

Glimpsed Views of the Legal Landscape¹

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Following the soap opera of the *Cala Homes* litigation in 2011,² planning cases have returned to their more familiar niche away from the front pages. However, this does not mean this year of 2011/2012³ has been a poor vintage for the “planorak”.⁴

As always there are dangers in *being definite* about trends emerging from the authorities and in particular in seeking to identify any collective agenda on the part of judges through the way they decide cases.

This is for three reasons:

- First, the factual basis and legal issues on which cases come forward to be decided is a random function of events and the motivation of the parties to litigate. The biggest factor affecting the decision to start court proceedings being the financial risk/benefit of litigating and not, as would be much more helpful, the intrinsic legal interest of their particular case.
- Secondly, judges generally have no agenda other than trying to “get it right” in the sense of doing justice between the parties.
- Thirdly, and in any event, it would be wrong to assume judges actually have some collective view about what the law definitely is now, let alone how the law should be changed!

So the clue is in the name “Legal Update” and “Glimpsed views”. This paper will try to tell you what has happened in the courts this year, trying to cover the most significant cases. Electronic data bases mean judgments are available that years ago would, for better or worse, have languished in obscurity. This paper does not pretend to try to cover every judgment given in the planning sphere over the last year. Rather I have sought to concentrate on those which alter the law rather than reinforcing points arising from cases decided previously and those which cover issues which arise quite frequently in practice such as time limit for challenges.

Finally, despite the caveats, I do conclude by considering what may be the topics to come through the courts in 2012/2013.

The format of this paper

The paper tries to follow an order through the definition of development; the process of obtaining planning permission; material considerations and then onto appeals and enforcement. Not all cases fit easily into a category and some straddle more than one but the general scheme is to consider cases under these topics. The significant cases involving Environmental Impact Assessment have been considered in the earlier paper presented to the conference.

What constitutes “development”?

Will “intensification” as a material change of use ever make it to the real world?

The concept of intensification of a use of land to an extent where the nature of that use has changed such that a “material change of use” amounting to development having taken place is long established in

¹ It is hoped that as in *some* Landscape Visual Impact Assessments the final view may be clearer and the features more prominent than the phrase “glimpsed views” suggests!

² *R. (on the application of Cala Homes (South) Ltd) v Secretary of State for Communities and Local Government* [2011] EWCA Civ 639.

³ This paper aims to cover cases where judgment was given between August 1, 2011 and July 31, 2012.

⁴ The credit goes to Simon Ricketts of S J Berwin for inventing and promulgating this description “planorak” through twitter.

planning text books and noted in the Encyclopedia.⁵ However the foundations of the principle have never been especially firm. The starting authority in the 1970's⁶ allowed for possibility of intensification without finding that it had occurred.

Intensification was reconsidered by Ouseley J. in *Hertfordshire CC v Secretary of State for Communities and Local Government*.⁷

Metal Recycling Ltd had operated as a scrap yard in Hertfordshire since the 1970s with the benefit of a planning permission which was not subject to any conditions. In 2006, the company bought a new fragmentiser and as a result activity at the site increased with consequential increases in noise, dust and disturbance from HGV movements. Following complaints from local residents an enforcement notice was served alleging:

“... without planning permission the material change of the use of the Land from a scrap-metal yard with an average yearly material throughput of 121,174 tonnes, to a scrap yard, (including as part of this use an end of life vehicle recycling facility), with an average yearly material throughput of 231,716 tonnes, the totality of the new use having a different nature and character from the former use.”

So the notice alleged approximately a doubling of activity. The Inspector found that this change did not constitute a material change of use and quashed that notice.⁸ Ouseley J. noted that although the concept of intensification was said to be well established there has never been a decided case in which it has been found to exist.⁹ In particular he stressed that it was a change in the character of a use which needed to be assessed and that this was a different question to assessing simply whether the impacts from a use had increased. He stated:

“42 The relevance of impacts comes in evidencing a material change of use of the land, a definable change in its character, but one which is defined by a material change in use, not by a change however severe or minimal, in the effects of a use.

43 I add these *words of caution about attempting to broaden material change of use by intensification as a substitute for proper conditions on planning permissions*. Although authorities, in the Court of Appeal for example in *Fidler v First Secretary of State* [2004] EWCA Civ 1295 at [28], and earlier in, for example, *Lilo Blum v Secretary of State for the Environment* [1987] J.P.L. 278 per Simon Brown J., treat the principle of a material change of use by intensification as well established, the fact remains that no decided case has been shown to me in which a material change of use by intensification has been found to have occurred.

44 In *Brooks and Burton Limited v Secretary of State for the Environment* [1977] 1 W.L.R. 1294, Megaw L.J. pointed out on page 1306E–J that experienced planning counsel had found no reported case in which an intensification in existing use had been found to be a material change of use. That remained the position in front of me. Although earlier cases, mentioned in the authorities cited above say that the existence of a material change in use by

⁵ See *Encyclopedia of Planning* (Sweet and Maxwell) Vol.II para.55.53.

⁶ *Brooks & Burton Ltd v Secretary of State for the Environment* [1977] 1 W.L.R. 1294.

⁷ *Hertfordshire CC v Secretary of State for Communities and Local Government* [2012] EWHC 277 (Admin).

⁸ There was a second notice concerned with new buildings and other operational development which was also quashed but that is not as relevant to the principles here.

⁹ The case of the barking dogs is often cited as an example. *Wallington v Secretary of State for Wales* (1991) 62 P. & C.R. 150; [1990] J.P.L. 112. Change of use of dwelling house had occurred where 44 dogs were being kept at one house. However, this is actually an example of the *ancillary* use growing so as to overtake the primary use—a much more common phenomenon would be a farm shop in the countryside starting to import goods rather than sell produce grown on that holding itself. Had there been an extended but very closely related family of 44 adults and children all living in the one house—that would have been a very extreme but much more interesting set of facts!

- intensification is well recognised, they do no more themselves than recognise that material change of use by intensification may exist. They have never actually found one.
- 45 This reflects what Sullivan J. said in *R. v Thanet DC and Kent International Airport Plc*[2001] P. & C.R. 2 at [54]:

“It is easy to state the principle that intensification may be of such a degree or on such a scale as to make a material change in the character of a use, it is far more difficult to apply it in practice. There are very few cases of ‘mere intensification’. Usually the increase in activity will have led to some other change: from hobby to business, from part to full-time employment, or an increase in one use at the expense of other uses in a previously mixed use.”

- 46 The precise description of the existing and changed uses is important. Mere generic descriptions may not always be sufficiently precise to reflect material planning differences. The statutory overlay, for example in relation to generic residential and industrial uses, may now qualify what might have been the role which the concept of intensification may have been thought able to play many years ago. But for all that, *the cases have all emphasised the need to identify a material change in the definable character of the use of the land. None of them has suggested that this could be done simply by reference to examining impacts alone*, relevant though they are to that crucial issue in a material change of use by intensification case.”

Ouseley J. also made clear that problems of intensification are avoided by proper use of conditions when granting permission. It is sometimes said that intensification is the last resort of the local authority which has failed to take enforcement action in the 10 years since the use started and hence need some other trigger for serving an enforcement notice. As time goes on the number of pre-existing unregulated, unconditioned uses¹⁰ gets fewer and hence the utility of the doctrine of intensification as constituting a material change and allowing planning control to come in and regulate the use also reduces.

There is an appeal to the Court of Appeal outstanding.¹¹ However, although it is unlikely the Court of Appeal will remove even the theoretical possibility of a material change of use by intensification, the concept would appear to be close to extinguishment for any practical purposes of planning control.

Making policy: Plan making and challenges to adoption of DPDs.

Time limits for challenge:

The Timescale for Challenge is six weeks from the date of adoption (that is the resolution of the council adopting the Development Plan Document (“DPD”)) and starts on that day of adoption *not* the day after.

***Hinde v Rugby BC and Barker v Hambleton DC*¹²**

Hinde (Core Strategy) at first instance and *Barker* [2012] EWCA Civ 610 (Allocations DPD) in the Court of Appeal both involved challenges to the adoption of Development Plan Documents. The route of challenge is via s.113 PCPA 2004.¹³ The time limit is set by s.113(4) “... the application must be made not later than the end of the period of six weeks *starting with* the relevant date”. Section 113(10) sets the relevant date for the variety of “strategies, plans and documents” which can be challenged under this section.¹⁴

¹⁰ Certainly non residential and non retail uses.

¹¹ With leave given by Carnwath L.J.

¹² *Hinde v Rugby BC* [2011] EWHC 3684 (Admin) and *Barker v Hambleton DC* [2012] EWCA Civ 610.

¹³ Planning and Compulsory Purchase Act 2004.

¹⁴ For instance the 6 week period for challenging Wales Spatial Strategy starts on “the date when it is approved by the National Assembly for Wales”; for the London Plan (the Spatial Development Strategy) starts on “the date when the Mayor of London publishes it”—s.113(10)(e).

Section 113(10) reads:

“References to the relevant date *must* be construed as follows: ... d) for the purposes of a development plan document (or a revision of it), the date when it is adopted by the local planning authority or approved by the Secretary of State (as the case may be).”

The statute is unambiguous. Both *Hinde* and, with the greater weight of the Court of Appeal, *Barker* [2012] EWCA Civ 610 make clear that the difference in wording between s.113 PCPA 2004 “starting with the relevant date” and s.287 of the Town and Country Planning Act 1990 (“TCPA”) “from the relevant date” is material. The words mean what they say and the 6 weeks for challenging a DPD includes the day of adoption.

Although the Council are required to give notice of adoption “as soon as is reasonably practicable”¹⁵ that notice does not alter the date of adoption. That date is the date of the resolution passed by the local planning authority adopting the DPD.¹⁶

In *Barker* [2012] EWCA Civ 610 the Court of Appeal also considered, although then rejected, a number of points with general application to time limits. These included whether pushing the papers under the door of the court before it opened next day was good enough; whether the LPA had the power to extend time limits by taking no point on late lodging or inadvertently by making errors in their adoption statement; compatibility with EU principles of effectiveness and fair determination of civil rights and obligations under art.6(1) of the European Convention on Human Rights. It concluded the time limit set by the statute was clear, reasonable and should be applied.

The time limit for Judicial Review and the adequacy of reasons: *R. (on the application of) Macrae v Herefordshire DC*¹⁷

Contrary to repeated recommendations from their planning officers the members of Herefordshire DC granted planning permission for a new three bedroom house. The published reasons simply set out some of the policies of the development plan and said that they had been taken into account but gave no further detail. The officers’ reports gave no indications of the reasons for granting permission because they had consistently recommended refusal. The minutes of the meetings gave a broad account of what members had said but there was no discernible common theme or clear list of points which could be said to form their reasons for granting permission.

