granted planning permission.

26. At first instance, the High Court dismissed the subsequent appeal to the High Court and held: (Emphasis added)

> *"28. A balance has to be struck in planning decisions such as the present between the rights of the developer and the rights of those affected by the proposed development. If an adjoining occupier seeks to build on or change the use of his land, an individual is likely to be affected and his enjoyment of his property may be interfered with. In addition, the public generally may be affected if, for example, conservation areas or the green belt is affected. These various matters have all to be weighed and that is what a local planning authority or an inspector will do. In the vast majority of cases, that exercise will deal with all matters which are relevant in deciding proportionality within the meaning of Article 8 or Article 1 of the First Protocol……. While no doubt it would be sensible to refer explicitly to proportionality so as to avoid challenges such as this, it is not in my view necessary provided it is clear that all relevant factors have indeed been considered and the result would not be any different…*

27. The Court of Appeal agreed and held that – in the planning sphere – no separate consideration of Human Rights matters was required *because* the balance required to be struck by the Human Rights Act, when a potential interference arose, was inherent in the 'planning balance' that inevitably fell to be struck on an application for planning permission. In giving the leading judgment, Lord Justice Pill held:

> *11. It is submitted that the loss of privacy, overlooking, loss of light, loss of a view and interference with television reception all constitute breaches of Article 8. As to diminution in value, in his main submissions, Mr Clayton QC, for the Appellants stated that he was content to treat it as a measure of*

the loss of amenity relevant for the purposes of Article 8. However, in his reply, he argued that a broader view should be taken of the diminution as an interference with the right of respect for the Appellants' homes. In the alternative, it amounted to a partial taking of property under Article 1 of the First Protocol. As to television, Condition 20, proposed to be imposed on the planning permission, acknowledges the possibility of interference, during construction, with television reception at Falcon Point. Interference with television reception may be a serious matter, especially for the aged, the lonely and the bedridden (Hunter v Canary Wharf Ltd 1997 AC 655 at 684 per Lord Goff of Chieveley). It is submitted that in deciding whether a Convention right is engaged, the threshold is a low one. Human Rights instruments should be given a broad and generous interpretation.

28. Lord Justice Pill considered the scope of Article 8 and Article 1 of the First Protocol and then held: (Emphasis added)

42. The ECHR case of Hatton demonstrates the discretion available to national authorities in striking a fair balance between competing interests. In Connors, the expression "wide margin of appreciation" was used in relation to planning policies. Moreover, while stating, at paragraph 98 of Hatton, that the applicable principles were broadly similar, the court recognised the concept of balance under paragraph 1 of Article 8, without reference to paragraph 2, by referring to the requirement to "take reasonable and appropriate measures" to secure the rights under the paragraph. I acknowledge that, in Qazi, Lord Millett at paragraph 100, went straight to Article 8(2) when considering an alleged breach of Article 8(1). His analysis at paragraph 102 and the general approach of the majority in Qazi, however, implement the principle that Article 8(1) does not create an absolute right but a balancing of interests is appropriate in deciding whether there has been a breach. Where a breach of Article 8(1) has been found to exist, as in Lopez Ostra, Guerra and Marcic, where there was direct and serious interference with a person's home due to flooding with sewage, the effect on amenity has been a serious one. In Hatton, it was stated that an issue may arise under Article 8 where an individual is "directly and seriously affected" by noise or other pollution.

43. It emerges from the authorities:

(a) Article 8 is concerned to prevent intrusions into a person's private life and home and, in particular, arbitrary intrusions and that is the background against which alleged breaches are to be considered.
(b) Respect for the home has an environmental dimension in that the law must offer protection to the environment of the home.
(c) Not every loss of amenity involves a breach of Article 8(1). The degree of seriousness required to trigger lack of respect for the home will depend on the circumstances but it must be substantial.
(d) The contents of Article 8(2) throw light on the extent of the right in Article 8(1) but infringement of Article 8(1) does not necessarily arise upon a loss of amenity and the reasonableness and appropriateness of measures taken by the public authority are relevant in considering whether the respect required by Article 8(1) has been accorded.
(e) It is also open to the public authority to justify an interference in accordance with Article 8(2) but the principles to be applied are broadly similar in the context of the two parts of the Article.
(f) When balances are struck, the competing interests of the individual, other individuals, and the community as a whole must be considered.
(g) The public authority concerned is granted a certain margin of appreciation in determining the steps to be taken to ensure compliance with Article 8.
(h) The margin of appreciation may be wide when the implementation of planning policies is to be considered.

