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.

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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.