The claimant neighbour commenced Judicial Review proceedings two days before the three month time limit expired. At first instance, the judge refused permission on the basis that the claim had not been brought “promptly”. The Court of Appeal reversed that finding. Significantly, they held that inadequate reasons for granting planning permission could not be supplemented by the minutes of the debate. In addition it was held that the issue of promptness and the adequacy of reasons could not be considered discretely.

Sullivan L.J. set out the position:

“Whether an application for permission to apply for judicial review is made promptly will depend upon all the circumstances. *One of those circumstances is the extent to which the alleged error of law in the decision is plain or whether the decision ‘leaves the claimant in the dark’ as to the basis on which it was taken.* In the latter case it would normally be reasonable for the claimant to seek to ascertain, so far as he reasonably can, what was the basis for the decision before he resorts to litigation. ... it was, in my judgment, entirely reasonable for the appellant’s solicitors to seek formal clarification

¹⁵ Town and Country Planning (Local Development) England Regulations 2004 (SI 2004/2204) reg.36.

¹⁶ See judgement in *Barker v Hambleton DC* [2012] EWCA Civ 610 at [16]–[19].

¹⁷ *R. (on the application of Macrae) v Herefordshire DC* [2012] EWCA Civ 457.

of what was meant by the reference in the summary reasons to ‘the application report’ which the informative said would give ‘further detail on the decision’. The solicitors asked this question of the respondent by letter dated 19 August, some two months after the grant of planning permission. The respondent answered nearly three weeks later on 7 September and the claim was then filed on 15 September.”

So the court held there was no lack of promptness. The judgment then contains helpful guidance on what will or will not satisfy the statutory requirement to give reasons for the grant of planning permission. Put shortly, neither the minutes of what members said at the committee meeting nor a “paper chase” through other documents not expressly cross referenced in the statutory statement of reasons will be enough:

“In particular, the summary reasons failed to make it clear whether the members had decided to grant planning permission because they considered that the development was in accordance with the development plan or whether they had recognised that the proposed development was not in accordance with the development plan but had nevertheless decided to grant planning permission because ‘material circumstances’ had persuaded them to depart from the policies referred to in the Informative.

The reference to ‘the application report’ [the officers’ report recommending refusal] merely added to the confusion because the officers’ reports had advised members that the development was contrary to the development plan and that material circumstances did not justify a departure from the plan ...

... [other document not expressly cross referenced and the minutes were not enough because] the underlying statutory purpose of requiring local planning authorities to give a summary of their reasons for granting planning permission was to avoid the need for claimants to pursue a paper chase and to examine extrinsic evidence in order to ascertain what the reasons for granting planning permission really were.

... *The judge in the present case thought it was permissible to rely on contemporaneous evidence, that is to say the minutes, albeit that they were extrinsic to the summary reasons for granting planning permission. If the summary reasons cross-refer to an officers’ report which has recommended the grant of planning permission, it is entirely consistent with the statutory purpose to look at that document as fleshing out the summary reasons given for the grant of permission. However, looking at extraneous documents to which the summary reasons do not refer, and in effect conducting a ‘paper chase’ through the local planning authority’s minutes, frustrates the statutory purpose of requiring summary reasons. The minutes of the council’s debates were not referred to in the summary reasons, and they do not in any event enable an answer to be given to the question: did the members think that this was a decision that was in accordance with the development plan, and if so for what reasons since they were disagreeing with the officers’ view; or was this a decision that was contrary to the development plan but material considerations indicated that permission should be granted, and if so what were those material considerations which justified the departure from the development plan given that the officers had said that a departure was not justified?”*

Therefore, as well as covering the issue of promptness, the Court of Appeal has made clear to local authorities what will be required where reasons have to be given for the grant of planning permission and that permission has been granted contrary to officers’ recommendations.

When to challenge during the DPD process: The pre-emptive strike

*Manydown Co Ltd v Basingstoke and Deane BC*¹⁸

The process for adopting a DPD can gather momentum as it goes along. The different stages of consultation from issues and options to the call for sites may mean that the final submission version of the DPD and especially any DPD which allocates sites has built up quite a head of steam going into the Examination in Public (“EIP”) process. This is important since the Inspector at the EIP will start on the basis that the plan being examined is sound. Therefore, developers with sites which are either not allocated in the DPD or allocated or safeguarded for uses which they do not support may wish to try to make an early challenge rather than face what in effect will be a protracted rear guard action through the incremental steps of the plan making process.

That was the dilemma facing Manydown Ltd. They are the freehold owners of 800 acres of farmland west of Basingstoke. Their ownership does not however currently have much value since the Council acquired a 999 year lease of the Manydown site using a CPO under the TCPA 1990. The purpose of its acquisition of the land was to promote a high quality, comprehensive housing development. For Manydown the point is that they are entitled to receive from the Council half the proceeds of development, provided that development takes place before 2050, but not if it takes place after that.

It appears development on the site was controversial and, after a change of administration in 2006, the council suspended active promotion of residential development at Manydown. It reaffirmed that stance in 2009.

Promotion of the Core Strategy (“CS”) followed in which Basingstoke are not promoting the Manydown site for housing. Whilst Manydown are not the effective owners of the site, having had it compulsorily purchased, they obviously want it developed as soon as possible to receive their share of the proceeds and certainly before 2050.

The case came before Lindblom J. with a challenge by way of Judicial Review to two decisions of the council. Firstly a decision not to reconsider the decisions taken in 2006 and 2009 which had been for the council to suspend indefinitely their promotion of the site for housing and secondly a decision which logically followed which was to adopt for consultation a draft of the CS which sought to meet housing needs without utilising the Manydown site.

The point of the case which is of wider importance is a jurisdictional one. The Council took the point that these challenges were to the Core Strategy as a DPD document and hence could only be brought by way of proceedings under PCPA 2004 s.113. This would mean the challenge could only be brought *after* the DPD had been adopted in its final form. This point failed.

Lindblom J. held that the challenge was to process and not to the final form of the documents.¹⁹ Hence the normal method of challenging and restraining unlawful behaviour by a public authority, that of Judicial Review, was appropriate:

“81 I cannot accept that these proceedings for judicial review are precluded by section 113 of the 2004 Act ...

82 ... As with any statutory ouster of the court’s jurisdiction, one must interpret this provision strictly in accordance with the words Parliament has chosen for it. ... I also think it is important to notice the difference in statutory language between the ouster provision in section 113 and the one that previously applied to challenges to local plans. Section 284(1) of the 1990 Act applied to a local plan “whether before or after the plan ... has been approved or adopted”. Such words do not appear in section 113 of the 2004 Act.

¹⁸ *Manydown Co Ltd v Basingstoke and Deane BC* [2012] EWHC 977 (Admin).

¹⁹ *Manydown Co Ltd v Basingstoke and Deane BC* [2012] EWHC 977 (Admin) at [81]–[88].

- 83 ... the present claim does not seek to question a ‘relevant document’ of the kind to which section 113 refers. It impugns two decisions, each of which, in a different way, affects the parameters of the process that will culminate in the adoption of the Core Strategy under section 23 of the 2004 Act. They are, in that sense, decisions antecedent to, and not part of, the process. I do not think this approach departs from that indicated by the authorities, including *ex parte* Huntington.²⁰ On the contrary, I think it is entirely consistent with the relevant jurisprudence.
- 84 Under the provisions of section 113(1)(c), (2), (3), (4) and (11)(c) it is a development plan document that may be questioned only upon its adoption, and within six weeks of that date — not some prior step on the part of the local planning authority, even one that might vitiate the development plan document itself once it has been adopted. Adoption—or approval, as the case may be—is of more than merely formal significance. It is a defining characteristic of the “strategies, plans and documents” embraced in the statutory jurisdiction under section 113.
- 85 I cannot see how the preclusive provision in section 113(2) could catch a decision such as that taken by the Council on 15 December 2011. That decision was, in effect, a decision not to promote land owned by the Council in a plan-making process. In my view it lies well beyond the ambit of section 113. It is, however, plainly susceptible to proceedings for judicial review.
- 86 Nor do I accept that the decision taken by the Council’s Cabinet on 23 January 2012 lies within the reach of the preclusive provision. That decision had the effect of approving a pre-submission draft of the Core Strategy for consultation, the results of which would later inform the preparation of the submission draft. Such a decision does not, in my judgment, constitute a local development document being adopted as such by resolution of the local planning authority. *These proceedings were begun before even the pre-submission Core Strategy had crystallized in a document published for consultation. And they do not seek to question any development plan document as such, either adopted or in draft.*
- 87 Therefore, I do not think it is necessary to decide in this case whether a pre-submission draft of a core strategy qualifies as a ‘relevant document’ within section 113. But I would hold that it does not. The relevant statutory provisions must be read together. Admittedly, the requirement in section 20(1) of the 2004 Act that the local planning authority must submit a development plan document to the Secretary of State for independent examination implies that, according to the particular statutory context, the concept of a development plan document can include the submission draft of such a document. This is also effectively acknowledged in the 2004 regulations. However, I do not believe one can infer from any of the relevant statutory provisions that a pre-submission draft, published—or about to be published—for consultation, qualifies as a development plan document within section 113(1).
- 88 *The conclusion that these proceedings are not ousted by section 113(2) seems both legally right and pragmatic. In a case such as this an early and prompt claim for judicial review makes it possible to test the lawfulness of decisions taken in the run-up to a statutory process, saving much time and expense—including the expense of public money—that might otherwise be wasted. In principle, it cannot be wrong to tackle errors that are properly amenable to judicial review, when otherwise they would have to await the adoption of the plan before the court can put them right. Improper challenges—including those caught by the ouster provision in section 113(2) —can always be filtered out at the permission stage.”*

²⁰ *R. v Cornwall CC Ex p. Huntington* [1994] 1 All E.R. 694 CA.

Lindblom J. then examined the particular decisions and found them unlawful on standard *Wednesbury* criterion. Following the judgment (given on April 17, 2012) Basingstoke have not yet progressed further with their Core Strategy so it is not clear how things will progress in practice. This case is an illustration of the need for LPAs to ensure as far as possible that they do not leave themselves open to challenge in the earlier stages of preparing DPDs since the resultant disruption and delay for themselves and other landowners involved in the process will be significant. As the Court of Appeal stressed in *Barker* [2012] EWCA Civ 610²¹ litigation over planning issues is rarely simply a bi-lateral process and there are often other parties who will be just as affected by the outcome as those actually appearing in court.