48. Recognition must be given to the fact that Article 8 and Article 1 of the First Protocol are part of the law of England and Wales. That being so, Article 8 should in my view normally be considered as an integral part of the decision maker's approach to material considerations and not, as happened in this

case, in effect as a footnote. The different approaches will often, as in my judgment in the present case, produce the same answer but if true integration is to be achieved, the provisions of the Convention should inform the decision maker's approach to the entire issue. There will be cases where the jurisprudence under Article 8, and the standards it sets, will be an important factor in considering the legality of a planning decision or process. Since the exercise conducted by the Inspector, and his conclusion, were comfortably within the margin of appreciation provided by Article 8 in circumstances such as the present, however, the decision is not invalidated by the process followed by the Inspector in reaching his conclusion. Moreover, any criticism by the Appellants of the Inspector on this ground would be ill-founded because he dealt with the Appellants' submissions in the order in which they had been made to him.

49. *The concept of proportionality is inherent in the approach to decision making in planning law. The procedure stated by Dyson LJ in Samaroo, as stated, is not wholly appropriate to decision making in the present context in that it does not take account of the right, recognised in the Convention, of a landowner to make use of his land, a right which is, however, to be weighed against the rights of others affected by the use of land and of the community in general. The first stage of the procedure stated by Dyson LJ does not require, nor was it intended to require, that, before any development of land is permitted, it must be established that the objectives of the development cannot be achieved in some other way or on some other site. The effect of the proposal on adjoining owners and occupants must however be considered in the context of Article 8, and a balancing of interests is necessary. The question whether the permission has "an excessive or disproportionate effect on the interests of affected persons" (Dyson LJ at paragraph 20) is, in the present context, no different from the question posed by the Inspector, a question which has routinely been posed by decision makers both before and after the enactment of the 1998 Act. Dyson LJ stated, at paragraph 18, that "it is important to emphasise that the striking of a fair balance lies at the heart of proportionality".*
50. *I am entirely unpersuaded that the absence of the word "proportionality" in the decision letter renders the decision unsatisfactory or liable to be quashed. I acknowledge that the word proportionality is present in the post-Samaroo decisions and the judgments of Sullivan J in Egan and Elias J in Gosbee but I do not read the conclusion reached by either judge as depending on the presence of that word or on the existence of a new concept or approach in planning law. <u>The need to strike a balance is central to the conclusion in each case.</u> There may be cases where the two-stage approach to decision making necessary in other fields is also appropriate to a decision as to land use, and the concept of proportionality undoubtedly is, and always has been, a useful tool in striking a balance, but the decision in Samaroo does not have the effect of imposing on planning procedures the straight-jacket advocated by Mr Clayton. There was no flaw in the approach of the Inspector in the present case.*
51. *There remains the discrete question on the Inspector's finding "that matters of property valuation do not amount to material planning considerations, and its bearing on Convention rights. I readily accept that a diminution in value may be a reflection of loss of amenity and may be taken into account as demonstrating such loss and its extent but, in his reply, Mr Clayton, as I understand it, sought to create diminution of value as a separate and distinct breach of Article 8 and Article 1 of First Protocol. Having regard to the background and purpose of each Article, I do not accept that submission. A loss of value in itself does not involve a loss of privacy or amenity and it does not affect the peaceful enjoyment of possessions. Diminution of value in itself is not a loss contemplated by the Articles in this context…*

29. The renowned planning Judge, Lord Justice Keene agreed. He held:

54. *I agree that this appeal should be dismissed for the reasons given by Pill LJ. Not every adverse effect on residential amenity will amount to an infringement of the right to respect for a person's home under Article 8(1), as the Strasbourg jurisprudence makes clear. The inspector's findings in the present case suggest that that threshold level of impact would not be reached as a result of the proposed*

development, but it is clear from those findings that, even if there was a prima facie infringement, it was justified under Article 8(2) once one took into account the need to protect "the rights and freedoms of others". Those others would include the owners of the appeal site as well as the public in general.

55. I agree with Pill LJ that the process outlined in Samaroo, while appropriate where there is direct interference with Article 8 rights by a public body, cannot be applied without adaptation in a situation where the essential conflict is between two or more groups of private interests. In such a situation, a balancing exercise of the kind conducted in the present case by the inspector is sufficient to meet any requirement of proportionality.