Revocation of Regional Strategies: What it means in practice

The first round of Strategic Environmental Assessments (“SEA”) into the abolition of Regional Spatial Strategies (“RSS”) have now been completed. However, the current timetable for their abolition has been put back again²² following the European Court of Justice (“ECJ”) decision on SEA.²³ Currently, it appears that it is the East of England Plan which is in line to be revoked first. This means the following cases may relatively quickly be of historic interest only, on the other hand they still contain some guidance on recurring issues such as how to deal with anticipated/possible changes to overarching guidance during the plan making period and the duty to co-operate.

The “duty to co-operate” is created by s.110 of the Localism Act and inserted into the Planning and Compulsory Purchase as s.33A. Section 110 of the Localism Act immediately follows the provision abolishing Regional Strategies and is intended to substitute regional planning authorities with this new broad but vaguely defined duty so that local planning authorities will get together and do strategic planning for themselves. The duty is to “co-operate in relation to planning of sustainable development” and extends to the preparation and adoption of development plan documents and other local development documents where those documents could have a “significant impact” on at least two planning areas. The extent to which co-operation has taken place will be a matter to be taken into account in judging the soundness of the DPD at EIP.²⁴

*R. (on the application of Stevenage BC) v Secretary of State for Communities and Local Government*²⁵

A large proportion of the housing planned for Stevenage in the Core Strategy was to be built in neighbouring North Hertfordshire DC’s (“NHDC”) area. This was in accordance with the strategy in the East of England Plan. However, during 2011 and the *Cala Homes* saga, NHDC took the stance that since it was likely that they would no longer be obliged to meet the aspirations of Stevenage the District was no longer willing to co-operate in achieving the East of England Plan (“EoEP”) strategy that growth for Stevenage should take place in their area.

Following a variety of legal submissions, the examination in public was reconvened in March 2011, between the decisions of Lindblom J. and the Court of Appeal in *Cala Homes*. The Inspector’s recommendation to Stevenage BC emerged on May 6, 2011, before the Court of Appeal decision. He recommended that the Core Strategy was unsound because the cross border issues remained “unresolved”, (diplomatic language for NHDC seeing no reason why they should grant planning permission for houses

²¹ See above—the case on time limits for s.113 challenges to the adoption of DPD documents.

²² See written Statement of Baroness Hanham July 25, 2012.

²³ *Inter-Environmental Bruxelles ASBL v Government of the Brussels-Capital Region*, ECJ March 2012.

²⁴ Localism Act 2011 s.110(3).

²⁵ *R. (on the application of Stevenage BC) v Secretary of State for Communities and Local Government* [2011] EWHC 3136 (Admin) Per Ouseley J.

in their area to meet the needs of Stevenage and what's more had absolutely no intention of doing so!) and so it could not be delivered. That recommendation was binding on Stevenage BC.

Stevenage BC sought to quash that binding recommendation on the grounds that the Inspector had wrongly taken into account the Government's intention to revoke Regional Strategies, and had misdirected himself about the obligations of NHDC in preparing its DPD timetable and the plans themselves. Stevenage BC said these had to conform at all stages to the still extant Regional Strategy, and the Inspector ought to assume that NHDC would comply with that legal obligation at all stages, including producing in due course a plan providing for Stevenage growth in NHDC's area. This meant that the soundness of Stevenage BC's Core Strategy should have been judged on the assumption that it would be matched by the NHDC Plans, and could not therefore be regarded now as "unsound".

NHDC and the Secretary of State argued that NHDC had adopted a local development scheme which anticipated the revocation of the RSS and pointed out that no challenge had been brought to NHDC's timetable for the production of its DPDs, nor to its intention to produce DPDs which would not conform to the East of England Plan, unless at the time of submission for examination, that Plan remained in force. Those decisions, they said, were the true point of challenge, and unless challenged had to be taken to be lawful. Further NHDC's unchallenged decision no longer to co-operate in providing housing for Stevenage's growth, could not be ignored in judging the soundness of the Stevenage Core Strategy, including its deliverability.

Stevenage's challenge failed. In summary this was because of the particular timescale in which the challenge was brought and the fact that because the precise statutory requirement was that a DPD needed to be in general conformity with the Regional Spatial Strategy *only at the time it was adopted* it was lawful for NHDC to propose to move forward with preparing a Core Strategy which anticipated the revocation of the RSS and facilitated their preferred position of no growth attributable to the needs of Stevenage in their neighbouring area. This was provided that, as NHDC indicated they would, there was also work done on preparing a Core Strategy which would accommodate that growth and could be adopted *if* the East of England Plan remained in force at the date in the future when the NHDC core strategy would be ready for adoption.

The precise interlinking of the timescale and the various statutory provisions is now perhaps of historic interest but it was dealt with by Ouseley J. in this way:

- “27 It has been quite clear for some time that North Hertfordshire DC does not support the Regional Strategy which would see a policy for the growth of Stevenage leading to extensive housing development in North Hertfordshire.
- 28 In my judgment, the lawfulness of those decisions cannot be attacked by the indirect method of challenging such conclusions as the Inspector reached about them, when NHDC has not been joined as a Defendant and no direct challenge, promptness aside, has been made to them with all the implications which that has for the evidence which it might submit and arguments it might present. It was not for the Inspector to be invited to or to act as a judicial review Court in respect of the decisions taken by NHDC. He had to take the NHDC decision of July 2010 no longer to co-operate in the Strategy and to suspend work on SNAP²⁶ as a lawful decision; time for challenging it had expired anyway. He had to take the NHDC timetable for the LDS as lawful, as he did.
- 29 He was therefore obliged to reach his decision on the soundness of the Stevenage Strategy on the basis that NHDC had acted lawfully in deciding to end co-operation with Stevenage BC and in setting a LDS timetable which could lead to DPDs being submitted which did not have to conform to any Regional Strategy ...

²⁶ A relevant Area Action Plan.

... The statutory obligation is quite clear. The DPD must be in general conformity with the Regional Strategy at the stage when it is submitted for examination; Section 20(2)(b) requires the local authority to submit it when it is ready and when it thinks that the plan generally conforms to the Regional Strategy. There is no earlier obligation in relation to general conformity. Section 20(5) requires the DPD to be submitted for examination for such conformity, and for soundness. Section 24 does not bite at any earlier stage in the preparation of the DPD. *It is not unusual for a Regional Strategy itself to be in a state of flux, and a wise authority can legitimately foresee and plan for expected changes. This is illustrated by the way in which Stevenage's own Core Strategy conformed to the draft Regional Strategy as it evolved, so that at submission it was in general conformity with what during the process had become the Regional Strategy. It was not generally in conformity with RPG6, the predecessor to the EoEP, which was current at earlier stages in the development of its Core Strategy. Some such flexibility is sensible in a hierarchy of constantly changing plans.*"

The longer term interest of the case is in relation to the duty to co-operate. It is still very early days to determine how that duty will work in practice and how the courts will define its scope and enforce it. The potential for conflicts of interest is obvious and indeed was part of the rationale for regional planning in the first place. Examples such as the *Stevenage* case, where the neighbouring local authorities are an urban, and in this case New Town, authority and the other a rural largely greenbelt authority with administrations of differing political complexion and objectives will not be unusual. Moreover they are just one example of the differing objectives and expectations likely to be held by adjoining districts.

What the *Stevenage* [2011] EWHC 3136 (Admin) decision makes clear is that plan making authorities cannot go blithely ahead assuming neighbouring authorities will cooperate in steps necessary to make the DPD being prepared by the plan making authority effective and deliverable where there is clear evidence that they will not. As Ouseley J. put it:

"... the prospects of one authority co-operating with another whose plan was being tested for soundness, or the factors which it could lawfully consider in deciding whether or not to co-operate ... touches upon [soundness] ... where the co-operation of now unwilling neighbours is at the heart of the implementation of the plan ... The statutory requirement to test a plan for its soundness involves, obviously, consideration of its practical implementation. The Stevenage Core Strategy is critically dependant for its practical implementation on a local authority which is opposed to that strategy and intends not to co-operate in its achievement. The Secretary of State has indicated no intention to bring pressure to bear on it to do otherwise nor to exercise any default powers he may have to that same end. *The law does not require NHDC to pretend it holds views which it does not hold and to refrain from letting housing developers know that it is hostile to large scale housing development in its area to meet the ambitions of Stevenage BC, ...*"

Quite where this goes is not yet clear. In addition to the statutory duty, the National Planning Policy Framework ("NPPF") paras 178–181 promotes cross boundary working in the preparation of plans.²⁷ PINS has confirmed the importance Inspectors will attach to the duty when considering the soundness of "cross border" plans such as waste strategies.²⁸ In particular, the duty to co-operate is something that must be considered during the plan preparation process. It cannot be put right or retro-fitted once the plan has been submitted for examination in public. This adds detail to how the Government expects the duty to co-operate to work but does not answer the fundamental question of when or if a duty to co-operate becomes a duty

²⁷ And in other specific areas such as local aggregate assessments, paras 145 and 146.

²⁸ The particular comments were in respect of the North London Waste Plan.

of one local authority to put the interests of the inhabitants of the neighbouring local authority area above the inhabitants (and more importantly voters) of their own.²⁹

Need for plan makers to demonstrate broad viability of land use proposals in AAPs if they are to be found to be deliverable and therefore sound

Failure to demonstrate viability has been the downfall of some large scale regeneration schemes requiring the use of CPO powers.³⁰ It will now be necessary to consider viability in Area Action Plans (“AAPs”) and site allocations DPDs as well.

*Linden Homes Ltd v Bromley BC*³¹

Under the Bromley Town Centre Area Action Plan the area around Bromley North Station was designated an opportunity site for “around 250 homes” with B1 and Community Facilities. The plan’s aspirations also included replacing the large amount of surface level only car parking in the area with a multi-storey car park. The claimant, Linden Homes, had an interest in the site and wanted to show that, with only 250 homes, the mixed-use scheme was unviable. In essence, they wanted the AAP amended to have the 250 homes as a minimum figure and to facilitate greater building heights and higher density flatted development. Developers arguing that more homes are needed to bear the costs of infrastructure is not an uncommon scenario in Area Action Plan examinations.³²

The guidance in force at the time was PPS 12 which, in relation to soundness and effectiveness and deliverability, read:

“In relation to ‘effectiveness’, :

‘Core strategies must be effective: this means they must be:

- deliverable;
- flexible; and
- able to be monitored.’

In relation to ‘deliverability’,:

‘Core strategies should show how the vision, objectives and strategy for the area will be delivered and by whom, and when. This includes making it clear how infrastructure which is needed to support the strategy will be provided and ensuring that what is in the plan is consistent with other relevant plans and strategies relating to adjoining areas. The evidence must be strong enough to stand up to independent scrutiny’”.

There was also the requirement that plans should contain “the most appropriate strategy when considered against the reasonable alternatives.”

The most specific *current* guidance in para.173 of the NPPF is arguably more specific and reads:

“Ensuring Viability and Deliverability

173 Pursuing sustainable development *requires careful attention to viability and costs* in plan-making and decision-taking. Plans should be deliverable. Therefore, *the sites and the scale of development identified in the plan should not be subject to such a scale of obligations*

²⁹ The potential conflict with the “well being powers” given to a local authority for “their area” under s.2 of the Local Government Act 2000 is one issue which may emerge.

³⁰ Notably the Croydon Town Centre Regeneration proposals.

³¹ *Linden Homes Ltd v Bromley BC* [2011] EWHC Admin 3430 (December 19, 2011) H.H. Judge Bidder QC (Sitting as Deputy High Court Judge).

³² See, e.g. the proposals for a residential development to be able to accommodate the land for a primary school next to the Hertford Canal in the Fish Island AAP in Tower Hamlets.

and policy burdens that their ability to be developed viably is threatened. To ensure viability, the costs of any requirements likely to be applied to development, such as requirements for affordable housing, standards, infrastructure contributions or other requirements should, when taking account of the normal cost of development and mitigation, provide competitive returns to a willing land owner and willing developer to enable the development to be deliverable.”

Together with an argument that alternatives have not been sought or evaluated, the Objector’s case at the EIP into the AAP was in essence that:

“There is a lack of evidence to support the current allocation of residential development on the site. The council have not undertaken any work that would suggest that the scheme providing 250 units and delivering all the benefits sought by the AAP, would be viable. The only market evidence submitted in support of the AAP is the Evidence Base Report published in June 2009. The values contained within this document date from December 2006 and mid-2007, the height of the property market, and as such this information is not considered to represent a robust evidence base given the subsequent change in market conditions and therefore represents insufficient justification to support the strategy outlined within the AAP.”

This case was supported by a planning report and specific up-to-date valuers’ evidence on viability which concluded that with only “around 250 homes” the proposals would not come forward as envisaged because they would not provide a developer with a sufficiently attractive return on their capital investment. In fact there would be a negative residual land value.

The Council’s response was fairly detailed but its main thrust was one which again is not uncommon in the current economic circumstances:

“[the scheme may not be presently viable but] ... the phasing of the current AAP has been given a flexible delivery timescale and is assumed to be delivered in phases one or two of the AAP period (a 5 to 10 year window). This indicates that there is clearly time for land values to recover to a point which would allow a viable scheme to be delivered, in line with parameters set by the current AAP.”

The Inspector was satisfied that the AAP met the requirements of the Act and Regulations and properly took as the starting point for his examination the assumption that the local authority had submitted what it considered to be a sound plan. On the issue of the viability of the Bromley North Station Opportunity Site he found:

“The Council has carried out a modelling exercise for the site which indicated a way forward. The scheme was dominated by a multi-storey car park and the relationship of building blocks would not appear to provide an adequate public space, or for the best location that tall buildings. *However the urban design analysis suggests that around 250 units would be appropriate for this site and this was supported by a financial appraisal based on September 2007 values. I accept for the present this may no longer be economically viable but the Area Action Plan delivery period is flexible.”*

This was the sole discussion in the Inspector’s report of whether 250 units were or would be capable of producing a viable scheme. The Inspector accepted that the financial appraisal put before him by the Council was simply incapable of being viable at the time it was being considered because it was based on outdated values.

Given that analysis, the judge accepted submissions that the Inspector’s conclusions on viability, which were material to his overall finding that the AAP was “sound” were: first, pure speculation, secondly, were contradicted by the unchallenged evidence from the valuers BNP Paribas, thirdly, were not supported

by any or any adequate reasoning and fourth, were not raised at the hearing and so were procedurally unfair.

The judge concluded:

“On the viability issue, I start, of course, from the premise that the Inspector is an expert but it must be said that one looks in vain in the report for any explanation for why he takes the view that over the period set for the [regeneration to come forward] in the plan the scheme may become viable, which is the clear inference from [his paragraph] 6.19. If he did conclude that, on the evidence before him, the scheme could be viable, then that conclusion flew in the face of that evidence and was a very substantial and material error in my judgment.

... Of all the issues raised before me, the viability issue appears to me to be the one that is most clearly established. In the absence of any reasoning that I can follow in the IR, it is, in my judgment, perfectly appropriate to categorise the Inspector’s conclusions on viability and alternatives as purely speculative. I do not believe even an expert and well informed party to the hearing would be able to understand how he reached these conclusions. He does not grapple with the BNP Paribas evidence, which was unchallenged and, on the face of it, perfectly reasonable and his findings are directly contradicted by that evidence. Although Mr Comyn suggests that the findings of the Inspector were reasonable I am unable to agree as I simply cannot follow how the Inspector has reconciled his conclusions with the financial viability evidence. To suggest that the 250 unit scheme could be saved by ‘adjustments’ to the elements of affordable housing and section 106 payments is an inadequate answer when one looks at the totality of the BNP Paribas report and the current deficit in land value calculated in it. Of course the Inspector is a planning expert, but if he is to use his expertise, the parties must be able to understand how he has done so.”

It is not surprising that the judge therefore found that the Inspector’s report should be quashed. In an illustration of how useful the power to quash part of a DPD has become his order dealt only with the specific parts of the AAP dealing with Bromley North. This prevented the need for an AAP for the whole of a struggling town centre to start from scratch. He stated:

“[I] remit the AAP to the Defendant with a direction requiring these parts of the document to be treated as not approved and to require the steps taken in the process that resulted in the approval of these parts of the AAP to be treated as not having been taken and to require the Defendant to prepare, publish, consult upon and promote an AAP for the [Bromley North Station] site in accordance with the Town and Country Planning (Local Development) (England) Regulations 2004.”

This is not a surprising or radical decision. The difficulty for any Inspector and plan making authority at EIP is that objectors are able to focus on one site and it can be difficult to ensure the appropriate degree of attention to the arguments and analysis of the evidence is given to the issues raised at each and every session of the examination given the number and breadth of objections to be considered, analysed and determined with reasons throughout the process as a whole. However, that is what must be done. In this case it appears that unfortunately for Bromley their evidence on viability was too general and too old and that led the Inspector into making broad and unsupported assertions.

The lessons for plan making authorities are perhaps:

- The viability of a scheme used to be regarded broadly as a matter for the developer. That attitude has to change certainly in the context of the relatively detailed proposals likely to be coming forward with AAPs.
- The evidence base for the promotion of DPDs may well be likely to be older than specific evidence produced by the objector at the EIP. LPAs must at least be prepared to obtain

evidence that any material such as financial projections was either future proofed at the time it was commissioned or has been revisited more recently.

- The requirement to consider alternatives is an important one and cannot be skated over.
- As always the need to constantly check that there is justification within the evidence base for the assertions which form the Council's case.

Consideration of alternatives in a Strategic Environmental Assessment prepared in relation to a Core Strategy

*Heard v Broadland DC*³³

The three councils adopted a joint core strategy ("the JCS") covering Norwich and surrounding areas. The JCS included, as part of its provision for the RSS requirement, major growth in an area to the north east of Norwich known as the North East Growth Triangle. This attracted objections from local residents and their action group "Stop Norwich Urbanisation" or "SNUB" challenged the adoption of the JCS under PCPA 2004 s.113.

The challenge focused on the SEA which had been prepared under the Environmental Assessment of Plans and Programmes Regulations 2004³⁴ and in particular reg.12(2)(b) which required the SEA to "identify, describe and evaluate the likely significant" environmental effects of implementing the plan, and of "reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme". By virtue of Sch.2 item 8 the report has to include such of the information as is reasonably required although it can be provided by reference to relevant information obtained at other levels of decision-making and that information must include:

"an outline of the reasons for selecting the alternatives dealt with, and a description of how the assessment was undertaken including any difficulties ... encountered in completing the information."

Throughout the process the Councils had conducted a "Sustainability Assessment" ("SA") and it was this document which was intended to fulfill the role of the SEA and indeed could in principle have done so. When the JCS came to be adopted it required an accompanying Environmental Statement ("ES"). In relation to alternatives the ES read:

- 5.1 The iterative plan making process set out above, informed by Strategic³⁵ Assessment [SA] and consultation throughout, involved consideration of a number of reasonable alternatives.
- 5.2 This is particularly the case in relation to the spatial location of growth. At the Issues and Options stage ten potential growth options were put forward (plus brownfield sites in the city & suburbs). The Sustainability Appraisal was used to select options to take forward along with other evidence such as the water cycle study, public transport modelling and discussions with children's services.
- 5.3 The former preferred options document considered alternatives for growth options and area-wide policies. The alternatives were assessed and captured in the SA document and remain in it as evidence of considering reasonable alternatives.
- 5.4 The strategy submitted to the Secretary of State has a relatively concentrated pattern of growth in Broadland, based on sustainable urban extensions and a more dispersed pattern in south Norfolk, with growth focused on a number of existing settlements. Earlier plan

³³ *Heard v Broadland DC* [2012] EWHC 344 (Admin).

³⁴ Environmental Assessment of Plans and Programmes Regulations 2004 (SI 2004/1633).

³⁵ It appears this should have read "Sustainability Assessment" not "Strategic Assessment" but nothing turns on this.

- drafts, supported by the SA, included options that had promoted a somewhat less dispersed pattern of growth in south Norfolk, with more limited development at Long Stratton.
- 5.5 Having regard to the technical evidence and public comment, the strategic preference of the GNDP was to promote growth in Long Stratton to achieve the consequent environmental improvements to the village.
- 5.6 The strategy has been adopted subsequent to a formal Examination in Public. The independent Inspectors concluded that the plan is sound, subject to a number of required changes. These changes have been incorporated into the adopted strategy.”

This generic approach was not good enough. Ouseley J. found that despite the complex history of the preparation of the JCS and extensive consultation there was not:

“any document in which the outline reasons for the selection of alternatives at any particular stage were clearly being given ... Nor was there any discussion in an SA, in so far as required by the Directive, of why the preferred options came to be chosen. Nor was there any analysis on a comparable basis, in so far as required by the Directive, of the preferred option and selected reasonable alternatives.”

In relation to the issues and options paper which is where the statute and regulations anticipate early consideration of alternatives will take place he noted:

“The Issues and Options Paper and its Sustainability Appraisal are in themselves perfectly sensible papers. However Option D, the different combination of growth areas, was not assessed, and the SA itself did not explain why not. *There was therefore no assessment of an alternative which did not include development in the NEG, nor an explanation of why that was not a reasonable alternative, even though one which might have been identified as an option.* This was not unimportant in the light of ...[other relevant planning factors such as the delivery of further highways infrastructure].”