30. More recently, in *Fearn v Board of Trustees of the Tate Gallery* [2023] UKSC 4, the Supreme Court considered – not an application for planning permission but - a claim in *private nuisance* by owners of flats nearby to the then extended Tate Modern at Bankside. The Supreme Court upheld the appeal: (Emphasis added)

109. <u>While a planning authority is likely to consider the potential effect of a new building or use of land on the amenity value of neighbouring properties, there is no obligation to give this factor any particular weight in the assessment</u>. Quite apart from this, as Lord Neuberger observed in Lawrence v Fen Tigers Ltd [2014] UKSC 13; [2014] AC 822, para 95:

> *"<u>when granting planning permission for a change of use, a planning authority would be entitled to assume that a neighbour whose private rights might be infringed by that use could enforce those rights in a nuisance action; it could not be expected to take on itself the role of deciding a neighbour's common law rights</u>."*

110. For such reasons, the Supreme Court made it clear in Lawrence that planning laws are not a substitute or alternative for the protection provided by the common law of nuisance. As Carnwath LJ said in Biffa Waste, para 46(ii), in a passage quoted with approval by Lord Neuberger in Lawrence, at para 92:

> *"Short of express or implied statutory authority to commit a nuisance … there is no basis, in principle or authority, for using such a statutory scheme to cut down private law rights."*

157. Much of the law relating to the basic ground rules in respect of the tort of private nuisance is common ground. Mann J and the Court of Appeal approached it in the same way. <u>Private nuisance is a tort concerned with real property and the violation of rights pertaining to real property</u>. It involves either an interference with the legal rights of an owner or a person with exclusive possession of land, including an interest in land such as an easement or a profit à prendre, or interference with the amenity of the land, ie the right to use and enjoy it, which is an inherent facet of a right of exclusive possession: Hunter v Canary Wharf Ltd [1997] AC 655 ("Hunter"), 687G-688E (Lord Goff of Chieveley, citing FH Newark, "The Boundaries of Nuisance" (1949) 65 LQR 480, 482: it is a tort "directed against the plaintiff's enjoyment of rights over land"), 696B (Lord Lloyd of Berwick), 702G-H, 706B and 707C (Lord Hoffmann) and 723D-F and 724D (Lord Hope of Craighead: the tort is concerned with cases where the claimant has a right to the land and there is "an unlawful interference with his use or enjoyment of the land or of his right over or in connection with it")…

206. No part of the reasoning above depends in any way upon article 8 of the ECHR and the HRA. In my view, the basic concepts of the English law of nuisance are already adapted to cover the circumstances of the present case and reference to article 8 is unnecessary and unhelpful. The claimants do not need to rely upon article 8 to make good their case on the first issue in this appeal…

208. The Court of Appeal (paras 86-95) made some well-directed criticisms of the judge's reference to article 8. In my respectful opinion, the judge did not analyse the position regarding the application of article 8 in a case concerning a clash of property rights between two sets of private persons with the care which would have been required had the case really turned on this. It is by no means clear that article 8 imposes a positive obligation on a state to intervene in some way in a dispute between private parties of the kind which arises in this case. Nor is it clear whether article 8 requires the state to extend or qualify the property rights of one or other of the parties as a departure from whatever balance the state's own law has itself struck between the competing interests, once one takes account of the usual margin of appreciation allowed to a state in striking a balance between competing interests and rights of private persons, particularly when they are covered by Convention rights such as article 1 of the First Protocol to the ECHR (right to protection of property). It is also by no means clear that the Tate (as opposed to the individuals who make use of the viewing platform and actually look into the claimants' flats) is properly to be regarded as the relevant party which engages in intrusion into the home or the privacy of the claimants for the purposes of analysis under article 8. But it is not necessary to lengthen this judgment by exploring any of these issues.

Thank you for the opportunity to speak at the planning committee and voice my objection to the conversion of 82 Chichester Road to a seven-bedroom HMO. I'm aware that the Council wants to ensure they have the right housing to meet the demand for certain types of accommodation however the Council has also quite rightly stated that the geographical constraints of Portsmouth streets and their densely built Victorian terraced housing means that converting them to HMOs creates problems for community cohesion and has also led to lower availability of much needed family housing in the city. This is one of the main reasons why I object to the conversion of 82 Chichester Road from a family home to an HMO.