The error the Councils preparing the JCS made was not to fail to consider alternatives because they clearly did so but to fail to ensure that consideration was tightly and expressly enmeshed and referenced in the SEA process, no “audit trail”:

“There was an important report to the Councils in February 2009 which led to the selection of the preferred option; it explains why it was preferred, and could contain information as to why the options examined had been selected. But that was not produced before me, and more importantly, it was not cross-referred to or publicly available as part of any SA. By the time of public consultation in March 2009, the preferred option had been selected.”

In relation to the Strategic Assessment Ouseley J.³⁶ noted:

“It would have been open to the Councils to describe here the process of selection of alternatives for examination at each stage. They could have done this by reference to earlier documents, if earlier documents had contained the required material. But the earlier documents do not contain the required information as to why the alternatives considered had been selected. If the outline of the reasons for the selection of alternatives was not dealt with in the earlier documents, the Councils had to provide them in this document. But that is missing from the SA ... The SA itself only describes what has been done. It contains no further analysis of the selection of alternatives for consideration at various stages, nor for the choice of the preferred option. It contains only a brief assessment of the alternatives, and does not itself contain the explanation which it implies is in the earlier documents, but, which in fact, on this particular aspect is simply not covered in them. Crucially, it is not possible to tell from

³⁶ *Heard v Broadland DC* [2012] EWHC 344 (Admin) at [62].

the SA itself or from earlier documents what the Councils' answer is to the Claimant's question: were the only alternatives it was thought reasonable to select ones involving development in [their area] , and if so -in outline- why so, especially in view of the uncertainty over the [highway improvements] ...”

Moreover, the fact that the report of the Inspectors into the JCS did consider alternatives and also explain why they should be rejected was not enough:

“But although their report evidences a view about alternatives, it is not itself part of the [SEA/ES]. [The inspectors] may be required to consider alternatives by the Secretary of State in PPS12, but that is not in fulfillment of the Directive obligation or of those in the regulations.”

And so finally this led to the judge concluding that:

“[Whilst] I accept that the plan-making process permits the broad options at stage one to be reduced or closed at the next stage, so that a preferred option or group of options emerges; there may then be a variety of narrower options about how they are progressed, and that that too may lead to a chosen course which may have itself further optional forms of implementation. *It is not necessary to keep open all options for the same level of detailed examination at all stages.*³⁷ *But if what I have adumbrated is the process adopted, an outline of the reasons for the selection of the options to be taken forward for assessment at each of those stages is required, even if that is left to the final SA [Environmental Statement] ...”*

As to the extent of the duty created by the requirement of the 2004 regulations the judge commented:

“an outline of reasons for the selection of alternatives for examination is required, and alternatives have to be assessed, whether or not to the same degree as the preferred option, all for the purpose of carrying out, with public participation, a reasoned evaluative process of the environmental impact of plans or proposals ... *The failure to give reasons for the selection of the preferred option is in reality a failure to give reasons why no other alternatives were selected for assessment or comparable assessment at that stage. This is what happened here. So this represents a breach of the directive on its express terms...* although there is a case for the examination of a preferred option in greater detail, the aim of the directive, which may affect which alternatives it is reasonable to select, is more obviously met by, and it is best interpreted as requiring, an equal examination of the alternatives which it is reasonable to select for examination along side whatever, even at the outset, may be the preferred option. It is part of the purpose of this process to test whether what may start out as preferred should still end up as preferred after a fair and public analysis of what the authority regards as reasonable alternatives ... Of course, an SA [SEA] does not have to have a preferred option; it can emerge as the conclusion of the SA process in which a number of options are considered, with an outline of the reasons for their selection being provided. But that is not the process adopted here.”

As a result the challenge succeeded. This case illustrates the need for ensuring that the precise requirements of SEA regulations are kept in mind by the promoting authority at all times during the plan making process. It may be argued that it is unfortunate. That even though a genuine consideration of alternatives did take place the plan was liable to be quashed because not enough attention was paid to writing up what was done. That the lack of reference in a single document did not reflect the actual thinking that had taken place. That the Council was being criticized for simply not ticking the right boxes. However, the reality is that that argument, if it ever had any merit, is already lost. See *Berkeley v Secretary of State for the Environment, Transport and the Regions (No.1)*³⁸ which found definitively that a disparate collection

³⁷ Hence the relevance of *Manydown Co Ltd v Basingstoke and Deane BC* [2012] EWHC 977 (Admin).

³⁸ *Berkeley v Secretary of State for the Environment, Transport and the Regions (No.1)* [2001] 2 A.C. 603.

of documents, a paper chase through which the public might find its way, did not constitute substantial compliance with Directive requirements on environmental assessment.

Again however, the form of relief in this case resulted in only the challenged aspect of the JCS being quashed avoiding a planning policy vacuum for Norwich and the surrounding area which would have resulted from the quashing of the JCS as a whole.

The meaning of adopted/published policy

*Tesco Stores Ltd v Dundee CC [2012] UKSC 13*³⁹

“... planning authorities do not live in the world of Humpty Dumpty: they cannot make the development plan mean whatever they would like it to mean.” *Tesco v Dundee* is an appeal from the Scottish Courts. Planning law cases are able to get more than their fair share of Supreme Court time. This is because in Scotland there is no requirement for the final court of appeal or the Supreme Court itself to grant leave to appeal. The requirement is that if two counsel in Scotland of appropriate expertise and standing are prepared to certify that the appeal should be heard by the Supreme Court then the Supreme Court will hear and determine the appeal. Since the two countries have a virtually identical statutory regime for planning law the Supreme Court hears cases which affect planning law in England and Wales more often than would otherwise be the case.

This year has been no exception.⁴⁰ In March 2012, the Supreme Court held that the correct interpretation of published planning policy is a matter of law, ultimately to be decided by the courts. It has made clear that the correct meaning of published planning policy is not a matter of judgement for the local planning authority or other decision maker subject to review only on the *Wednesbury* principles of irrationality or unreasonableness.

In this case, Asda made a mistake in applying for and being granted planning permission for a Superstore sited not in Dundee City centre but on one of the main roads leading into the town. Their mistake was to apply for and be granted permission when a rival superstore operator was seeking to relocate from their own city centre site to operate on a larger site further out of town. Another episode of “store wars” began.

Tesco founded a challenge on the interpretation of policy. The relevant policy required that before granting planning permission for an out of town food store the LPA had to be satisfied that:

“no suitable site is available, in the first instance within, and thereafter on the edge of the city...”

The planning authority considered that “suitable” meant “suitable for the development which we are being asked to grant planning permission for”. Tesco argued that the policy should be read so as to mean “suitable for meeting the retail needs of the area”.

In these extracts from the judgments I have substituted the references to Scottish planning legislation for the equivalent provisions in the English statutes.

“18 In the present case, the planning authority was required by [Planning and Compulsory Purchase Act 2004 s.38(6)] to consider whether the proposed development was in accordance with the development plan and, if not, whether material considerations justified departing from the plan. In order to carry out that exercise, the planning authority required to proceed on the basis of what Lord Clyde described as ‘a proper interpretation’ of the relevant provisions of the plan. We were however referred by counsel to a number of judicial dicta which were said to support the proposition that the meaning of the development plan was a

³⁹ *Tesco Stores Ltd v Dundee CC [2012] UKSC 13*.

⁴⁰ See *G Hamilton (Tullochgribban Mains) Ltd v Highland Council [2012] UKSC 31* for another example, this time in the field of Registration of Old Minerals Permissions.

matter to be determined by the planning authority: the court, it was submitted, had no role in determining the meaning of the plan unless the view taken by the planning authority could be characterised as perverse or irrational. That submission, if correct, would deprive [PCPA 2004 s.38(6)] of much of [its] effect, and would drain the need for a ‘proper interpretation’ of the plan of much of its meaning and purpose. It would also make little practical sense. *The development plan is a carefully drafted and considered statement of policy, published in order to inform the public of the approach which will be followed by planning authorities in decision-making unless there is good reason to depart from it. It is intended to guide the behaviour of developers and planning authorities. As in other areas of administrative law, the policies which it sets out are designed to secure consistency and direction in the exercise of discretionary powers, while allowing a measure of flexibility to be retained. Those considerations point away from the view that the meaning of the plan is in principle a matter which each planning authority is entitled to determine from time to time as it pleases, within the limits of rationality.* On the contrary, these considerations suggest that in principle, in this area of public administration as in others (as discussed, for example, in *R. (Raissi) v Secretary of State for the Home Department* [2008] Q.B. 836), *policy statements should be interpreted objectively in accordance with the language used, read as always in its proper context.*

- 19 That is not to say that such statements should be construed as if they were statutory or contractual provisions. Although a development plan has a legal status and legal effects, it is not analogous in its nature or purpose to a statute or a contract. As has often been observed, development plans are full of broad statements of policy, many of which may be mutually irreconcilable, so that in a particular case one must give way to another. In addition, *many of the provisions of development plans are framed in language whose application to a given set of facts requires the exercise of judgment. Such matters fall within the jurisdiction of planning authorities, and their exercise of their judgment can only be challenged on the ground that it is irrational or perverse (Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 W.L.R. 759 at 780 per Lord Hoffmann). *Nevertheless, planning authorities do not live in the world of Humpty Dumpty: they cannot make the development plan mean whatever they would like it to mean.”*

On one view the Supreme Court has refined rather than altered the law. A local planning authority has never had a free rein to “make the development plan mean whatever they would like it to mean”. The local planning authority reading of policy has long been subject to a *Wednesbury* challenge. However taking this view would be to underestimate what this judgment actually does. Whilst the answer to the questions posed by planning policy remains a matter for the decision maker what those questions are is, in a disputed case, now a matter entirely for the courts.

Drafting any document whilst avoiding unintended ambiguity is not easy. Current planning policy such as the NPPF is not free from ambiguity as to what it actually requires the decision maker to consider. Prior to *Tesco v Dundee* where planning policy could justifiably and rationally be read two ways there was little scope for challenging through the courts the choice made by the decision maker to opt for one reading rather than the other. That is no longer the case. The ultimate arbiter of which of those two readings is correct is now a judge or judges. This will involve detailed textual analysis of the type carried out by the Supreme Court in *Tesco v Dundee*. It will not always be easy to predict which interpretation a court will ultimately decide on. Let alone whether an appellate court will take the same view as to the meaning of policy as a judge at first instance.

It is not clear to what extent this case has yet generated litigation.⁴¹ The prediction has to be that it will. With the financial consequences of many planning decisions making litigation worthwhile the last ditch in defence or the final line of attack may be that even though it is possible to see why a planning decision maker has interpreted policy one way that is not enough. The Supreme Court has taken that decision out of the grasp of even the reasonable planning authority or Inspector and into the courts.

Determining planning applications

Natural justice—“fair crack of the whip”—Has the objector seen all the cards?

Where planning permission is granted despite representations from objectors who have engaged in the process it is important that the objector has seen and had a real chance to comment on all the material which is finally before the decision maker. Probably not a controversial proposition of law but fleshed out in two examples which have come before the courts this year.

Trellis Wars in Primrose Hill: *R. (on the application of Vieira) v Camden LBC*⁴²

A highly stretched planning authority and neighbours in expensive terraced houses in Primrose Hill create a recipe for litigation.

Stephen Viera and Lionel Saph are the owner occupiers of a house in Regents Park Road, Primrose Hill in Camden. A neighbour lived in the upper ground floor flat of the terraced house next door. As befits all terraced houses in Primrose Hill there was a rear conservatory extension and the upper ground floor flat had access to the roof of that extension as a roof terrace. There had been an extension built with planning permission in 1987 but in 2009 it was rebuilt on a larger scale and with a larger roof terrace at first floor level. In addition the steps which gave access between the terrace at first floor level and the garden were moved from their previous position on the other side of the house so as to be adjacent to the garden of the claimants' house.

The new conservatory was built without planning permission and following complaints from the claimants an application for retrospective planning permission was made. To counter the issue of overlooking large trellises were erected on the edge of the terrace and up the stairs to screen views into the claimants' garden and down through a glass roof into their own basement kitchen extension.

Whilst there was never any suggestion that the planning authority had acted in anything other than good faith, things were not perfect. The planning permission was granted under delegated powers. The objector was left not knowing precisely when the decision to grant planning permission had been made and believed it had already been granted when in fact it had been deferred by officers to allow the applicant to submit a further drawing. This further drawing (showing a reduced trellis) satisfied officers' concerns and permission was granted. However the claimants who were using planning consultants to make their objections were understandably able to show that had they known of the drawing they would have made further representations which could well have altered the officers' minds.

The grant of planning permission was quashed. The court held that the claimants should have been able to comment on all the material that was before the decision maker who in this case had been an officer exercising delegated powers. Where that officer had taken a decision which had, even inadvertently, included material which those previously actively engaged in the process and directly affected by the decision had not seen then there had not been the requisite “fair crack of the whip” and the decision was unlawful.

⁴¹ The judgment was on the February 21, 2012.

⁴² *R. (on the application of Vieira) v Camden LBC* [2012] EWHC 287.

Objectors must have the chance to comment on late evidence in written representations appeals

*R. (on the application of Ashley) v Secretary of State for Communities and Local Government*⁴³

The Greenwich LBC refused planning permission for a new housing scheme of 43 dwellings on the site of the former Montbell School, Domonic Drive, New Eltham. Local residents had objected to the application on the basis of impact on their amenity including disturbance from noise and activity which would be generated in a parking area which would be adjacent to an existing house at No.136 Domonic Drive.

The developers' appeal was determined through written representations. The local residents continued their opposition and engaged with the appeal process putting in their own submissions.

Under the timetable set for the appeal the developer, Taylor Wimpey, were required to send a statement by October 29, 2009 if they were going to "add details" to their appeal. There would then be final comments by November 19, 2009.

The claimants were not sent the PINS timetable. They were sent a letter by the Council which told them that both they and the appellant must make further comments by October 29, 2009. The letter stated that the final submission date was 29th October and the appellants did not realise they would have the chance to say anything further after that.

On October 29, Taylor Wimpey submitted to the Inspectorate and the Council an expert acoustic assessment which countered any evidence of noise disturbance from the new development. This had not been foreshadowed but was then heavily relied upon by the Inspector in reaching his conclusions and allowing the appeal. The case on behalf of the claimants was:

"... that the procedure was unfair in that the appellant was not made aware of an expert report produced at the time and in the circumstances described. It was submitted on the date which the appellant was told by the council was the final submission date. The appellant reasonably assumed that there would be no opportunity for further comment after that date, so that further action by him would not have been appropriate. No warning of the report had been given in the grounds of appeal. There was no background of expert evidence in the planning proceedings in relation to this site.

18. It was further submitted that the Inspectorate, or the Inspector himself, aware of this sequence of events, should have given the appellant, as the person directly affected, an opportunity to comment on the expert evidence. The reason for refusal and the ground of appeal refer specifically to 136 Domonic Drive. The appellant could not have been expected to anticipate the introduction of important new evidence at the time it was and without his having the opportunity to comment. The Inspectorate's own Guidance made inadequate provision for the situation which occurred."

The developers who had succeeded at first instance and, perhaps more surprisingly, the Secretary of State countered that the objector should have monitored the appeal more closely and himself checked after what he thought was the final date for submission what material was going to be considered by the Inspector:

"21. The Secretary of State and Taylor Wimpey submit that there is a short and simple answer to the claim that the hearing was unfair. The appellant should have visited the council offices after the final submission date of 29 October to see what was to be placed before the Inspector. Had the appellant done so, he could then have sought the opportunity from the Inspectorate

⁴³ *R. (on the application of Ashley) v Secretary of State for Communities and Local Government* [2012] EWCA Civ 559.

to make further representations. The appellant had hitherto participated in the planning process and strongly opposed the proposed development and could be expected to continue to participate by such a visit after 29 October.

22. When making the comment he did about the lack of opposition to the acoustic report, the Inspector was entitled to assume that there had been such a visit. In any event, to expect the Inspector or the Inspectorate to check whether the appellant had seen the expert report was to place too heavy a burden on them, a burden which would render ineffective the written representation procedure. No breach of the Town and Country Planning (Appeals) (Written Representation Procedure) (England) Regulations 2009 was alleged, and the hearing was, in the circumstances, fair.”

The court held that in this case the process had been unfair, stating initially:

- “23. It is common ground that the Regulations do leave a discretion to decision makers by way of allowing further time for information to be sent in. It is also common ground that whether there has been a fair hearing is fact sensitive and it is for the court to decide whether, on the particular facts, the hearing was fair.”

And then through Hallett L.J. in particular:

“... the reason that the appellant did not attend the council offices after 29 October was because he thought there was no point. He had been led to believe that there was a deadline for making submissions and that deadline expired on 29 October. Nothing had alerted him to the possibility that highly significant expert evidence, as the Inspector found it to be, would be submitted at the very last minute.

43. This was not a case where an objector had failed to engage in the process and therefore a failure to respond after the deadline could legitimately be taken as acceptance. On the contrary, the appellant had been very active in visiting the council offices, making himself familiar with documents and making representations up until the deadline expired, both on the procedure to be adopted and the merits of the appeal.
44. To my mind, in those circumstances, and in the light of the history outlined by my Lord Pill LJ, it was unfair to conclude that the appellant would have visited the council offices after the deadline for making submissions had expired, seen the material, and attempted to make further submissions upon it.
45. I am satisfied that there has been, on the particular combination of facts, a breach of natural justice. I should add two things: I also agree with Pill LJ that, given the timetable set out by the regulations, the Guidance to interested persons could be drafted in clearer terms. *Further, I have my doubts as to whether the written representation procedure was appropriate, following the service of what was bound to be controversial expert evidence on a central issue. However, it is not necessary in all the circumstances to decide the point.*”

The decision was quashed. If things had gone no further this would appear to be a decision confined to its own facts.

However, Pill L.J. suggested that the PINS guidance on the conduct of written representation appeals should be reconsidered:

- “31. It is not necessary to my conclusion but *in my respectful view, the Planning Inspectorate’s Guidance should be reviewed with a view to preventing the unfairness which, in my judgment, may arise if it is followed. There are circumstances in which, to avoid unfairness, representations by interested parties outside the six-week period will be appropriate. The*

view I have formed that in the circumstances the procedure followed was unfair is given further weight, in my view, by reference to the Guidance which has a potential for unfairness. The contents of the Guidance may have influenced the Inspectorate when failing to take action in a situation where written expert evidence had for the first time been submitted by the appellants on the last day of the six week period. No action was taken.”

Hallett L.J. agreed on this point but also, as set out above, added what may be come to be a much quoted passage as both local authorities and developers seek to persuade PINS to allow appeals to be heard by inquiry rather than informal hearing or by hearing rather than written representation:

“I should add two things: I also agree with Pill LJ that, given the timetable set out by the regulations, the Guidance to interested persons could be drafted in clearer terms. Further, I have my doubts as to whether the written representation procedure was appropriate, following the service of what was bound to be controversial expert evidence on a central issue. However, it is not necessary in all the circumstances to decide the point.”

Patten L.J. was more concerned to emphasise the responsibility of the Inspector as decision maker for ensuring the fairness of their own process:

“... it was, in my view, incumbent on the Planning Inspectorate, which has the conduct of the appeal process right through from its initiation to its eventual determination by the Inspector, to have satisfied itself—and this ultimately falls on the shoulders of the Inspector who conducts and determines the appeal—that a proper opportunity had been given to the interested party to respond to that evidence, either within or, if necessary, outside the six-week submission period.

51. The published Guidance which Pill LJ has referred to and which is contained in PINS 01/2009 makes it clear in paragraph 2.4.1 that late representations and evidence will not be accepted, other than in exceptional circumstances and that those exceptional circumstances need to be explained. It seems to me that, as part of that procedure, it is, for the reasons which I have indicated, incumbent on the Planning Inspectorate to satisfy itself that the interested party and not merely the local planning authority have been informed of the existence of that evidence so as to ensure them an opportunity to comment on it if so advised.
52. The facility under 2.4.1 for receiving that evidence, so to speak, out of time is of no assistance to the interested party if that party does not have notice of its existence and to say, as the judge did, that that can be remedied by the interested party going along at the end of the submission period to the local planning authority in order to inspect the file presupposes that there is some reason for the interested party to do that, on the assumption that there may have been additional evidence served at the very end of the six week period. It seems to me that that imposes what is tantamount to an obligation on the interested party that is unreasonable against the background of a general rule that no late evidence will be received by the Planning Inspectorate.
53. *If the Inspector wished to adhere, as he did, to the written statement procedure, he could only in my judgment do that consistently with the rules of natural justice by, as I have said, satisfying himself that the interested party was aware of the late evidence and had in fact chosen to make no comment upon it.”*

So in what could have been a very fact specific decision the Court of Appeal has made clear that the interests of natural justice are paramount and will, if necessary, override the desire to keep to a rigid timetable and also to retain their own control over whether an inquiry is to be determined by inquiry or hearing or written representation. On that front, it is understood that the first Judicial Review challenge

to a decision to refuse an inquiry requested by both parties and to oppose a hearing has been made and will be heard this autumn.