Despite the fact that the Council's own policy (PCS20) seeks to ensure that the future supply of family housing is not jeopardised by its unchecked conversion to shared accommodation and that communities are not negatively impacted by HMO development, it currently feels as though property developers can also use these policies and planning regulations to further their own ends in pushing through a high rate of HMO conversions, despite strong objections from neighbours, because the Council appears powerless to intervene against its own policies.

With respect to 82 Chichester Road, this development will increase the size of the property and instead of having one bathroom, it will have **seven bathrooms and an additional toilet**. Next door, 80 Chichester Road has been converted in the same style with seven ensuite bathrooms and an additional toilet, as has number 85 over the road, which now has eight ensuite bathrooms. This will have a cumulative effect on water demand and pressure and increase sewage and foul water. The Portsmouth Plan (2012, p.80) states that some parts of the city face the risk of flooding from surface and foul water, which currently flows into one combined sewer system, which then becomes overwhelmed during severe storms, leading to flooding of streets, homes and other property. It also states that one of the two main interceptor sewers in the city is at capacity. This is another reason why I object to the development of 82 Chichester Road.

I would ask the Council to reconsider reducing the 10% threshold limit to 5% of dwellings in any area of 50m radius given that Portsmouth is already a densely populated island city and there are already over twenty HMOs in Chichester Road alone. This further application for yet another HMO at 82 Chichester Road has the potential to cause noise and nuisance to neighbours and friction between the HMO residents themselves who will be living in what is essentially a glorified bedsit. Neighbours are quite rightly worried about an increase in activity within and coming and going from the property. If the developers and Council want to provide essential housing, then convert a large house into two two-bedroomed flats and provide individuals with a home rather than a bedroom, such as the proposed HMO development at 82 Chichester Road. HMOs are a short-term fix that potentially lead to longer-term issues such as poor wellbeing and increased demand on already stretched local services such as GPs and dentists. This is the final reason why I object to this development.

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Deputations 13/03/2024

Thank you Mr Chairman,

I am speaking in opposition of the application for 7 bed potentially 14 person HMO's at 82 Chichester Road and 165 Laburnum Grove as both are covered by the same arguments. Firstly I say 14 person HMO's because the reality of these developments are that despite the official line, there is generally nothing that can be done to prevent each room having 2 people occupying them (an official resident, and a respective partner). I'm quite sure we are going to hear lots of "what does the application state, what are the licencing rules" etc. but this is the sad reality.

There are many issues leading residents to oppose this, and many other HMO applications and they are issues that pose serious questions of the current policy and process. For example, If the administration is serious about its green credentials why is there not a cast iron link between planning policy and Green policy? Adding developments that will increase the amount of cars driving around the Copnor area looking for parking spaces that frankly aren't there to start with seems ludicrous. In the vicinity of both applications in Copnor on the agenda today are 4 schools, and we are supposed to be encouraging children and parents to be walking, cycling and scooting to school through the increasingly bad air quality ensured by the continued additions of HMO's.

And whilst these children are walking, cycling and scooting to school, they now also have to run the gauntlet of human excrement flowing from our sewers on a regular basis. If you think I am being dramatic, I can show you a very recent photo of this very situation showing excrement flowing into the street and children in very close contact. Southern Water have highlighted the two way valves as being the main issues for the increase in these incidences, and the continued increase of HMO's as a factor to the increased incidences of these sewage leaks.

I also want to raise the data issue. The wording in the agenda pack states "It has been raised that the HMO data in Laburnum Grove is inaccurate and there are several unregistered HMOs in the surrounding area. This has been investigated through planning application searches and corresponding this with

the licencing database and it is not believed that there are any extant permissions that are not represented within 50m of the application site". In my mind this doesn't answer the query and actual suggests that if there isn't a live application or it isn't already on the database then it is assumed that that there aren't more unregistered HMO's in the area. I've previously been assured that all efforts are made to ascertain if there are unregistered HMO's whenever an application is made but this seems to suggest that this isn't the case at all!

Finally, Its extremely disappointing that despite some extremely compelling arguments the request to look at moving to a 5% per cent per 50m threshold that would have made so much of a difference to our island city was dismissed out of hand on the basis of an informal show of hands at a meeting not attended by all members, and not published as a meeting where such a decision would be made. Its extremely poor.

Thank you Mr Chairman for the opportunity to submit this deputation to the Committee in writing. I fully understand the enormity of some of the applications on the agenda today and the time these take.