It is not clear if the developers delayed putting in their acoustic report until the last minute as a tactic⁴⁴ or whether they simply struggled to overcome other things on the desk to get it ready in time for the deadline. In any event, despite being aware of the active engagement of local residents they gave no forewarning of it coming and made no suggestion that the local residents should be made aware that the report would be before the Inspector where previously there had been no detailed acoustic evidence. *If* this was tactical as opposed to inadvertent, it backfired. There is no suggestion that the acoustic report was not helpful and persuasive and may well not have been effectively undermined by anything the local residents could have said. Instead the developers have borne the costs of High Court and Court of Appeal litigation as well as having the appeal decision in their favour quashed. Actively co-operating with all parties in the written representations process would almost certainly have prevented this happening.

Determining planning applications

Material considerations

Legitimate expectation is very unlikely to arise from previous planning briefs or planning policies

*R. (on the application of Godfrey) v Southwark LBC*⁴⁵

In May 2010, Southwark LBC granted planning permission for mixed use development on a site known as Downton on the Rotherhithe Peninsular. In stating their reasons for granting planning permission the council referred to “a number of important benefits”. These included the provision of a new and better quality health care centre and the provision of a community centre.

Prior to the development, the site had contained a community centre with 413m² of floorspace. A planning brief for the site had indicated that the developer would be expected to construct or finance “a new community hall on site if the existing hall site is to be redeveloped”. There was a new community hall within the development for which planning permission was granted but it only had 124m² of floorspace.

The application was brought, in effect, by the local residents’ group on the basis that they had a legitimate expectation that better facilities would be provided than ultimately were to be built under the permission. In particular that any new community hall would be of similar size and be equally as useful as the one it was to replace. The legitimate expectation was said to arise from the planning brief; the site schedule in the Unitary Development Plan (“UDP”) and council policies and other documents and consultation between council officers and the local residents during the years in which the redevelopment of the site had been being considered.

Lindblom J. refused permission to apply for Judicial Review and so did the Court of Appeal. They made clear that a local planning authority has to assess applications in the light of the current needs and current policies. Further this must be done in the broad public interest not simply the interests of one group who may well have believed that the planning brief and other documents could really lead to only one conclusion. It was also significant that, in this case as in many others, time had moved on since the formulation of the planning brief and circumstances had changed:

“51 A rigorous standard is to be applied when a substantive legitimate expectation is claimed on the basis of a representation or promise by a public authority. The duty of public authorities to exercise powers in the public interest must be kept in mind. Only when, in the court’s

⁴⁴ See article by Paul Winter, *Planning Resource*, July 13, 2012.

⁴⁵ *R. (on the application of Godfrey) v Southwark LBC* [2012] EWCA Civ 500.

- view, to fail to give effect to the promise would be so unfair as to amount to an abuse of power, should it override other considerations (*Murphy*). In *Begbie*, Laws LJ also contemplated situations in which ‘changes of policy, fuelled by broad conceptions of the public interest, may more readily be accepted as taking precedence over the interests of groups which enjoyed expectations generated by an earlier policy.’ (1131D)
- 52 While the approach to legitimate expectation must be fact sensitive, and the facts in *Barker* were quite different, that case also demonstrates that an earlier approach of the local planning authority to an issue, even if amounting to a planning policy, cannot have primacy over the statutory duty of the council to assess the current situation.
- 53 In determining the application for planning permission, the council was required to perform its statutory duty under section 70(2) of the 1990 Act and section 38(6) of the 2004 Act. Policy 7P of the UDP of 2007 required a community centre as a part of a development at Downtown. The policy did not include a specific requirement as to size. In deciding what provision to make, the council was required to assess current needs, assessment of such needs undoubtedly being a material consideration. With conspicuous care and thoroughness, the officer’s report, at paragraphs 248 to 253 assessed those needs. Regard was paid to other community facilities in the area. The report drew attention to the community centre proposed being significantly reduced in size from that in earlier planning applications. A consultation was conducted. The representations made were adequately summarised and responses stated in the officer’s report to committee.
- 54 The appellant’s case rests essentially on the 2002 documents and representations. Probably the appellant’s best point is that the expressions ‘re-provision’ of a community hall, and a ‘new community hall’ appeared in 2002 and 2003 documents. The council’s then proposal was for a facility substantially larger than that included in the permission now challenged. I approach the issues on an assumption that there was an intention in 2002, made known to community representatives, that a large and separate community centre be included in the development.
- 55 In my judgment, that falls well below constituting a substantive legitimate expectation. There was a delay of many years before the relevant planning application was considered. In considering it, the council was obliged to have regard to the current development plan which required an assessment of current needs. That was the public duty of the council to the community as a whole and it would have been wrong for the council to have been deflected from performing that duty because a different assessment of community needs had been made and communicated, before the UDP was adopted, in 2002. The 2002 assessment and project are not material considerations in the statutory sense to an assessment made in 2010.
- 56 The members of the committee were made aware that a larger community centre had been proposed in earlier applications. The council could not be required to carry forward that earlier assessment, even if accompanied by an understanding conveyed to representatives of the community in 2002, into a material consideration in 2010. Even if such an understanding was conveyed, it could not fetter the discretion of the council in the exercise of its statutory duty in present circumstances. There were competing needs for space in the proposed development and other interests, in addition to the need for a community centre, needed to be considered. It was far from being an abuse of power to assess current needs rather than apply an assessment of needs made many years before.
- 59 Council members may have been in breach of duty had they been deflected from assessing current needs in the light of current planning policies by taking into account earlier proposals

which, though discussed with community representatives, did not come to fruition. Council members would have had to have been advised that there was no substantive legitimate expectation and that they should apply policy 7P and apply it on the basis of their assessment of the current needs of the community. Properly advised, fuller consideration of the history by members could not have led to a different decision in this case.”

Material considerations more generally: Did the judge think he was doing an exam?

*Fox Strategic Land & Property Ltd v Secretary of State for Communities and Local Government*⁴⁶

This is a case which does not break much new ground. However, the facts could well have been created for an examination question in planning law. The judge was faced with an unusually high number of intertwined and sequentially dependant legal issues.

The judge was actually reviewing the decision of an Inspector on a challenge brought under s.288 of the Act. The decision confirms:

- **Consistency—**

The Secretary of State cannot determine one appeal in the same town one way and then a second shortly after where the same issues are considered in a different way unless he gives clear and cogent reasons for doing so. Indeed if the Secretary of State were to find himself with two substantial appeals in the same town at roughly the same time raising the same issues he would reduce the risk of an error of law by determining the two together.

- **Prematurity—**

here the judge upheld the decision. The Secretary of State was entitled to consider that the effect of granting permission would be “sending the wrong message to other developers” and be encouraging them to pre-empt decisions on revised settlement boundaries. In addition the approach taken by the Secretary of State in this case was not to refuse *solely* on grounds of prematurity so there was no conflict with the prohibition on refusing solely on these grounds in PPS3 para.72.

- **Localism—**

The Inspector had based an important part of her conclusions on the concept of localism. The judge was cautious about this expressing concern that the principle of “localism” whilst an attractive concept had “nothing about it against which once can measure a proposal”. However, the Secretary of State had not put as much weight on this issue as the Inspector and so this was not a ground for quashing the decision.

- The judge also considered the application and interpretation of PPS7 and PPS3. These parts of the judgment are now less relevant in the light of the adoption of the NPPF and the Supreme Court decision in *Tesco v Dundee*.

This judgment of H.H. Judge Andrew Gilbart QC was upheld by the Court of Appeal on July 20, 2012.⁴⁷ In particular, the Court of Appeal endorsed the proposition that the need for consistency in the planning process required like cases to be decided in a like manner, and although an inspector was free to disagree

⁴⁶ *Fox Strategic Land & Property Ltd v Secretary of State for Communities and Local Government* [2012] EWHC 444 (Admin).

⁴⁷ At the time of writing this paper the official transcript was not yet available.

with an earlier decision, he could do so only where he had had regard to it and had given his reasons for departing from it.

Supreme Court confirms that the financial consequences of the revocation of planning permission can be relevant

*Health and Safety Executive v Wolverhampton CC*⁴⁸

Wolverhampton CC granted planning permission for the erection of four blocks of student flats close to a liquefied petroleum gas facility. For some reason the HSE did not learn of the application or the grant of planning permission until three of the blocks had been erected. The Council refused a request from the HSE to revoke the permission. The HSE brought Judicial Review proceedings challenging both the initial grant of planning permission and the decision to refuse to revoke the planning permission in so far as it permitted the erection of the final block of student flats.

The Court of Appeal held that it was now inappropriate to quash the planning permission and also, with a dissenting judgement from Pill L.J., that it was legitimate for the council to take into account the financial consequences to them of the compensation they would have to award to the developer under s.107 of the Act when deciding whether to revoke under s.97 of the Act. The HSE took this second point to the Supreme Court.

In the Supreme Court Lord Carnwarth gave the judgment of the court and upheld not only the specific decision of the Court of Appeal but also reinforced the general principle that the financial consequences of a decision for the public purse are—unless very clearly ruled out by statutory language—a material consideration in discretionary decision making by public bodies. He set it out in this way:

“A simple view

- 24 I start by looking at the position in general terms, before considering whether there is anything in the particular statute, or the relevant authorities, which requires a different approach. *In simple terms, the question is whether a public authority, when deciding whether to exercise a discretionary power to achieve a public objective, is entitled to take into account the cost to the public of so doing.*
- 25 *Posed in that way, the question answers itself. As custodian of public funds, the authority not only may, but generally must, have regard to the cost to the public of its actions, at least to the extent of considering in any case whether the cost is proportionate to the aim to be achieved, and taking account of any more economic ways of achieving the same objective. Of course, the weight attributable to cost considerations will vary with the context. Where, for example, the authority is faced with an imminent threat to public security within its sphere of responsibility, cost could rarely be a valid reason for doing nothing, but could well be relevant to the choice between effective alternatives. So much is not only sound administrative practice, but common sense.*
- 26 Does section 97 require a different approach? On an ordinary reading, the answer must be no. The section requires the authority to satisfy itself that revocation is ‘expedient’, and in so doing to have regard to the development plan and other ‘material considerations’. It is not suggested in this case that the development plan throws any light on this issue. The other two expressions are, at least at first sight, capable of encompassing the cost consequences of revocation. The word ‘expedient’ implies no more than that the action should be appropriate in all the circumstances. Where one of those circumstances is a potential liability

⁴⁸ *Health and Safety Executive v Wolverhampton CC* [2012] UKSC 34.

for compensation, it is hard to see why it should be excluded. Similarly, at least at first sight, there is nothing in the expression ‘material considerations’ to exclude cost. ‘Material’ in ordinary language is the same as ‘relevant’. Where the exercise of the power, in the manner envisaged by the statute, will have both planning and financial consequences, there is no obvious reason to treat either as irrelevant.”

Lord Carnwath then went on to examine the statutory scheme in some detail⁴⁹ but found that it should not detract from his original “simple approach”.

The enforcement of planning control

There are two cases this year which may have lasting effects on the enforcement of planning control.

Injunctions and pleading poverty

*Buckinghamshire CC v Anglo Irish Plant Hire Ltd*⁵⁰

This is a difficult case for local planning authorities. It establishes that, even where the local authority has obtained an injunction under s.187B of the 1990 Act, that cannot really be enforced unless the authority can also show that those they claim to be in contempt have the financial ability to comply with its terms.

The courts will grant mandatory injunctions requiring the persons bound by the injunction not just to refrain from doing something but forcing them to do something positive. Frequently the terms of an injunction mirror the requirements of an enforcement notice and could typically include the need to implement a planting scheme or to remove wrongfully imported waste from the land. In this case the injunction was granted requiring the defendants to remove what was known as “the Hump” on land that they owned. The Hump was a large man made hill of contaminated soil brought onto the land by HGV’s over a number of years.

The County Council obtained an injunction requiring the soil to be removed by the defendants who were companies with control of the land and a director. The defendants pleaded poverty. They said that although the soil had been brought onto the land neither they nor the company now had the money to take it off, or to dispose of it appropriately. The judge⁵¹ refused to grant the injunction:

“It seems to me that, as a matter of principle, it must be an element in proving a contempt, where the contempt is alleged to consist in failing to comply with a mandatory order of the Court, that the alleged contemnor had the ability to comply and merely chose not to, or to use the words that appear in the notes to the White Book: ‘There had been a deliberate and wilful refusal to comply’.”

Whilst of course it is important that a very high test is satisfied before a court will commit someone to prison for a breach of an order, the practical implications of this decision are wide. In effect they mean that in order to enforce an injunction a local planning authority will have to be in a position to prove the alleged contemnor has the resources to comply. This may mean drafting injunctions with steps which are easy and cheap to comply with or sophisticated financial investigation. However, by the stage of bringing committal proceedings the local planning authority is often dealing with a fairly determined evader of planning control. Even getting the relevant financial information may not be easy and there is no statutory

⁴⁹ Lord Carnwath is continuing his approach from the Court of Appeal of striving for short judgments and plain speaking. In this case in dismissing an argument that compensation should not be taken into account by the revoking planning authority because it was only fixed after the decision to revoke had been made he said this: “The fact that a restaurant bill normally arrives after the meal does not mean that the likely cost of the meal has to be ignored in deciding where and what to eat. Similarly, potential liability to compensation cannot be said to be irrelevant merely because it is not fixed and payable at the outset.”

⁵⁰ *Buckinghamshire CC v Anglo Irish Plant Hire Ltd* [2011] EWHC 3686 (QB).

⁵¹ H.H. Judge Seymour QC.

power to do so. It is a frequent complaint of the public that enforcement lacks teeth — it is hard not to see this decision as giving some weight to those views.

The thin end of the wedge? 10 years' use within same use class sufficient to gain immunity

*R. (on the application of Harbige) v Secretary of State for Communities and Local Government*⁵²

A building in County Street in Southwark was in use as a place of worship. This caused noise disturbance to neighbours and they complained to the Council who issued an enforcement notice. On the facts an unlawful use had begun over 10 years ago when an unauthorised change had taken place from B1 light industrial use to use as a place of worship.⁵³

In the following 10 years there had been a number of uses which were not the same but all fell within Use class D1 of the Use Classes Order. So the issue was simple—to gain immunity does the use enforced against itself have to have been carried on for 10 years or are consecutive uses within the same use class capable of being strung together to make up the requisite 10-year period?

In deciding the case Ouseley J. found it surprising that the issue had not been before the courts before but he felt that on analysis of the 1990 Act the answer was clear. Crucially s.55(2)(f) of the Act defines development as *excluding* changes of use between uses in the same use class. Therefore he found that to require absolutely the same use to have been carried on for 10 years might lead to very fine distinctions. What was important was that development amounting to a breach of planning control had taken place and that was maintained for 10 years without further development taking place to stop that period of time from running. Since a change of use within the same use class is simply not development (not even permitted development) then, providing all uses for a 10-year period where within the same use class, the development amounting to a breach of planning control had been maintained for 10 years, and had not been cut short by any further change itself amounting to new development and therefore immunity was achieved.

“... The effect of the sequence of changes within class D1 was not that there was a material change of use which had somehow received a statutory sanction. It was that the use that began after the place of worship initially ceased did not constitute development. The subsequent changes did not constitute development. The institution of the place of worship use by the Recovery Chapel did not constitute development.

34 The position of a local authority seeking to enforce against a sequence of uses all within a particular use class, none lasting 10 years so as to confer, on any view, immunity, but before the expiry of 10 years of unauthorised D1 uses, is not as difficult as suggested. An enforcement notice can properly strike at the existing use being carried on. On the hypothesis that there has been no 10-year use within class D1, the enforcement notice will not be quashed on ground C or ground D and the other unauthorised D1 uses could not lawfully be restarted. Whether it would be advisable for the local authority to state what the breach of planning control was in terms of a breach of planning control from B1 to the sequence of D1 uses culminating in the one struck against is a matter for the local authority. For my part, I see nothing unlawful in that. The point is to convey to the recipient of the notice what is said to be the breach which affects him. There is no difficulty in formulating a notice that strikes at the current activity because of the unauthorised nature of the predecessor D1 uses.”

⁵² *R. (on the application of Harbige) v Secretary of State for Communities and Local Government* [2012] EWHC 1128 (Admin).

⁵³ Planning permission had been granted for the change of use but conditions precedent had not been complied with. Presciently one of those conditions had been for the submission and approval of a scheme of sound insulation.

Therefore the decision of the Inspector who had upheld the ground (d) appeal and quashed the notice was upheld. It is difficult to predict the effects of this decision in practice. Ouseley J. commented that:

“Where a local authority is faced with an unauthorised use to which it does not in itself take exception but is aware that a change could take place in its operation, it is for the local authority to take enforcement action; otherwise, if there has been no application for planning permission, the authority is at risk of uncontrolled, undesirable change.”

What this comment does not recognise is the reality that it is usually only once the consequences of a use, in terms of noise or other disturbance to neighbours, becomes a problem that any complaint will be made and enforcement action instigated. There are likely to be many neighbours who then feel aggrieved because no action can be taken against this latest noisy use because they had not complained about the previous uses which, whilst in the same use class as that now disturbing them, were in themselves and at the time “good neighbours”. Is preventative enforcement action against a benign use where other uses in the same use class may cause more disturbance in the future now not only “expedient” but wise? An application for permission to appeal to the Court of Appeal has been made by the neighbour claimants but is yet to be determined.

Conclusions: What to watch out for over the next 12 months

For everybody

How is *Tesco v Dundee* going to work out in practice? Has the Supreme Court decision lowered the bar for challenge? It will not necessarily be difficult to point to ambiguity in the wording of policy. Prior to the decision that was not enough to demonstrate any error of law by a decision maker. Now it may be sufficient to assert the true meaning of policy is different to that applied by the decision maker. Importantly it may be relatively easy for such an assertion to get past the “properly arguable” threshold for Judicial Review. Will it be worthwhile developers making clear in their application material what they consider the policy to mean? Local authorities will also have to ensure they have really understood what their policies say and hope that coincides with what they have always thought they said!

The mode of determination of appeals. There is a tension between the resources open to PINS and avoiding lengthy periods for determining appeals and the desire of appellants, third parties and local authorities to have matters dealt with at public inquiry. The number of cases where PINS have imposed determination of the appeal by hearing despite the requests of both appellants and the local authority for a formal inquiry appears to be growing. One aspect of this is for the parties to appear at informal hearings represented by advocates who then feel the need to try and play a bigger part in proceedings than the informal hearing process allows for. This is not the answer for the parties or the Inspector.

At the time of finalising this paper in early August 2012 there is an application for permission for Judicial Review awaiting determination on the papers. The application seeks to challenge the decision of the Planning Inspectorate to require an appeal to be determined following an informal hearing rather than a public inquiry. The appeal concerns a new house in the open countryside within the South Downs National Park. The house is being promoted on the “truly outstanding and ground breaking quality” exception to the prohibition on new houses in the open countryside which existed in para.11 of PPS7.

Similar applications may also be awaiting determination. This is now one issue which it is pretty clear that there will be guidance from the courts⁵⁴ in the next few months.

⁵⁴ Even if initially only in the form of a judgment refusing permission. Given the currency of the issue such a judgment would probably be taken to the Court of Appeal.

For developers

When promoting sites or uses through a site allocation DPD or AAP, consider when to challenge if it appears the consultation process is moving against the project. Given the approach of Inspectors at the EIP that the starting point is that the submission draft of the DPD is “sound”, it may be worthwhile challenging early rather than going through the whole consultation and policy formulation process on the back foot.⁵⁵

Be aware of the *need for consistency* in decision making in *Fox Strategic Land* [2012] EWHC 444 (Admin). This may work for a development proposal or against it but Inspectors and local planning authorities will now need good reasons to depart from previous decisions not just on the same site but in the vicinity where the same issues arose. Is that taboo concept “precedent” just quietly raising its head?

For Local Authorities

The *duty to co-operate*: what will it mean? How will it work in practice? What happens when there are predictable and understandable conflicts of interest between the inhabitants of adjoining local authority areas? Sharing information is all very well—taking the waste disposal facilities, expanded housing or industrial development to benefit a nearby town in another district represented by different councillors may be another.

In addition, it has not been a good year for enforcement. Poverty as a defence to a committal application for breach of an injunction. The need to consider “preventative enforcement” after *Harbige*.

As this paper made clear at the start all these points and others may or may not be worked out before the courts in the coming year. The one thing nobody has control of is which parties will choose to litigate and on which sets of facts. As always, the only accurate prediction is that next year the courts will deal with at least one issue which nobody has seen coming and which may form the centrepiece for next year’s legal update.

⁵⁵ See *Manydown Co Ltd v Basingstoke and Deane BC* [2012] EWHC 977 (Admin).